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WRONGFUL DISMISSAL: WHAT CHOICE DOES AN EMPLOYEE HAVE?

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This article looks at the common law's answer to the question of whether a wrongfully dismissed employee can choose to keep his contract alive, and discusses some practical considerations and difficulties.

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I. Introduction

1 Wrongful dismissal is one of the most prevalent topics in employment law, yet the legal rules regarding the effect of a wrongful dismissal on the existence of the employment contract are surprisingly difficult to pin down. In a nutshell, the question is this: does a wrongful dismissal automatically terminate the employment contract and leave the employee[1] to pursue a claim in damages only (the "automatic theory")? Alternatively, is it for the employee to elect whether he will "accept" the wrongful repudiation – in other words, does the employee get to choose whether his employment contract should stay alive despite his employer's wishes (the "elective theory")?

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1 This article refers to situations where a wrongful repudiation is committed by the employer and the employee is the innocent non-breaching party. However, the same principles also apply in the converse situation where the employee commits the repudiatory breach and the employer is the innocent non-breaching party. See *Geys v Société Générale, London Branch* [2013] 1 AC 523 at [63].

2 If the employee has the right to choose under the elective theory, this theoretical "right" leads to further legal and practical questions. Does the employee need to have good reasons before the law will permit him to affirm his contract, and how would such reasons be assessed? Also, can an employee realistically affirm his contract and keep it alive, given the practical constraints of a situation where his employer has sacked him and does not want him to turn up for work?

3 The choice between the automatic theory and the elective theory has not yet come up before the Singapore courts and is open for debate. In the UK, the decision was made in the seminal case of *Geys v Société Générale, London Branch*[2] ("*Geys*"), where the Supreme Court by a 4–1 majority held in favour of the elective theory. This article will summarise the key features of the *Geys* case and the policy considerations that were identified in the majority and dissenting judgments in support of the two competing theories. The article will then examine the approaches taken in past Singapore cases, and discuss what practical guidance might be taken from the existing case law.

II. The position in the UK

A. The issues in Geys v Société Générale, London Branch

4 Mr Geys was employed by Société Générale, London Branch (the "Bank") as the managing director of European Fixed Income Sales. In the written employment contract between the parties, it provided that either party could terminate the contract by giving three months' notice. The contract also incorporated the terms of the Bank's staff handbook, which had a "payment in lieu of notice" clause. This clause gave the Bank the right to terminate the employment contract with immediate effect at any time by making a payment to the employee in lieu of notice. The staff handbook also included a clause which entitled Mr Geys to a

2 [2013] 1 AC 523.

termination package that would be calculated with reference to the date when the employment terminated.

5 On 29 November 2007, Mr Geys was summarily dismissed by the Bank. The Bank's dismissal was wrongful, because the Bank neither gave three months' notice to Mr Geys nor made payment in lieu of notice as was contractually required for immediate termination. On 18 December 2007, the Bank paid into Mr Geys' bank account an amount that corresponded to a payment in lieu of notice. On 2 January 2008, Mr Geys' lawyers wrote to the Bank stating that he had decided to affirm his contract. In response, the Bank wrote to Mr Geys to inform him that it had exercised its right to terminate his contract. The Bank also provided him with details of the payment which had been made to him on 18 December 2007. Under the terms of the staff handbook, this communication from the Bank was deemed to be received by Mr Geys on 6 January 2008.

6 The Bank's position was that Mr Geys' employment had terminated on 29 November 2007 when he was wrongfully dismissed, or at the latest on 18 December 2007 when the Bank had credited Mr Geys' bank account with the payment in lieu of notice. If the termination date was 29 November 2007 or 18 December 2007 as the Bank contended, the termination package due to Mr Geys under his contract would be assessed with reference to his bonus awards in 2005 and 2006.

7 In contrast, Mr Geys' position was that his employment only terminated on 6 January 2008. If Mr Geys was correct, his termination package would be assessed with reference to bonus awards made to him in 2006 and 2007, which were significantly higher.

8 The choice between the elective theory and the automatic theory was at the heart of the dispute. If the automatic theory applied, it did not matter that the Bank's summary dismissal of Mr Geys on 29 November 2007 was wrongful. It would still have automatically brought Mr Geys' employment contract to an end on 29 November 2007.

9 On the other hand, if the elective theory applied, the Bank's repudiatory breach on 29 November 2007 would not have served to terminate the contract, as the repudiation was not accepted by Mr Geys. Mr Geys' employment contract would have only terminated on 6 January 2008, when he received notice that the Bank had paid him a sum of money in lieu of notice to terminate his employment.

B. The majority's decision in Geys v Société Générale, London Branch

10 By a 4-1 majority, the UK Supreme Court in *Geys* held that the Bank's wrongful dismissal of Mr Geys on 29 November 2007 did not automatically terminate the employment contract. Applying the elective theory of repudiation, the court held that the Bank's wrongful repudiatory breach had not been accepted by Mr Geys, who had affirmed the contract instead. The contract had therefore continued to exist until it was lawfully terminated by the Bank on 6 January 2008.

11 There were three main reasons underlying the majority's preference for the elective theory of repudiation.

12 First, the automatic theory was said to allow the wrongdoer (*ie*, the party who committed the repudiatory breach) to determine the contract for his own convenience. Lord Wilson stated that it would "reward the wrongful repudiator of a contract of employment with a date of termination which he has chosen", which would certainly be "most beneficial to him and, correspondingly, most detrimental to the other, innocent, party to it".[3] Lord Hope also agreed that the automatic theory would produce injustice.[4] The termination of the contact would be "beyond the control of the innocent party" if the automatic theory applied, whereas under the elective theory, "it is for the innocent party to judge whether it is in his interests to keep the

3 *Geys v Société Générale, London Branch* [2013] 1 AC 523 at [66].

4 *Geys v Société Générale, London Branch* [2013] 1 AC 523 at [18].

contract alive".[5] Thus, "[m]anifest justice favours preferring the interests of the innocent party to those of the wrongdoer".[6]

13 Secondly, the elective theory (as applied in the earlier English Court of Appeal case of *Gunton v Richmond-upon-Thames London Borough Council*[7] ("*Gunton*")) was described as having "stood for 30 years, apparently without evidence of practical difficulty or injustice".[8] In contrast, there was a lack of coherent support for the application of the automatic theory. Concerns were expressed over how far the automatic theory would extend if it was valid, *eg*, whether it would apply to contracts for services as well as employment contracts. It was also noted that there could be questions as to whether wrongful dismissals should be treated differently if they were express or implied, immediate or delayed, *etc*.[9] Lord Wilson highlighted that in cases of constructive dismissal, for example, "[i]nherent in the notion of a constructive dismissal is resignation in response to fundamental breach … So is there not inherent in it the need for acceptance …?"[10]

14 Further, the automatic theory could not be reconciled with past cases where, following an unaccepted repudiation, provisions that did not survive termination had been enforced against the repudiator, such as those relating to competition or disciplinary procedures.[11]

15 For instance, in a case where an actress had wrongfully repudiated her contract with her employer, the English court had enforced a negative covenant in the contract by granting the employer an injunction to prevent the actress from participating

5 *Geys v Société Générale, London Branch* [2013] 1 AC 523 at [19].
6 *Geys v Société Générale, London Branch* [2013] 1 AC 523 at [19].
7 [1981] Ch 448.
8 *Geys v Société Générale, London Branch* [2013] 1 AC 523 at [100].
9 *Geys v Société Générale, London Branch* [2013] 1 AC 523 at [95]–[96].
10 *Geys v Société Générale, London Branch* [2013] 1 AC 523 at [96(e)].
11 *Geys v Société Générale, London Branch* [2013] 1 AC 523 at [69] and [75].

in any other film "during the continuance of the contract".[12] This presupposed that the contract had not been automatically terminated by the employee's unilateral repudiation.

16 Thirdly, the majority of the UK Supreme Court in *Geys* rejected the argument that because an employment contract was not capable of specific performance, the contract would be automatically terminated by either party's unilateral repudiation.[13] Lord Wilson stated that there was circularity in the premise that "there is no remedy so there is no right so there is no remedy"[14] – this had the effect of the remedy dictating the extent of the right, instead of the other way around. According to Lord Wilson, the correct analysis was that an employment contract would survive beyond wrongful repudiation until acceptance of the repudiation occurred, irrespective of the availability of specific performance, because it was "the range of remedies that is limited, not the right to elect".[15]

17 Lord Wilson also rejected the proposition of the English Court of Appeal in the prior case of *Gunton* that the court should easily infer that the innocent party has accepted the guilty party's repudiation of the contract, just because a wrongfully dismissed servant usually has little choice but to accept the repudiation (as he or she cannot ask for specific performance).[16] There was no point in conferring on a party the right to elect whether to accept a repudiation, only to apply it in a manner which deprived that right of "real value".[17] The law required real acceptance from the non-breaching party. Thus, there had to be

12 *Geys v Société Générale, London Branch* [2013] 1 AC 523 at [72], citing *Warner Brothers Pictures Inc v Nelson* [1937] 1 KB 209.

13 *Geys v Société Générale, London Branch* [2013] 1 AC 523 at [91], citing *Gunton v Richmond-upon-Thames London Borough Council* [1981] Ch 448.

14 *Geys v Société Générale, London Branch* [2013] 1 AC 523 at [89].

15 *Geys v Société Générale, London Branch* [2013] 1 AC 523 at [86], citing *Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 1 WLR 361.

16 *Geys v Société Générale, London Branch* [2013] 1 AC 523 at [92].

17 *Geys v Société Générale, London Branch* [2013] 1 AC 523 at [92].

a conscious intention by the non-breaching party to bring the contract to an end.[18]

C. The dissenting opinion in Geys v Société Générale, London Branch

18 In his dissenting judgment in *Geys*, Lord Sumption favoured the automatic theory for three main reasons.

19 First, Lord Sumption stated that employment relationships had "significant social and economic implications" on society, and were unlike normal contractual bargains as there were more sensitive considerations when it came to enforcing an unwanted relationship of employer and employee.[19] As such, the *general* contractual principle that an innocent party would have an unfettered right to elect and treat the contract as subsisting should not apply to *employment* contracts.

20 Lord Sumption was of the view that the application of the automatic theory of repudiation to employment contracts was consistent with the line of authorities which established that an innocent party's right to elect is subject to exceptions and qualifications. Lord Sumption reasoned that an innocent party could not elect to treat a repudiated contract as subsisting unless he could either perform it without the co-operation of the other party or compel that co-operation through specific performance.[20]

21 In the case of an employment contract, Lord Sumption expressed the view that performance would require the co-operation and mutual confidence of the employer and employee. Once the employer repudiated the contract, the co-operation would end and the employee "cannot meaningfully be said to have a right to treat the contract as subsisting if he

18 *Geys v Société Générale, London Branch* [2013] 1 AC 523 at [17].
19 *Geys v Société Générale, London Branch* [2013] 1 AC 523 at [118].
20 *Geys v Société Générale, London Branch* [2013] 1 AC 523 at [116].

cannot perform it and the law will not allow him to enforce it".[21] The application of the elective theory would lead to an undesirable outcome where the employment contract would be incapable of performance and "all that survives is the husk or shell of a contract devoid of practical content".[22]

22 Secondly, Lord Sumption favoured the automatic theory as he felt it would bring about more certainty than the elective theory. Under the automatic theory, the position was clear – an employment contract would terminate when the employment relationship ended. The employee would then have a duty to mitigate his losses. In contrast, Lord Sumption thought that the elective theory would create more uncertainty. For example, it could be difficult to clearly determine whether a wrongful repudiation had been accepted, or whether the relationship was still subsisting.[23]

23 Lord Sumption was also of the view that the elective theory was inconsistent with the innocent party's duty to mitigate loss. In past cases, the courts had held that an employee who had been wrongfully dismissed should mitigate his loss by taking reasonable steps to seek alternative employment. Such steps by the employee would, in effect, "put it out of his power to perform his contract".[24] However, under the elective theory, the employee could exercise his right to treat the repudiated contract as subsisting and – instead of seeking alternative employment – continue to earn wages while the contract remained alive. The issue of mitigation would not arise as the employee's claim would be for salary, and not damages.[25] Lord Sumption was of the view that it was not satisfactory to say that an employee had both a duty to seek alternative employment but also a right to insist on the continuation of his current employment. Such a

21 *Geys v Société Générale, London Branch* [2013] 1 AC 523 at [139].
22 *Geys v Société Générale, London Branch* [2013] 1 AC 523 at [139].
23 *Geys v Société Générale, London Branch* [2013] 1 AC 523 at [140].
24 *Geys v Société Générale, London Branch* [2013] 1 AC 523 at [139]; see also [79].
25 *Geys v Société Générale, London Branch* [2013] 1 AC 523 at [139].

position was equally undesirable for employers, who could be left with contractual liability of an uncertain duration.[26]

24 Thirdly, Lord Sumption drew a distinction between "core" and "collateral" obligations. Core obligations were said to be those "fundamental to the continued existence of the employment relationship" (*ie*, the employee's obligation to work and the employer's obligation to pay the employee), whereas collateral obligations would not depend on the existence of an employer-employee relationship (*eg*, covenants against competition and disclosure of confidential information).

25 Lord Sumption reasoned that the automatic theory would bring an end to the parties' core obligations but would not extinguish any collateral obligations which could continue to bind after the contract was terminated. Lord Sumption was of the view that given this distinction, there was no need to "prolong the life of a repudiated contract of employment"[27] in order to justify the cases where the courts had enforced collateral obligations against the repudiator post-termination, which were relied on by the majority in support of the elective theory.

D. English cases decided after Geys v Société Générale, London Branch

26 English cases decided after *Geys* have, in both the employment and non-employment context, applied the principle that a wrongful repudiation does not automatically terminate a contract, and that there must be an acceptance of the repudiation by the innocent party.[28]

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26 *Geys v Société Générale, London Branch* [2013] 1 AC 523 at [139].

27 *Geys v Société Générale, London Branch* [2013] 1 AC 523 at [141].

28 See *Sunrise Brokers LLP v Michael William Rodgers* [2014] EWHC 2633 (QB) at [51] (employment context). See also *Alan Ramsay Sales & Marketing Ltd v Typhoo Tea Ltd* [2016] EWHC 486 (Comm) at [68] and *MSC Mediterranean Shipping Company SA v Cottonex Anstalt* [2016] EWCA Civ 789 at [36] (non-employment context).

27 Interestingly, in the case of *Sunrise Brokers LLP v Michael William Rodgers*[29] ("*Sunrise Brokers*"), the English High Court considered a portion of Lord Wilson's judgment in *Geys* where he stated that the innocent party should have a "good reason" for affirming the contract.[30] Lord Wilson did not provide much explanation or detail as to what would be a "good reason", but held that such a reason was present on the facts of the *Geys* case.[31]

28 In *Sunrise Brokers*, the case concerned an employee who had wrongfully repudiated the contract, which the employer then sought to affirm. The court held that the employer had good reason to affirm the contract. The court accepted the employer's evidence that since brokers "can be hot headed", the employer could "legitimately have hoped (and did in fact hope) to persuade" the employee to return.[32] Further, the desire to keep an employee from working for another competitor firm was also said to be "an entirely legitimate and sensible commercial reason"[33] that provided a good reason to affirm the contract. The court's decision on this issue was not challenged on appeal.

29 If a wrongfully dismissed employee needs to have a "good reason" to continue the employment contract, this requirement could be an important qualification to the right of affirmation under the elective theory. An employee who affirms the contract may risk having that affirmation being found invalid if his reasons were not good enough. That same employee, who thought he was still employed under a subsisting contract and earning salary, may ultimately be found to have breached his duty to mitigate because he failed to obtain alternative employment.

29 [2014] EWHC 2633 (QB).
30 *Sunrise Brokers LLP v Michael William Rodgers* [2014] EWHC 2633 (QB) at [51].
31 *Geys v Société Générale, London Branch* [2013] 1 AC 523 at [94].
32 *Sunrise Brokers LLP v Michael William Rodgers* [2014] EWHC 2633 (QB) at [56].
33 *Sunrise Brokers LLP v Michael William Rodgers* [2014] EWHC 2633 (QB) at [57].

30 Given Lord Wilson's comment in *Geys* that the right to elect whether to accept a repudiation should *not* be applied in a manner which deprives that right of real value, a "good reason" should not be too high a standard. However, it presently remains uncertain how the line would be drawn between affirmations which are made for "good reasons", and those which are not.

III. The position in Singapore

31 In Singapore, there is no reported case where the court has explicitly considered which theory of repudiation should apply to employment contracts under Singapore law.[34]

32 Past Singapore cases have taken varying approaches that could be said to illustrate both the automatic and elective theories of repudiation. For example, the Court of Appeal's decision in the case of *Chiam Heng Hsien v Jurong Town Corp*[35] ("*Chiam Heng Hsien*") appeared to favour the automatic theory in the employment context. However, other cases including the Court of Appeal's fairly recent decision in *Schonk Antonius Martinus Mattheus v Enholco Pte Ltd*[36] ("*Schonk*") applied the elective theory. These two decisions by the Court of Appeal and other Singapore cases are discussed in further detail below.

A. Support for the automatic theory

33 In *Chiam Heng Hsien*, the employee was employed as an executive officer. By way of a letter dated 23 June 1976, his employer suspended him on the ground that he had breached the employer's terms and conditions of service by taking up part-time employment with a competitor. On 5 November 1976, the employer wrote to the employee to terminate his employment with effect from 23 June 1976. The employee claimed that he was

34 Singapore cases have cited *Geys v Société Générale, London Branch* [2013] 1 AC 523 but on different issues. See *Tan Poh Leng Stanley v UBS AG* [2016] 2 SLR 906 and *CPIT Investments Ltd v Qilin World Capital Ltd* [2017] 5 SLR 1.

35 [1985–1986] SLR(R) 92.

36 [2016] 2 SLR 881.

wrongfully dismissed. He sought declarations that the dismissal was null and void and that he continued to be employed.

34 At trial, the employer conceded that the employee's dismissal was wrongful. The only issue was as to the appropriate relief to be given. At first instance, the High Court refused to grant the declarations sought by the employee, stating that the employment "must be treated as having in fact come to an end on 5 November 1976".[37] Interestingly, the High Court cited the English case of *Gunton*, which was described in *Geys* as an example of the 30-year-old pedigree of the election theory, but for the proposition that an employee had "*no option* but to accept his employer's repudiation of the contract" [emphasis added]. The High Court held that the employee's remedy lay in a claim for damages. He was awarded his salary up to 5 November 1976, which was the date when the wrongful dismissal occurred via the employer's letter of termination, and damages equivalent to a further three months' salary.

35 The employee appealed, arguing that the declarations sought by him should have been granted. His appeal was dismissed by the Court of Appeal. The Court of Appeal noted that when the employee was suspended from service on 23 June 1976, he had "returned everything" to and "stopped working" for the employer, and that from 5 November 1976, he was precluded from performing any service for the employer permanently. The Court of Appeal opined that "for all practical purposes", the employment had ceased and "the relationship between [the parties] as that of employee and employer was completely severed" from 5 November 1976.[38] There had been "*a* de facto *dismissal* of the appellant, *albeit wrongful*" [emphasis added].

36 The above analysis applied by the Court of Appeal appears consistent with the automatic theory endorsed by the minority

37 *Chiam Heng Hsien v Jurong Town Corp* [1983–1984] SLR(R) 154 at [15].

38 *Chiam Heng Hsien v Jurong Town Corp* [1985–1986] SLR(R) 92 at [15].

judgment in *Geys*, where the termination of the employee-employer relationship automatically terminates the contract.[39]

37 The Court of Appeal in *Chiam Heng Hsien* also went on to hold that if the employer's *de facto* dismissal was a repudiation which did not in effect bring the employment contract to an end *de jure* until the repudiation was accepted, the employee had accepted the repudiation at the trial because he pursued his claim for damages when his claim for declarations regarding his continued employment had failed.[40] The Court of Appeal also stated that even if the employer's repudiation was accepted at the trial, it would not increase the damages awarded to the employee because he was "immediately" under an obligation to mitigate his loss by seeking alternative employment upon being wrongfully dismissed on 5 November 1976.[41] This reasoning appears to favour the automatic theory – as pointed out in Lord Sumption's dissenting judgment in *Geys*, it is rather difficult to say that the law gives a wrongfully dismissed employee a legal right to continue employment by affirming the contract, but at the same time immediately imposes a legal obligation to seek alternative employment.[42]

38 In the subsequent case of *Alexander Proudfoot Productivity Services Co S'pore Pte Ltd v Sim Hua Ngee Alvin*[43] ("*Alexander Proudfoot*"), the employer was entitled to terminate the services of two employees by giving one month's written notice. On 26 March 1987, both employees were issued notices which sought to terminate their employment with effect from 25 April 1987. However, the notices of termination were issued by a corporate entity that had no contractual relationship with the employees. During the purported notice period, both employees were told not to turn up for work but to keep themselves contactable for assignments. They also received their usual

39 *Geys v Société Générale, London Branch* [2013] 1 AC 523 at [139(3)] and [139(4)].
40 *Chiam Heng Hsien v Jurong Town Corp* [1985–1986] SLR(R) 92 at [15].
41 *Chiam Heng Hsien v Jurong Town Corp* [1985-1986] SLR(R) 92 at [17].
42 *Geys v Société Générale, London Branch* [2013] 1 AC 523 at [139(5)].
43 [1992] 3 SLR(R) 933.

wages during the notice period. After the notice period expired, the employees were excluded from work. One of the employees found alternative employment and started work on 1 June 1987; the other employee found employment only in October 1987. The employees brought an action for wrongful dismissal and damages.

39 The Court of Appeal held that the notices issued on 26 March 1987 were defective and "of no effect".[44] With regard to the employer's alternative argument that the employees had accepted the termination of their employment by not turning up for work after 26 March 1987, the court held that there was "really nothing in the conduct of the respondents which showed that they had unequivocally accepted the termination. On the contrary, there was evidence that they were not happy and consulted their solicitors for advice".[45]

40 At first blush, the Court of Appeal's analysis that the employees did not accept the termination of their employment after 26 March 1987 appears to be consistent with the elective theory. However, on closer reading of the judgment, the Court of Appeal's analysis was that the wrongful issuance of the invalid notices on 26 March 1987 was not a breach by the employer – the breach only occurred at the end of the notice period when the employees were excluded from employment by the employer (*ie*, on 26 April 1987).[46] In that regard, the Court of Appeal held that both employees were only entitled to one month's remuneration as damages for wrongful dismissal,[47] as this was equivalent to the notice period in their contracts.

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44 *Alexander Proudfoot Productivity Services Co S'pore Pte Ltd v Sim Hua Ngee Alvin* [1992] 3 SLR(R) 933 at [11].

45 *Alexander Proudfoot Productivity Services Co S'pore Pte Ltd v Sim Hua Ngee Alvin* [1992] 3 SLR(R) 933 at [12].

46 *Alexander Proudfoot Productivity Services Co S'pore Pte Ltd v Sim Hua Ngee Alvin* [1992] 3 SLR(R) 933 at [13] and [14].

47 See also *Fong Sun Yong v Yau Lee Construction* [2010] SGMC 7 at [40] and [41], where the Magistrates' Court cited the Court of Appeal's decision in *Alexander Proudfoot Productivity Services Co S'pore Pte Ltd v Sim Hua Ngee Alvin* [1992] 3 SLR(R) 933 and *Halsbury's Laws of Singapore Volume 9 – Employment*

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41 Notably, for the employee who only found work in October 1987, the Court of Appeal held that *it did not matter that he had refused to accept the repudiation by the employer* – the employer's liability was still one month's wages.[48] The Court of Appeal stated that the first instance judge had fallen into error by holding that "*until [the employee] accepted the repudiation* by taking up other employment, *he was entitled to all his salary for that period as damages*" [emphasis added].[49] It is difficult to reconcile this ruling with the elective theory, considering that in *Chiam Heng Hsien* and *Alexander Proudfoot*, the employees were paid or were held to be entitled to their salaries for the periods preceding the wrongful dismissals when they were still employed, even though they were not performing services and had stopped work. If the application of elective theory meant their employment continued *de jure* after the wrongful dismissals and until the employees accepted the repudiations at a later date, it seems odd that the continued non-performance of services would have disentitled them to salaries when their employment status had not changed.

42 As for the other employee in *Alexander Proudfoot* who found work in June 1987, the Court of Appeal mentioned that he was "out of a job for about a month",[50] which happened to correspond to the one month's salary awarded to him as damages. While the Court of Appeal did not provide a detailed analysis in its judgment, the fact that the employee was unemployed in May 1987 suggests that the employer's wrongful repudiation on 26 April 1987, when the employees were excluded from work, had served to terminate the employment on that date. This seems to be consistent with the automatic theory.

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for the proposition that the categorisation of the employee's claim for salary as damages seemed to adopt the view that a repudiatory breach automatically ends the contract of employment.

48 *Alexander Proudfoot Productivity Services Co S'pore Pte Ltd v Sim Hua Ngee Alvin* [1992] 3 SLR(R) 933 at [15].

49 *Alexander Proudfoot Productivity Services Co S'pore Pte Ltd v Sim Hua Ngee Alvin* [1992] 3 SLR(R) 933 at [15].

50 *Alexander Proudfoot Productivity Services Co S'pore Pte Ltd v Sim Hua Ngee Alvin* [1992] 3 SLR(R) 933 at [16].

B. Support for the elective theory

43 In the case of *Arokiasamy Joseph Clement Louis v Singapore Airlines Ltd*[51] ("*Arokiasamy*"), the employee was alleged to have committed a deemed repudiation of the employment contract pursuant to s 13(2) of the Employment Act.[52] The Singapore High Court commented that "once the conditions [in s 13(2)] are met, there is a deemed repudiation and *it is for the employer to elect whether to act on it or not*" [emphasis added].[53]

44 While the High Court's approach in *Arokiasamy* was consistent with the elective theory of repudiation, the case was concerned with the effect of statutory provisions and not the position at common law. In fact, the court expressly noted that neither party in that case was arguing that s 13(2) of the Employment Act provided for automatic termination.[54] The court's judgment did not consider whether or not automatic termination was the correct approach at common law.

45 In *Cheah Peng Hock v Luzhou Bio-Chem Technology Ltd*,[55] the employee alleged that he had been constructively dismissed by his employer, who had excluded him from day-to-day operations of the company and withdrawn his privileges in a manner calculated to embarrass him and undermine his position as CEO. The High Court held that the employer's actions had amounted to a repudiatory breach, which the employee had accepted by sending an e-mail to the Board which outlined his grievances.[56] That the e-mail was an acceptance of repudiation by the employee did not appear to have been disputed by the

51 [2004] 2 SLR(R) 233.

52 Cap 91, 1996 Rev Ed.

53 *Arokiasamy Joseph Clement Louis v Singapore Airlines Ltd* [2002] 2 SLR(R) 233 at [27].

54 *Arokiasamy Joseph Clement Louis v Singapore Airlines Ltd* [2002] 2 SLR(R) 233 at [16].

55 [2013] 2 SLR 577.

56 *Cheah Peng Hock v Luzhou Bio-Chem Technology Ltd* [2013] 2 SLR 577 at [32] and [137].

employer in that case.[57] Interestingly, the court observed that "any breach would *have* to be *accepted in order for a claim of constructive dismissal to arise*" [emphasis added].[58] This statement was consonant with Lord Wilson's observation in *Geys* that the need for an election was "inherent" in constructive dismissal cases, as there was no outright act of dismissal by the employer which could automatically terminate the employment.[59]

46 In the more recent case of *Schonk*, the employee breached his duty of loyalty by diverting business from his employer to his own company. The Singapore Court of Appeal noted that although an employer could claim damages for a breach of duty by its employee, such a breach would not by itself disentitle the employee to his or her salary. Rather, the employer could make a deduction from the salary in respect of such loss as the employer could prove it had suffered.[60]

47 Based on the above principles, the employee contended that his employer had committed repudiatory breaches of the employment contract by withholding his salary for two months in April 2012 and May 2012.[61] The employee had ceased to provide any service after May 2012. From June 2012 onwards, he did not regard himself as an employee and proceeded to divert business away from his employer.

48 The Court of Appeal allowed the employee's claim for salary for April 2012 and May 2012 only. It held that the employee's claim for salary after June 2012 was inconsistent with the "evidentiary point" that the employee had ceased to regard himself as an employee from June 2012, as the employee's actions were "a purported acceptance of [the employer's] repudiation".[62] The employee's actions were described as a

57 *Cheah Peng Hock v Luzhou Bio-Chem Technology Ltd* [2013] 2 SLR 577 at [136].
58 *Cheah Peng Hock v Luzhou Bio-Chem Technology Ltd* [2013] 2 SLR 577 at [136], citing the English case of *Western Excavating (ECC) Ltd v Sharp* [1978] QB 761.
59 See para 13 above.
60 *Schonk Antonius Martinus Mattheus v Enholco Pte Ltd* [2016] 2 SLR 881 at [15].
61 *Schonk Antonius Martinus Mattheus v Enholco Pte Ltd* [2016] 2 SLR 881 at [16].
62 *Schonk Antonius Martinus Mattheus v Enholco Pte Ltd* [2016] 2 SLR 881 at [16].

"purported acceptance" because in that case, the employment contract was found to have only terminated on 24 August 2012.[63]

49 The Court of Appeal's decision in *Schonk* is consistent with the elective theory, in so far as the employee's (ineffective) election to accept a "repudiation" and terminate the contract in June 2012 was used to limit his claim for salary to a date *prior* to the actual termination of the contract in August 2012.

50 A further point to note (although this was not expressly addressed in the court's judgment) is that if the automatic theory had applied, the employment contract in that case should have automatically terminated from June 2012 when the employee ceased to regard himself as employed, since such conduct by an employee is basically the counterpart of a wrongful dismissal by an employer. Instead, the employment contract was held to have only terminated in August 2012. It is implicit in this ruling that *the employer was able to affirm and continue the contract* after the employee's repudiatory breach in June 2012. This would be an example of the elective theory of repudiation operating in a situation where the employer was the non-breaching party. In *Geys*, Lord Wilson noted that regardless of whether it was the employee or the employer who committed the repudiatory breach of contract, the same theory of repudiation should apply.[64]

IV. What are the practical steps that an employee can or cannot take to affirm a contract?

51 It remains to be seen how the Singapore courts will decide the question of whether the automatic or elective theory should apply to employment contracts under Singapore law. Considering that there is already a line of Singapore cases which has followed the approach under the elective theory, and persuasive authority would also be provided by the majority

63 *Schonk Antonius Martinus Mattheus v Enholco Pte Ltd* [2016] 2 SLR 881 at [8].

64 *Geys v Société Générale, London Branch* [2013] 1 AC 523 at [63].

decision in *Geys*, there appears to be a fairly good prospect (or at the least, an arguable chance) that the elective theory would prevail.

52 If so, the next question is: what are the actions which an employee can or cannot take, if he or she wishes to affirm the employment contract following a repudiation by the employer? Realistically speaking, in cases where the employer has outright purported to sack the employee and exclude him or her from work, there are severe practical constraints on the employee's ability to take any action. Yet, in *Geys* Lord Wilson emphasised that the right to elect should be applied by the courts in a manner that gives the right real value, and that acceptance of repudiation should not be easily inferred.

53 With the above in mind, this article will conclude with some possible situations or actions which may arise in cases of wrongful dismissal.

A. Excluding the employee from work

54 Exclusion of the employee from work probably occurs in almost every case of wrongful dismissal. Here, it is rather futile to inquire what the employee might do, as the employee in all likelihood cannot do anything about his or her exclusion from work.

55 The issue, though, is whether the mere fact that an employee stops (or is prevented from) coming to work would be sufficient to give rise to an acceptance of repudiation. There seems little point in giving the employee *a choice* as a matter of legal theory, but telling the employee that he has *no choice* but to accept the repudiation once he or she is precluded from working in the office. Such an approach would give the elective theory little practical utility or meaning.

56 In *Alexander Proudfoot*, the outcome reached in that case ultimately did not give the employee's right of election any significant value or utility. However, it is interesting that the Court of Appeal held that an acceptance of repudiation could not

be inferred from the fact that the employees did not turn up for work (their employer having told them not to do so). The Court of Appeal posed these rhetorical questions: "What could the respondents do? Were they expected to barge into the appellants' office in Singapore when they had been told not to do so?"[65] The Court of Appeal also suggested that there had to be positive proof which showed that the termination had been accepted by the employee, as non-objection by the employee was regarded as merely equivocal.[66]

57 In the English case of *Sunrise Brokers*, the contract stated that the employee could only resign with 12 months' notice after 22 September 2014. Before that date had passed, the employee committed a wrongful repudiation by purporting to resign with immediate effect on 27 March 2014. He did not turn up for work and the employer stopped paying his salary. Post-repudiation, however, the employer communicated to the employee on several occasions that the purported resignation was not accepted and that he remained an employee of the company. The employer also told the employee that it would remunerate him if he was to attend work.[67] The employee's response, through his lawyers, was that his primary position was that he had resigned with immediate effect on 27 March 2014, but if that was not correct, he accepted the employer's non-payment of his salary as a repudiatory breach that terminated the employment with immediate effect as of 16 May 2014.[68]

58 The English court held that based on the decision in *Geys*, the employer was entitled to affirm the contract despite the employee's purported resignation on 27 March 2014. As for the employee's refusal to attend work and the employer's non-payment of his salary, these did not amount to an acceptance of

65 *Alexander Proudfoot Productivity Services Co S'pore Pte Ltd v Sim Hua Ngee Alvin* [1992] 3 SLR(R) 933 at [12].

66 *Alexander Proudfoot Productivity Services Co S'pore Pte Ltd v Sim Hua Ngee Alvin* [1992] 3 SLR(R) 933 at [12].

67 *Sunrise Brokers LLP v Michael William Rodgers* [2014] EWHC 2633 (QB) at [22] and [24].

68 *Sunrise Brokers LLP v Michael William Rodgers* [2014] EWHC 2633 (QB) at [26].

the employer's repudiation. On a true interpretation of the contract, the employee's entitlement to payment was dependent on his readiness and willingness to work. The employee's non-performance of the latter obligation did not automatically bring the contract to an end, but merely suspended the employer's performance of the former obligation.[69]

59 An employee's wrongful refusal to attend work and an employer's wrongful exclusion of an employee from work are two sides of the same coin. If an employer who cannot compel his employee to attend work nevertheless retains the ability to affirm the contract, it should follow that in the converse situation, a dismissed employee who is prevented from attending work should also have a real and practical choice of whether to affirm the contract. The exclusion of the employee from work therefore should not leave the employee with *no choice* but to accept the repudiation.

B. Communicating an affirmation in writing

60 A practical step which a wrongfully dismissed employee can take to affirm the contract is to create a clear record of his or her affirmation by sending a written communication to the employer.

61 Ideally, this should be done in a timely manner and not too long after the wrongful dismissal, as the right to elect ought to be exercised within a reasonable period of time after the relevant facts giving rise to the right of election are known to the non-breaching party.[70]

62 In *Geys*, for example, Mr Geys' lawyers wrote to the Bank stating that he had decided to affirm his contract slightly over a month after the Bank's wrongful repudiation occurred.[71]

69 *Sunrise Brokers LLP v Michael William Rodgers* [2014] EWHC 2633 (QB) at [58]–[61].

70 *G1 Construction Pte Ltd v Astoria Development Pte Ltd* [2018] SGHC 225 at [58].

71 See *Geys v Société Générale, London Branch* [2013] 1 AC 523 at [11].

Similarly in *Sunrise Brokers*, the employer's lawyers wrote to the employee about a month after the repudiation to state that his wrongful resignation was not accepted and he remained employed.[72] Based on these two English cases where the affirmations were ultimately upheld by the courts, a month would likely be regarded as a reasonable period of time to choose whether to affirm the contract or not.

63 Strictly speaking, if a dismissed employee does not take any positive steps to convey his or her intention either way, the general position is that an unreasonable delay by the innocent party to take positive steps to communicate its decision to discharge the contract may permit an inference that the innocent party elected to affirm the contract.[73] However, in exceptional cases and depending on the context, inaction following breach may be taken as an election to discharge the contract (*eg*, where there is silence coupled with subsequent non-performance of the contract).[74]

64 The practical implications are that it would be risky for a dismissed employee to keep silent if the intention is to affirm the contract, especially given the cases where the courts already seemed inclined to treat the contract as having come to an end once exclusion from work occurred.

C. Expressing unhappiness and seeking legal advice

65 The fact that a wrongfully dismissed employee expresses unhappiness over the repudiation and seeks legal advice may also constitute evidence that the employee did not accept the

72 *Sunrise Brokers LLP v Michael William Rodgers* [2014] EWHC 2633 (QB) at [22].

73 *The Law of Contract in Singapore* (Andrew Phang gen ed) (Academy Publishing, 2012) at para 17.223, cited in *G1 Construction Pte Ltd v Astoria Development Pte Ltd* [2018] SGHC 225 at [58].

74 *The Law of Contract in Singapore* (Andrew Phang gen ed) (Academy Publishing, 2012) at paras 17.224–17.225, citing the case of *Vitol SA v Norelf Ltd (The Santa Clara)* [1996] AC 800 where silence coupled with the subsequent non-performance of the contract was held to be a communication of an acceptance of the repudiation.

employer's repudiation. Such factors were taken into consideration by the Court of Appeal in *Alexander Proudfoot* to find that no acceptance had occurred in that case.[75]

D. Searching for alternative employment

66 In *Geys*, it was stated that the act of searching for alternative employment in mitigation "will normally put it out of [the employee's] power to perform his contract with his former employer", and possibly negate the ability to affirm the previous employment contract.[76] Read literally, this statement could put a wrongfully dismissed employee who wishes to affirm his contract in a rather difficult spot. The employee's primary intention may be to affirm the repudiated employment contract, and he or she may only be identifying alternative employment as a possible backup plan. Indeed, considering that there is some uncertainty as to what constitutes a "good reason" to affirm the repudiated contract, the dismissed employee might be undertaking a search for alternative employment to evidence the fact that he or she cannot find new employment and therefore has a good reason to affirm the employment.

67 The question is whether the act of seeking alternative employment would jeopardise the employee's chances of affirming the contract. It is suggested that the mere act of looking for alternative employment should not destroy the employee's ability to affirm the contract that was repudiated by his or her employer. After all, existing employees can go job-hunting while their employment contract is still in operation. If they do, it does not amount to wrongful conduct by the employees, nor is it inconsistent with their existing employment.

68 The point at which a wrongfully dismissed employee would put it out of his or her power to perform the former

75 *Alexander Proudfoot Productivity Services Co S'pore Pte Ltd v Sim Hua Ngee Alvin* [1992] 3 SLR(R) 933 at [12].

76 *Geys v Société Générale, London Branch* [2013] 1 AC 523 at [139(5)].

contract, and thereby lose the right to affirm, should only arise if and when the employee accepts an offer for new employment. This is illustrated by the case of *Fong Sun Yong v Yau Lee Construction*, where the Magistrates' Court held that by securing alternative employment, a wrongfully dismissed employee had accepted his employer's repudiation and ended his erstwhile employment.[77]

V. Conclusion

69 It remains to be seen whether the Singapore courts will favour the elective or automatic theory of repudiation in the employment context. If the elective theory is upheld, it will be interesting to see how the courts determine the existence of a "good reason" to affirm a contract and resolve the interaction (if not tension) with the duty to mitigate.

77 *Fong Sun Yong v Yau Lee Construction* [2010] SGMC 7 at [41]. The court's analysis was premised on the assumption that the automatic theory does not apply. The court also held that by securing the alternative employment, the employee had not suffered any loss and therefore was only entitled to nominal damages.