

13. CONTRACT LAW¹

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I. Discharge of contract on grounds not initially relied upon

13.1 As the Court of Appeal clarified in *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd*,² a contract may be variously discharged in any one of a number of different “Situations”, including “Situation 1”, where a contracting party discharges the contract by exercising a contractually stipulated power for the same.

13.2 These expressly stipulated powers sometimes present difficulties of construction, some of which arose in *Center for Competency-Based Learning and Development Pte Ltd v SkillsFuture Singapore Agency*³ (“*SkillsFuture*”). This case may also have extended the proposition in *Alliance Concrete Singapore Pte Ltd v Comfort Resources Ltd*⁴ (“*Alliance Concrete*”) permitting a party to rely on alternative grounds of discharge. Whereas *Alliance Concrete* is authority for the proposition that a party may rely on an alternate repudiatory breach (ie, a “Situation 2” or “Situation 3” ground) *other* than that which it initially relied on to validly discharge a contract, in *SkillsFuture*, the General Division of the High Court (“General Division”) appeared to have applied the same principle

1 The views adopted in this chapter are expressed by the authors in their personal academic capacities and do not necessarily reflect the views of the Singapore Management University or the National University of Singapore.

2 [2007] 4 SLR(R) 413. For general discussion as to the chief ways by which a contract may be discharged and brought to an end, see *The Law of Contract in Singapore* (Andrew Phang gen ed) (Academy Publishing, 2nd Ed, 2022) at Part VI.

3 [2024] 5 SLR 481.

4 [2009] 4 SLR(R) 602.

to a case where the alternate ground of discharge was a contractual term giving rise to a power of termination (*ie*, a “Situation 1” ground).

13.3 The plaintiff in *SkillsFuture*, the Center for Competency-Based Learning and Development Pte Ltd (“CBLD”), contracted with the defendant, the Skills Future Singapore Agency (“SSG”), a body established under s 3 of the SkillsFuture Singapore Agency Act 2016⁵ on its own standard form. It provided that SSG would pay CBLD in consideration for providing various training courses to specified categories of workmen (“trainees”) in order to subsidise the training costs borne by employers who sent their employees for these courses.

13.4 SSG subsequently took the view that CBLD had conducted some courses with “gross moral turpitude”, thus permitting the exercise of its power under cl 12.1(d) of the contract to terminate it as it granted SSG the entitlement to terminate the contract once SSG formed the opinion that CBLD had “deceived or attempted to deceive [SSG]”.⁶ SSG argued that it was consequently released from paying further sums under the contract, including sums for training that had been provided, but which had yet to be disbursed. Alternatively, SSG invoked a “Clawback Clause”⁷ which would require CBLD to repay sums previously disbursed under the contract, as well as entitle SSG not to make payments for sums claimed by CBLD, but not yet disbursed.

13.5 CBLD argued that SSG’s contract termination was wrongful as SSG’s opinion was baseless. Alternatively, CBLD argued that SSG’s discretion to exercise the cl 12.1(d) termination power was subject to an implied precondition that it was not to be exercised “arbitrarily, capriciously and/or irrationally”.⁸ As for the Clawback Clause, CBLD argued that SSG was estopped from relying on it.

13.6 For various reasons which will be examined in greater detail below,⁹ Lee Sei Kin J held that the contract had been validly terminated by SSG. The learned judge pointed out that, in general, such terminations

5 2020 Rev Ed.

6 *Center for Competency-Based Learning and Development Pte Ltd v SkillsFuture Singapore Agency* [2024] 5 SLR 481 at [35].

7 The Clawback Clause provided that: “Upon the termination of the Contract or the termination or revocation of any right or benefit granted under the Contract by reason of any matter set out in Section 12.1(a) to (g), you shall pay to SSG the full amount of any funding or subsidy received from SSG under the Contract or in connection with the right or benefit so terminated or revoked.”

8 *Center for Competency-Based Learning and Development Pte Ltd v SkillsFuture Singapore Agency* [2024] 5 SLR 481 at [181].

9 See para 13.7 *ff* below.

would operate prospectively from the time when the contractual power of termination had been effected, and not before.¹⁰ However, the learned judge also seemed to accept that the Clawback Clause not only required sums disbursed to be repaid, and excused SSG from having to disburse sums which had been claimed, but which had yet to be disbursed prior to the termination of the contract.¹¹ Nevertheless, the learned judge ruled in favour of CBLD on the estoppel point in connection with sums arising from claims which were made from 16 October 2020 onwards, but not to earlier sums:¹² although SSG had given CBLD notice on that date to explain how it had conducted and managed the training courses prior to that date, that notice did not direct CBLD to suspend training sessions pending such showing of cause.¹³ This representation on SSG's part was relied on by CBLD to its detriment, as it had spent time and financial resources in running these post-16 October 2020 courses.¹⁴ Consequently, the learned judge held that SSG's claim based on the Clawback Clause *was* estopped, but only for these post-16 October 2020 training sessions.¹⁵

A. Constraints on exercising contractual powers “arbitrarily, capriciously and/or irrationally”: implication or construction?

13.7 Drawing on English cases such as *Abu Dhabi National Tanker Co v Product Star Shipping (No 2)*,¹⁶ *Socimer International Bank Ltd v Standard Bank London Ltd*,¹⁷ (“*Socimer*”) and *Braganza v BP Shipping Ltd*¹⁸ (“*Braganza*”), Lee Seiu Kin J observed that:¹⁹

... In recent times ..., the courts have occasionally held that the discretion conferred by contract is subject to an implied term that it will not be exercised ‘dishonestly, for an improper purpose, capriciously or arbitrarily.’ ...

10 *Center for Competency-Based Learning and Development Pte Ltd v SkillsFuture Singapore Agency* [2024] 5 SLR 481 at [209].

11 *Center for Competency-Based Learning and Development Pte Ltd v SkillsFuture Singapore Agency* [2024] 5 SLR 481 at [211]–[212].

12 *Center for Competency-Based Learning and Development Pte Ltd v SkillsFuture Singapore Agency* [2024] 5 SLR 481 at [228].

13 *Center for Competency-Based Learning and Development Pte Ltd v SkillsFuture Singapore Agency* [2024] 5 SLR 481 at [231].

14 *Center for Competency-Based Learning and Development Pte Ltd v SkillsFuture Singapore Agency* [2024] 5 SLR 481 at [230].

15 *Center for Competency-Based Learning and Development Pte Ltd v SkillsFuture Singapore Agency* [2024] 5 SLR 481 at [231].

16 [1993] 1 Lloyd's Rep 397 (EWCA).

17 [2008] EWCA Civ 116.

18 [2015] 1 WLR 1661.

19 *Center for Competency-Based Learning and Development Pte Ltd v SkillsFuture Singapore Agency* [2024] 5 SLR 481 at [182].

This development extends to instances where the contract gives one party the power to form an opinion as to the relevant facts ...

13.8 Lee J then referred²⁰ to a passage in *Brogden v Investec Bank plc*,²¹ (“*Brogden*”) where Leggatt J had explained the results in *Socimer* as follows:²² “The concern as Rix LJ observed in *Socimer* ... is that the decision-maker’s power [arising under a contract term] should not be abused. The implication is justified *as a matter of construction* to give effect to the presumed intention of the parties.” [emphasis added]; and also to a passage in *Braganza*, where Lady Hale had expressed the basis for the implication of a constraint on the exercise of a contractually-stipulated power to prevent their abuse in the following manner:²³ “They have done so by implying a term as to the manner in which such powers may be exercised, a term which may vary according to the terms of the contract *and the context* in which the decision-making power is given”. [emphasis added].

13.9 Although counsel for SSG contended that, following *Dong Wei v Shell Eastern Trading (Pte) Ltd*,²⁴ (“*Dong Wei*”) no term ought to be “implied” to constrain the exercise of a contractual power, particularly those allowing parties to “exit” from a contract, Lee J pointed out²⁵ that the power in issue in *Dong Wei* had been a power to terminate an employment contract by way of notice, and the Appellate Division of the High Court (“Appellate Division”) in that case had been particularly concerned with how contractual rights of termination with notice or payment in lieu of notice in employment contracts tended to “cut both ways” (*ie*, be available to both employer and employee).

13.10 Lee J also pointed out²⁶ that, in *Dong Wei*, the Appellate Division had noted²⁷ that if contractual powers to terminate employment contracts by notice or payment in lieu were restricted, such restriction would permit employers to postpone the termination of the employment relationship, notwithstanding an employee’s exercise of such powers by raising objections based on the non-satisfaction of such constraints resulting in an employee being compelled to work, in the interim.

20 *Center for Competency-Based Learning and Development Pte Ltd v SkillsFuture Singapore Agency* [2024] 5 SLR 481 at [183].

21 [2014] EWHC 2785 (Comm).

22 *Brogden v Investec Bank plc* [2014] EWHC 2785 (Comm) at [100].

23 *Braganza v BP Shipping Ltd* [2015] 1 WLR 1661 at [18].

24 [2022] 1 SLR 1318 at [92].

25 *Center for Competency-Based Learning and Development Pte Ltd v SkillsFuture Singapore Agency* [2024] 5 SLR 481 at [188].

26 *Center for Competency-Based Learning and Development Pte Ltd v SkillsFuture Singapore Agency* [2024] 5 SLR 481 at [188].

27 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 at [92].

13.11 The learned judge thus concluded that the conservative approach of the Appellate Division in *Dong Wei* on “implication” of constraints on the exercise of contractual powers was limited to the context before that court, and was not of general application: it did not, “necessarily arise with as much force in the case of an express clause permitting termination in the event of a default and which permits the non-defaulting party to exercise its sole discretion as to the *occurrence* of that qualifying event” [emphasis in original].²⁸

13.12 Lee J accepted that cl 12.1(d) was preconditioned upon SSG forming an adverse *opinion* as to CBLD; but, even so, “the parties could not have intended that the requisite opinion [of gross moral turpitude on CBLD’s part might] be formed without any basis whatsoever, or capriciously or arbitrarily” (leaving aside cases where the parties had contracted for “termination for convenience” such as terms providing for termination by notice or by payments in lieu of notice).²⁹ Thus:³⁰

... [although] the exercise of SSG’s discretion [would be] final and binding on CBLD in the sense that the court will not substitute its own judgment for that of CBLD’s as to whether there [had been] gross turpitude[,] ... SSG’s contractual discretion *to form the opinion* that there [had] been gross moral turpitude on the part of CBLD [was] subject to the implied term that the discretion [would] not be exercised dishonestly, for an improper purpose, irrationally, capriciously or arbitrarily. [emphasis in original]

13.13 As the evidence before the court demonstrated that SSG had *not* formed this opinion “dishonestly, for an improper purpose, irrationally, capriciously or arbitrarily”, it followed that the implicit precondition to the exercise of its power to terminate the contract under cl 12.1(d) had been satisfied.³¹

13.14 A terminological clarification is, however, helpful at this point. Although counsels’ submissions and the learned judge’s grounds of decision discuss this point as involving *implication*, the doctrine which was applied in this case was not the *implication* of a term, whether in fact or at law: the principles governing such implications were not raised

28 *Center for Competency-Based Learning and Development Pte Ltd v SkillsFuture Singapore Agency* [2024] 5 SLR 481 at [189].

29 *Center for Competency-Based Learning and Development Pte Ltd v SkillsFuture Singapore Agency* [2024] 5 SLR 481 at [189].

30 *Center for Competency-Based Learning and Development Pte Ltd v SkillsFuture Singapore Agency* [2024] 5 SLR 481 at [190].

31 *Center for Competency-Based Learning and Development Pte Ltd v SkillsFuture Singapore Agency* [2024] 5 SLR 481 at [191]–[196].

or applied.³² Rather, given the learned judge's references to *Brogden* and *Braganza* (reproduced in para 13.8 above), the concept relied on was *construction* of the term(s) in question (*ie*, "implication ... justified as a part of construction", in keeping with Leggatt J's judgment in *Brogden* which was reproduced at para 13.8 above). This is also highlighted by the learned judge's emphasis that in *Dong Wei*, the *context* therein led to the conclusion that the proposed constraints in that case ought not to be applied.

B. Relying on alternate ground for termination

13.15 In *SkillsFuture*, in its initial correspondence with CBLD to bring the contract between them to an end, SSG relied on cl 12.1(d). However, at trial, SSG sought to rely on an alternate ground for termination: the termination provision set out in cl 12.1(a).

13.16 Lee J accepted that although SSG's primary basis for its defence rested on its invocation of cl 12.1(d), it had sufficiently pleaded the alternative argument based on the power set out in cl 12.1(a).³³ The learned judge then accepted that it was permissible for a contracting party to rely on an alternate ground of termination resting on invocation of a contractual power of termination (*ie*, a "Situation 1" basis for termination), in lieu of the ground originally relied on.

13.17 Although not reproduced in the grounds of decision, it is possible to infer that cl 12.1(a) was an express contract term empowering SSG to terminate the contract if any warranties in the contract were breached, or if representations leading to its formation were untrue. Here, the relevant warranties related to terms requiring CBLD to, "(a) ensure that the information provided to SSG [in its claim submissions were] true, accurate and complete; and (b) to maintain a formal system to track the attendance of its trainees"³⁴

32 At another part of the judgment, consideration was had as to the implication of a term as to the time of performance of SSG's obligations under the contract ("within a reasonable time") in law (and not in fact): see *Center for Competency-Based Learning and Development Pte Ltd v SkillsFuture Singapore Agency* [2024] 5 SLR 481 at [209].

33 *Center for Competency-Based Learning and Development Pte Ltd v SkillsFuture Singapore Agency* [2024] 5 SLR 481 at [171].

34 *Center for Competency-Based Learning and Development Pte Ltd v SkillsFuture Singapore Agency* [2024] 5 SLR 481 at [36]. The specific terms are set out at [142] and [145].

13.18 Lee J held³⁵ that SSG had established that the grounds to trigger the power set out in cl 12.1(a) had arisen because of breaches of assorted warranties and terms³⁶ within the contract, albeit not dishonestly,³⁷ and without ruling that these warranties were promissory terms whose breach gave rise to a general power at common law to discharge the contract for breach (*ie*, a “Situation 3” case).³⁸

13.19 Was it, then, open for SSG to rely on the contractual power of termination set out in cl 12.1(a), even though its initial correspondence with CBLD had only relied on the power of termination set out in cl 12.1(d)? Applying the reasoning (and one of the qualifications)³⁹ set out in *Alliance Concrete*, Lee J held that SSG was permitted to rely on this alternative ground for termination.

13.20 As mentioned above, the Court of Appeal in *Alliance Concrete* had been concerned with two alternative grounds for termination, neither of which was concerned with termination in exercise of a contractually-stipulated power – *ie*, that case was not concerned with Situation 1-type scenarios (unlike the state of affairs in *SkillsFuture*). In *Alliance Concrete*, the Court of Appeal held that neither the initial ground for discharge (*ie*, breach by reason of late payments) nor the alternative (*ie*, breach of the obligation to order a certain minimum quantity of product) was made out as neither alleged breach would have fallen into either “Situation 3(a)”, or “Situation 3(b)”;⁴⁰ nor was there any evidence to show that the respondent had treated the appellant’s acts of under-ordering to amount to acts of renunciation (*ie*, a “Situation 2”

35 See *Center for Competency-Based Learning and Development Pte Ltd v SkillsFuture Singapore Agency* [2024] 5 SLR 481 at [142]–[162], though Lee J took pains to emphasise that the breaches had not arisen dishonestly: at [164].

36 Namely, cll 7.3 and 14.1(c) (reproduced in *Center for Competency-Based Learning and Development Pte Ltd v SkillsFuture Singapore Agency* [2024] 5 SLR 481 at [142(b)] and [142(a)], respectively); and also cll 4.6(a)–4.6(c) (reproduced in *Center for Competency-Based Learning and Development Pte Ltd v SkillsFuture Singapore Agency* [2024] 5 SLR 481 at [142(c)]).

37 *Center for Competency-Based Learning and Development Pte Ltd v SkillsFuture Singapore Agency* [2024] 5 SLR 481 at [162].

38 Rightly so, SSG seems not to have raised such a possibility before the court.

39 *Alliance Concrete Singapore Pte Ltd v Comfort Resources Ltd* [2009] 4 SLR(R) 602 accepted that a valid election for an alternative ground for termination would only be made if: (a) the alternative ground had not been previously waived such that subsequent reliance upon it would be estopped; and (b) had the basis for the alternative ground for termination been made known to the counterparty, the counterparty would have taken steps to remove that basis.

40 *Alliance Concrete Singapore Pte Ltd v Comfort Resources Ltd* [2009] 4 SLR(R) 602 at [51]–[58] and [74]–[76], respectively.

scenario).⁴¹ Hence, even if it were permissible for the respondent to raise either alternative basis for discharge for breach owing to the under-ordering of sand at trial, it would have been to no avail.

13.21 That said, the Court of Appeal in *Alliance Concrete* further held that the respondent would *not* have been permitted to rely on the alternative ground based on the appellant's breach in terms of under-ordering in any event since this would only be permitted subject to certain prerequisites, not all of which were satisfied. To wit, the Court of Appeal in *Alliance Concrete* accepted that a valid election for an alternative ground for termination would only be made if (a) the alternative ground had not been previously waived such that subsequent reliance upon it would be estopped;⁴² and (b) had the basis for the alternative ground for termination been made known to the counterparty, the counterparty would have taken steps to remove that basis: "[T]he innocent party will not be entitled to rely on a ground not raised at the time of termination if the party *in breach* could have rectified the situation had it been afforded the opportunity to do so." [emphasis added].⁴³ (For clarity's sake, it bears pointing out that there is a third prerequisite: the alternative ground of termination must also have been extant at the time when the initial ground had been asserted).⁴⁴

13.22 Although *Alliance Concrete* addressed whether, and when, a contracting party might subsequently rely on an alternate basis for discharge of a contract within Situation 3 (and, perhaps, Situation 2), thus framing one of the three prerequisites to be satisfied before this election was permissible in terms of needing to give the party-*in-breach* some opportunity to *rectify* the said breach, and to ascertain whether, if the opportunity to so rectify had been given, the party-*in-breach* would have done so, the Court of Appeal did not touch on a Situation 1 scenario.

13.23 In *Alliance Concrete*, the Court of Appeal traced the development of this doctrine of "alternate grounds for termination" from *Taylor v Oakes, Roncoroni and Co*⁴⁵ ("*Taylor v Oakes*"); *Heisler v Anglo-Dal*

41 *Alliance Concrete Singapore Pte Ltd v Comfort Resources Ltd* [2009] 4 SLR(R) 602 at [73].

42 *Alliance Concrete Singapore Pte Ltd v Comfort Resources Ltd* [2009] 4 SLR(R) 602 at [65].

43 *Alliance Concrete Singapore Pte Ltd v Comfort Resources Ltd* [2009] 4 SLR(R) 602 at [67].

44 *Alliance Concrete Singapore Pte Ltd v Comfort Resources Ltd* [2009] 4 SLR(R) 602 at [63], citing a passage from *Taylor v Oakes, Roncoroni and Co* (1922) 127 LT 267 at 269.

45 (1922) 127 LT 267.

*Ld*⁴⁶ (“*Heisler*”); *Panchaud Frères SA v Etablissements General Grain Company*;⁴⁷ and *Lidl UK GmbH v Hertford Foods Ltd*⁴⁸ (“*Lidl UK*”). Apart from *Heisler* (which will be discussed in greater detail below),⁴⁹ the other three cases do not seem to be concerned with the question of election at trial for a ground of termination based on exercise of a contractual term providing for a contractual power of termination (a Situation 1-type case). Rather, they seem to be concerned with alternative grounds predicated on the power arising at common law to discharge a contract for repudiatory breaches of contract (*ie*, Situation 2- or 3-type cases).⁵⁰

13.24 As Chadwick LJ explained in *Lidl UK*, the proposition stemming from *Taylor v Oakes* is as follows:⁵¹

[I]t is not seriously in dispute that a party who has purported to treat a contract as terminated on the grounds of the other’s repudiatory conduct – but who has wrongly identified the conduct upon which he relies – is entitled, in subsequent proceedings, to rely on other conduct which he could properly have treated as *repudiatory* at the relevant time, even if he did not then know about it – see *Taylor v Oakes*, *Roncoroni & Co* (1922) 127 LT 267, 269 and the other cases cited in *Chitty on Contracts* (28th edition, 1999) at paragraph 25-013. [emphasis added]

Accordingly, these four cases stand for the proposition that a party who had wrongly repudiated a contract on one ground is, even so, entitled to rely on “other conduct which he could properly have treated as *repudiatory* at the relevant time” [emphasis added]: they are silent as to whether such “alternate ground” might encompass a basis rested on the exercise of a power of termination set out in an express contract term.

13.25 Given the above, it is not obvious that any of these English cases involve what, as a matter of Singapore authority, would be referred to as a “Situation 1” case as the “alternate ground”. And the same is true of the cases set out in the 28th edition of *Chitty on Contracts*⁵² which

46 [1954] 1 WLR 1273.

47 [1970] 1 Lloyd’s Rep 53.

48 [2001] EWCA Civ 938.

49 At paras 13.33–13.36.

50 See Greer J’s judgment in *Taylor v Oakes* (1922) 127 LT 267 at 269, which was affirmed on appeal by the Court of Appeal, but without addressing this specific part of his judgment. As for *Panchaud Frères SA v Etablissements General Grain Company* [1970] 1 Lloyd’s Rep 53, and *Taylor v Oakes*, *Roncoroni & Co* (1922) 38 TLR 349, like *Alliance Concrete Singapore Pte Ltd v Comfort Resources Ltd* [2009] 4 SLR(R) 602, neither case was concerned with alternative grounds resting on exercise of a power of termination provided for by an express term.

51 *Lidl UK GmbH v Hertford Foods Ltd* [2001] EWCA Civ 938 at [41].

52 *Chitty on Contracts* (H G Beale ed) (Sweet & Maxwell, 28th Ed, 1999) at para 25-013.

Chadwick LJ referred to in the above extract – being, tellingly, the chapter on “Discharge by *Breach*”.

13.26 In addition to *Taylor v Oakes*, that paragraph in *Chitty on Contracts* also cited *Ridgway v Hungerford Market Co*,⁵³ *Baillie v Kell*,⁵⁴ *Boston Deep Sea Fishing and Ice Co v Ansell*,⁵⁵ *British & Benningtons Ltd v NW Cachar Tea Co Ltd*,⁵⁶ *Etablissements Chainbaux SARL v Harbormaster Ltd*,⁵⁷ *Universal Cargo Carriers Corp v Citati*,⁵⁸ *Denmark Productions Ltd v Boscobel Productions Ltd*,⁵⁹ *The Mihalis Angelos*,⁶⁰ *Cyril Leonard & Co v Simo Securities Trust Ltd*,⁶¹ *Scandinavian Trading Co A/B v Zodiac Petroleum SA*,⁶² *State Trading Corp of India v M Golodetz Ltd*,⁶³ and *Sheffield v Conrad*.⁶⁴

13.27 Although some of these cases involved alternate grounds of discharge such as frustration, apart from *The Mihalis Angelos*,⁶⁵ none of these were cases involving elections to rely on an “alternate ground” through exercise of a contractual term granting a power of termination.

13.28 Turning to *The Mihalis Angelos*:⁶⁶ that was a case where the party seeking to terminate the contract had initially relied on the power to terminate the contract as provided by a contractual *force majeure* clause, but who then subsequently “switched” to base its termination of the contract on grounds of the counterparty’s breach of a condition in the contract. The question as to whether one could “switch” to an alternative basis for termination premised on exercise of a contractual power of termination was not examined in that case.

13.29 Indeed, the same continues to be true of the 35th edition of *Chitty on Contract*⁶⁷ where the account set out above is updated and

53 (1835) 3 Ad & E 171 at 177–178 and 180.

54 (1838) 4 Bing NC 638.

55 (1888) 39 Ch D 339 at 352 and 364.

56 [1923] AC 48 at 71.

57 [1955] 1 Lloyd’s Rep 303 at 314.

58 [1957] 2 QB 401 at 443–445 (affirmed in part in *Universal Cargo Carriers Corp v Citati* [1957] 1 WLR 979 and reversed in part in *Universal Cargo Carriers Corp v Citati (No 2)* [1958] 2 QB 254).

59 [1969] 1 QB 699 at 722 and 732.

60 [1971] 1 QB 164 at 195, 200 and 204.

61 [1972] 1 WLR 80 at 85, 87 and 89.

62 [1981] 1 Lloyd’s Rep 81 at 90.

63 [1988] 2 Lloyd’s Rep 182.

64 (1988) 22 Con LR 108.

65 [1971] 1 QB 164 at 195, 200 and 204.

66 [1971] 1 QB 164 at 195, 200 and 204.

67 *Chitty on Contracts* (H G Beale ed) (Sweet & Maxwell, 35th Ed, 2023) at para 28-067.

supplemented by references to *Reinwood Ltd v L Brown & Sons Ltd*⁶⁸ (“*Reinwood*”); *Seadrill Management Services Ltd v OAO Gazprom*⁶⁹ (“*Seadrill Management*”); *Nakanishi Marine Co Ltd v Gora Shipping Ltd*⁷⁰ (“*Nakanishi*”); and *Lombard North Central Plc v European Skyjets Ltd*⁷¹ (“*Lombard North Central*”). However, none of these additions stands as clear authority for the extension of the principle on “alternate grounds” which may be extended to instances based on exercise of a contractual term granting a power of termination.

13.30 In his judgment in *Reinwood*, Lloyd LJ (with whom Hooper and Richards LJ agreed) only referred to the principle⁷² in passing to show how a particular contention by counsel on waiver between inconsistent courses of action was inconsistent with that principle (though Lloyd LJ suggested that the principle was not necessarily restricted to cases where the facts supporting the alternative basis for discharge were initially unknown).

13.31 As for *Seadrill Management*, that was a case where the defendant had initially sought to discharge the contract owing to the plaintiff’s alleged breach of contract, but where the defendant then sought to rely on an alternative basis for discharge based on the plaintiff’s alleged renunciation of the contract by reason of acts and words which were not initially known to the defendant, but which only came to light subsequently. Lloyd J pointed out that in order for the principle to apply so as to permit the party seeking to discharge the contract on an alternative ground based on renunciation of the contract through the words and conduct of the counterparty, such words and conduct would have to have been known to the party seeking discharge at the time of the initial purported termination: the question as to whether the principle might be applied beyond instances where the alternative ground rested on breach or renunciation was not addressed.

13.32 Indeed, in *Nakanishi*, Burton J expressed doubt as to whether the principle of election could be applied to permit the party seeking to terminate the contract to invoke at a subsequent point in time a contractual power of termination by giving notice, especially where the clause required the notice to set out the event(s) which were relied on as

68 [2008] EWCA Civ 1090 at [51].

69 [2009] EWHC 1530 (Comm) at [265].

70 [2012] EWHC 3383 (Comm) at [35(iii)].

71 [2020] EWHC 679 (QB) at [62]–[68].

72 *Reinwood Ltd v L Brown & Sons Ltd* [2008] EWCA Civ 1090 at [51].

the basis for exercising that contractual power. Burton J's doubts were cited without comment by Freedman J in *Lombard North Central*.⁷³

13.33 Finally, turning to *Heisler*, the remaining case which had been cited by the Court of Appeal in *Alliance Concrete*⁷⁴ as authority for the principle in question: in *Heisler*, the plaintiff was contractually bound to supply the defendants with a “guarantee” of payment of a certain sum in US dollars. Instead of supplying a third-party guarantee (say, one issued by a bank), the plaintiff provided the defendants with a personal guarantee. When pressed to provide a third-party guarantee, the plaintiff declined. This refusal was taken by the defendants to be an anticipatory repudiatory breach of the contract, which they then purported to accept. Subsequently, the plaintiff sued the defendants for damages for breach of contract on the premise that there had not been any anticipatory repudiatory breach on his part and that the defendants’ purported discharge was without legal basis.

13.34 At first instance, Devlin J held that the personal guarantee which the plaintiff had provided sufficed to satisfy the contractual requirement. On appeal, counsel for the appellant (the defendant below) argued that the personal guarantee would *not* have sufficed to satisfy the requirements under the contract because the sum guaranteed was to have been paid in US dollars. Consequently, Treasury permission for such payment should have been sought and a letter documenting such approval would have had to accompany the “guarantee” to fulfil the requirements of the contract. However, Somervell LJ took the view that it was not open for counsel to raise this objection in the appeal.

13.35 In support of the appellant’s position, counsel had relied on Greer J’s principle in *Taylor v Oakes* (as set out above). But Somervell LJ pointed out that, “This rule is ... subject to a proviso. If the point not taken is one which if taken could have been put right, the principle will not apply. *This has ... clear application here.*” [emphasis added].⁷⁵

13.36 Somervell LJ did *not* explicitly hold that Greer J’s substantive principle was applicable in the first place. Rather, Somervell LJ’s position was that, *even if* it were applicable to begin with, its application was qualified by the proviso; and since the proviso was not satisfied, Greer J’s principle could not be applied in any event. There was not, accordingly, any ruling on the question as to whether the “alternate ground” principle

73 *Lombard North Central Plc v European Skyjets Ltd (in Liquidation)* [2020] EWHC 679 (QB) at [68].

74 *Alliance Concrete Singapore Pte Ltd v Comfort Resources Ltd* [2009] 4 SLR(R) 602.

75 *Heisler v Anglo-Dal Ld* [1954] 1 WLR 1273 at 1278.

also included alternate grounds premised on invocation of a contractually agreed power of termination.

13.37 While there is arguably nothing in *Alliance Concrete* or the English authorities which the Court of Appeal cited to preclude *extension* of the principle in *Taylor v Oakes* to other contexts, thus leaving it open to a court to extend the principle, in *SkillsFuture*, counsel appeared to have assumed that the law as it stood *already* extended to the present scenario before the court, and that no extension of the principle was needed. Given the discussion of the English authorities which deal with the matter, and how none of them seem to have considered the point, the assumptions of counsel seemed questionable.

13.38 The lack of concern here may be contrasted with the position under English *and* Singapore law as to the recovery of damages for consequential losses. Because “Situation 1”-type cases are essentially cases of termination where the basis of termination is *not* a “breach”, but simply because the parties had agreed for the contract to come to an end, consequential damages are often not recoverable for the “losses” sustained (or “gains” not earned) following the exercise of such a power.⁷⁶ The unanswered question is whether a similar distinction should apply (and if not, why not) in connection with the permissibility for a contract party to rely on a “Situation 1”-type contractual clause as an alternate ground to justify termination, when, say, its initial ground for termination turns out to be unsatisfactory or unsustainable. As the Court of Appeal had observed in *Sports Connection Pte Ltd v Deuter Sports GmbH*,⁷⁷ that a “Situation 1” termination “entails (in substance) the same legal effect as a condition (pursuant to the condition-warranty approach [*ie*, a “Situation 3”-type case]), this is only with regard to the termination of the contract” [emphasis in original omitted].⁷⁸ Hence, as a matter of authority, it is the *effect* which is the same, not the conceptual reason or mechanism for the effect. And it is this difference in reason or mechanism which then leads to a difference in effect so far as awards of damages are concerned. The question as to whether this difference in reason might also justify different treatment so far as the “alternate ground” doctrine having been glossed over in *SkillsFuture*, it is to be hoped that any opportunity in the future to consider the merits for and against such an extension of the *Alliance Concrete* doctrine will not be missed.

76 See, eg, *Financings Ltd v Baldock* [1963] 2 QB 104 at 110; *Stocznia Gdynia SA v Gearbulk Holdings Ltd* [2009] 1 Lloyd’s Rep 461; *Max Media FZ LLC v Nimbus Media Pte Ltd* [2010] 2 SLR 677 at [35] *ff*; and *Sports Connection Pte Ltd v Deuter Sports GmbH* [2009] 3 SLR(R) 883 at [51]–[55].

77 [2009] 3 SLR(R) 883.

78 *Sports Connection Pte Ltd v Deuter Sports GmbH* [2009] 3 SLR(R) 883 at [55].

II. Economic duress and undue influence

13.39 *Oon Swee Gek v Violet Oon Inc Pte Ltd*⁷⁹ (“*Oon Swee Gek*”) involved a breakdown in relations between the shareholders of a company, Violet Oon Inc Pte Ltd (“*Company*”) and also the first defendant), resulting in the claimants seeking relief for shareholder oppression and, by way of alternative, seeking an order for the *Company* to be wound up.

13.40 The claimants were Oon Swee Gek, popularly known as Violet Oon (“*Ms Oon*”), as well as her daughter and son, Tay Su-Lyn (“*Ms Tay*”), and Tay Yiming (“*Mr Tay*”) respectively. Ms Oon was employed by the *Company* as its culinary curator and chef, and her children were employed as managers of the *Company*. The claimants were also the *Company*’s directors.

13.41 Up until 2014, the claimants held 100% of the shares in the *Company*. However, in 2014, another entity, MMM Delicious Pte Ltd (“*MMM Delicious*”) subscribed for shares in the *Company*: thereafter, the claimants held 50% of its shares, with MMM Delicious holding the other 50%.

13.42 MMM Delicious’s 50% shareholding was subsequently transferred to the third defendant, Group MMM Pte Ltd (“*Group MMM*”), in which the second defendant, Murjani Manoj Mohan (“*Mr Murjani*”) was sole shareholder, director, and chief executive officer; and Mr Murjani was made a director of the *Company* in August 2016.

13.43 Between January 2015 and November 2018, the claimants had increased their remuneration as employees of the *Company* (within reasonable bounds). When discovered in December 2018, Mr Murjani objected to the remuneration having been made without due authorisation, but he proposed a resolution by recording increases to the quantum of shareholder loans extended by Group MMM to the *Company* in the company’s accounts by \$300,000.

13.44 Various terms were e-mailed to Mr Tay on 21 February 2019 (“*2019 Terms*”),⁸⁰ *inter alia*, Group MMM would receive \$1.55m for the alleged overpayments, Ms Oon and Ms Tay would be removed as directors of the *Company*, Mr Murjani would be appointed as the *Company*’s chairman and chief executive officer, and if the *Company* did not pay \$1.55m to Group MMM as repayment for a shareholder loan, that loan would be converted to equity in the *Company* (thereby increasing Group

79 [2024] 6 SLR 313.

80 *Oon Swee Gek v Violet Oon Inc Pte Ltd* [2024] 6 SLR 313 at [15].

MMM's percentage shareholding). A new shareholders' agreement was subsequently concluded on 26 February 2019 ("2019 SHA") incorporating these terms.

13.45 Following a further breakdown in relations with Mr Murjani, the claimants filed applications for relief pursuant to s 216(2) of the Companies Act 1967⁸¹ on grounds of shareholder oppression ("OC 301"), and, alternatively, for the Company to be wound-up ("CWU 195"). But, in support of their prayers for relief, the claimants also contended that the 2019 Terms and the 2019 SHA ("2019 Agreements") had been obtained by economic duress and/or undue influence.

13.46 Both OC 301 and CWU 195 were heard by Philip Jeyaretnam J in the General Division. As to the former, Jeyaretnam J made an order under s 216 of the Companies Act 1967, compelling Group MMM to sell its 50% shareholding in the Company to the claimants, but made no order on the latter.⁸²

13.47 In the course of dealing with the two applications, the learned judge also made some interesting observations on the substantive principles involved with the vitiation of a contract for economic duress, or for undue influence. These are discussed below.

A. *Undue influence*

13.48 As will be discussed below,⁸³ Philip Jeyaretnam J ruled in *Oon Swee Gek* that the 2019 Agreements resulted from economic duress.⁸⁴ Hence, ruling on the question of undue influence was not strictly necessary. Nevertheless, the learned judge took the view that it would be helpful to do so:⁸⁵

[W]hile its starting point is different from economic duress, it sometimes traverses the same ground. ... [T]he victim may experience both pressure and influence from a wrongdoer at or about the same time. Consequently, in order to do justice in the round, both vitiating factors are often properly considered together.

13.49 The learned judge reiterated the well-trodden point that, "[u]ndue influence divides into proved actual undue influence, *ie*, Class 1 undue

81 2020 Rev Ed.

82 *Oon Swee Gek v Violet Oon Inc Pte Ltd* [2024] 6 SLR 313 at [131].

83 See paras 13.53–13.73 below.

84 *Oon Swee Gek v Violet Oon Inc Pte Ltd* [2024] 6 SLR 313 at [90].

85 *Oon Swee Gek v Violet Oon Inc Pte Ltd* [2024] 6 SLR 313 at [91].

influence, and presumed undue influence, *ie*, Class 2 undue influence⁸⁶; and that in relation to establishing actual undue influence sufficient to vitiate a contract, the Court of Appeal in *BOM v BOK*⁸⁷ had clarified what was required by citing the following passage from *The Law of Contract in Singapore*:⁸⁸ “the heart of the inquiry is whether the person exercising the undue influence has ‘exercised such domination over the plaintiff victim’s mind that his independence of decision was substantially – or even totally – undermined’” [emphasis in original omitted].

13.50 The learned judge then examined the evidence concerning Mr Murjani’s interactions with Mr Tay, the third claimant, focusing on Mr Murjani’s capacity to influence Mr Tay owing to his position as “mentor” to the latter, and with whom Mr Murjani had insisted on negotiating with whilst excluding the other two claimants, Ms Oon and Ms Tay. The learned judge also observed that there were written communications at critical points in time evidencing Mr Tay’s conciliatory and submissive response to Mr Murjani’s “outrage” at the unauthorised salary increases initiated by the claimants, as well as evidence that Mr Murjani was a considerably more experienced businessman than the claimants.⁸⁹ Consequently, the learned judge found that Mr Murjani had, “in fact exercised undue influence over Mr Tay”.⁹⁰

13.51 As for the other two claimants, the learned judge made an interesting finding of fact:⁹¹

100 Mr Murjani was one person, the claimants three. Mr Murjani directly exerted undue influence only on Mr Tay. As I have found at [63(d)] and [82], this was a deliberate strategy on Mr Murjani’s part. Nonetheless, it raises the question whether Ms Oon [, Mr Tay’s mother,] and Ms Tay [, Mr Oon’s sister,] should be entitled to rely on actual undue influence of Mr Tay to avoid the 2019 Agreements. While the economic duress applied to Mr Tay plainly affected mother and sister too, only Mr Tay was directly besieged with emotional bullying and manipulation. The law expects adults who are not incapacitated or vulnerable to take responsibility for their own interests. However, the facts of this case are special. *I am satisfied that both Ms Oon and Ms Tay were deeply disturbed by the toll on Mr Tay and just wanted the nightmare to stop. In this way, the reach of Mr Murjani’s undue influence extended to them as well.* [emphasis added]

86 *Oon Swee Gek v Violet Oon Inc Pte Ltd* [2024] 6 SLR 313 at [92].

87 *BOM v BOK* [2019] 1 SLR 349 at [103].

88 *The Law of Contract in Singapore* (Andrew Phang gen ed) (Academy Publishing, 2nd Ed, 2022) at para 12.135.

89 *Oon Swee Gek v Violet Oon Inc Pte Ltd* [2024] 6 SLR 313 at [93]–[98].

90 *Oon Swee Gek v Violet Oon Inc Pte Ltd* [2024] 6 SLR 313 at [99].

91 *Oon Swee Gek v Violet Oon Inc Pte Ltd* [2024] 6 SLR 313 at [100].

13.52 This passage shows that *actual* undue influence was found by the learned judge to have been also applied to both Ms Oon and Ms Tay *indirectly*, owing to the undue influence and other manipulative and bullying tactics which Mr Murjani had actually applied to Mr Tay. This case thus illustrates how actual undue influence may be held to have been indirectly applied to one party owing to their relationship to another on whom improper influence was actually and directly applied.

B. Economic duress

13.53 How, and when “lawful act” economic duress⁹² might vitiate a contract were sketched out by Judith Prakash J in *Tam Tak Chuen v Khairul bin Abdul Rahman*⁹³ (“*Tam Tak Chuen*”). However, that case presents certain difficulties.

13.54 First, *Tam Tak Chuen* suggests that economic duress having been established, there follows a reversal of the burden of proof on the question of causation,⁹⁴ following the Privy Council in *Alexander Barton v Alexander Ewan Armstrong*,⁹⁵ but seemingly without noting that that had been a case of duress to the person (by way of threats of physical harm), and not a case of economic duress.⁹⁶

13.55 Second, adopting the analysis in N Enonchong’s *Undue Influence and Unconscionable Dealing*,⁹⁷ Prakash J accepted⁹⁸ that where the pressure in question involved a threat to commit a lawful action, such pressure would be “illegitimate” if the, “terms secured as a result of the threat of lawful action are so ‘manifestly disadvantageous’ to the complainant as to make it unconscionable for the defendant to retain the benefit of them”. This seems to suggest that proof of manifest disadvantage is a *requirement* to establish that illegitimate pressure had been applied.

13.56 Both the “reversal” of the burden of proof in connection with causation, and the role of “manifest disadvantage” in establishing the presence of “illegitimate” pressure as would amount to economic duress were re-examined by Jeyaretnam J in his decision in *Oon Swee*

92 That is, economic duress arising from threats to carry out lawful acts, but which if carried out, would have adverse economic effects on the target of those threats.

93 [2009] 2 SLR(R) 240.

94 *Tam Tak Chuen v Khairul bin Abdul Rahman* [2009] 2 SLR(R) 240 at [22] and [62].

95 [1976] AC 104 (PC).

96 *Tam Tak Chuen v Khairul bin Abdul Rahman* [2009] 2 SLR(R) 240 at [62].

97 Nelson Enonchong, *Undue Influence and Unconscionable Dealing* (Sweet & Maxwell, 2006) at para 3-031.

98 *Tam Tak Chuen v Khairul bin Abdul Rahman* [2009] 2 SLR(R) 240 at [22].

Gek, and there is now a clear divergence at the High Court level in relation to these two points. As the discussion below will also show, *Oon Swee Gek* also serves as a useful reminder of equity's concurrent jurisdiction over contracts and transactions induced by duress, including economic duress.

(1) “But-for” causation and reversal of burden of proof

13.57 In holding that the claimants in *Oon Swee Gek* had successfully established that they were entitled to rescind the contract in issue because of economic duress, Jeyaretnam J declined to follow the proposition in *Tam Tak Chuen* that once “illegitimate pressure amounting to compulsion of the will” had been made out by the rescinding party, rescission for economic duress would be available unless the counterparty proved that such economic duress had “contributed nothing” to the rescinding party’s decision to enter into the contract in issue.⁹⁹

13.58 Nor was the learned judge inclined to adopt the slightly differently-worded proposition made by Quentin Loh J in *EC Investment Holding Pte Ltd v Ridout Residence Pte Ltd*,¹⁰⁰ that, “once the plaintiff had proved that illegitimate pressure had been exercised on him, it was up to the defendant to prove that the pressure *had not contributed* to the plaintiff’s decision to execute the agreement” [emphasis added].

13.59 Jeyaretnam J took the view that these propositions suggesting a shifting of the burden of proof so far as the causal link between the illegitimate pressure (if any) and the formation of the disputed contract in both *Tam Tak Chuen* and *EC Investment* at the High Court were mere *dicta*, and noted that the point had yet to be considered by the Court of Appeal.¹⁰¹

13.60 Not being bound to do so, Jeyaretnam J declined to follow these prior High Court decisions of coordinate jurisdiction:¹⁰²

56 ... I do not agree that the burden of proof shifts in this way. Such a shift in the burden of proof would align the position for economic duress with that of duress to the person, but diverge from how another similar doctrine operates, namely misrepresentation, where the party seeking to avoid the contract must satisfy the ‘but for’ test. The shift in the burden of proof is ordinarily justified for one of two policy reasons:

99 *Oon Swee Gek v Violet Oon Inc Pte Ltd* [2024] 6 SLR 313 at [58].

100 [2011] 2 SLR 232 at [48].

101 *Oon Swee Gek v Violet Oon Inc Pte Ltd* [2024] 6 SLR 313 at [55].

102 *Oon Swee Gek v Violet Oon Inc Pte Ltd* [2024] 6 SLR 313 at [56]–[57].

- (a) persons in the position of the party to whom the burden shifts are likely to have special knowledge of that aspect of the case; or
- (b) to signal societal disapproval of the conduct that triggers the shift in the burden of proof.

57 The party found to be exerting economic duress would not have better knowledge of the party's state of mind. While applying economic duress is far from laudable, it is hard to see why it would merit opprobrium more than the making of misrepresentations. The seriousness and reprehensibility of duress is of a different order from economic duress. Thus, in this matter, I will not shift the burden of proof to the defendants. Rather, I will need to consider whether the claimants have satisfied the 'but for' test.

13.61 The learned judge also pointed out that English case law, too, distinguished between cases of duress to the person (in which it was well-settled that it would be for the perpetrator of such duress – once established by the victim thereto – to prove that it had not led to the formation of the disputed contract), and cases of economic duress, where the victim of economic duress who seeks to rescind for the same must not only show that such duress had been applied, but also that “but for” such application, it would not have entered into the disputed contract.¹⁰³

13.62 Furthermore, the learned judge pointed out¹⁰⁴ that the following passage in *BOM v BOK*¹⁰⁵ suggested that the Court of Appeal was also minded to require proof of causation by the victim of duress, namely:¹⁰⁶

... [duress] requires a transaction to have been procured by the *illegitimate pressure* that is exerted by one party over the other. ... [Duress is thus concerned with] (a) the nature of the pressure (*ie*, is the threat, or the demand accompanying the threat, made in such a manner as to render the pressure *illegitimate?*); and (b) the impact of the threat on the person at whom the threat is directed, specifically whether the threat so affected him as to *coerce* his will: ... [emphasis in original]

13.63 Given the above, Jeyaretnam J summarised the law in Singapore on economic duress as a contractual vitiating factor as follows:¹⁰⁷

60 The burden lies on the party seeking to rely on [economic duress to rescind a contract] to establish the following.

- (a) The other party had exerted pressure directed at compulsion of their will.

103 *Oon Swee Gek v Violet Oon Inc Pte Ltd* [2024] 6 SLR 313 at [58].

104 *Oon Swee Gek v Violet Oon Inc Pte Ltd* [2024] 6 SLR 313 at [59].

105 [2019] 1 SLR 349.

106 *BOM v BOK* [2019] 1 SLR 349 at [172].

107 *Oon Swee Gek v Violet Oon Inc Pte Ltd* [2024] 6 SLR 313 at [60].

(b) Such pressure was illegitimate, which entails an objective evaluation of the pressure exerted and the overall circumstances. Mere commercial pressure is insufficient but it is not necessary that the pressure involve unlawful means.

(c) But for the illegitimate pressure, [the parties to the disputed contract] would not have agreed at all or on those terms.

13.64 At this juncture, it should be kept in mind that when determining if the duress in question had caused the entry into the disputed contract, that exercise involves ascertaining the state of mind of the party subjected to the alleged duress. Thus, as Butt J observed in *Scott v Sebright*:¹⁰⁸

It has sometimes been said that in order to avoid a contract entered into through fear, the fear must be such as would impel a person of ordinary courage and resolution to yield to it. I do not think that is an accurate statement of the law. Whenever from natural weakness of intellect or from fear—*whether reasonably entertained or not*—either party is actually in a state of mental incompetence to resist pressure improperly brought to bear, there is no more consent than in the case of a person of stronger intellect and more robust courage yielding to a more serious danger. [emphasis added]

13.65 If, as the above suggests, determination of causation is “subjective” in that the court is to make a finding as to whether the party who had been on the receiving end of the alleged “duress” (*ie*, the “victim”) had been induced by it to enter into the disputed transaction owing to the victim having been put into such a state of “mental incompetence”, it would seem that evidence by the victim of its state of mind would be relevant, and admissible. Then, if such evidence were not inherently incredible and disbelieved by the finder of fact, it would then be for the party who had allegedly applied the “duress” in question to show that it could not have affected the decision-making autonomy of the victim. Hence, *Oon Swee Gek* may well be a useful reminder that *some* credible evidence must be tendered by the “victim” of the alleged duress as to the question of causation.

(2) *Manifest disadvantage, coercion of will, illegitimacy of pressure and causation: an “objective” inquiry?*

13.66 Turning to the role of “manifest disadvantage” in connection with the vitiation of a contract for economic duress, Jeyaretnam J pointed out that:¹⁰⁹

Economic duress is distinct from the doctrine of unconscionability, but nonetheless manifest disadvantage in the bargain struck may support inferences

108 (1866) 12 PD 21 at 24.

109 *Oon Swee Gek v Violet Oon Inc Pte Ltd* [2024] 6 SLR 313 at [61].

that their will was coerced, that the pressure exerted was illegitimate and that the transaction was the result of such illegitimate pressure.

13.67 Given this, *Oon Swee Gek* appears to suggest that the extent to which the disputed contract resulted in “manifest disadvantage” to the victim of the alleged economic duress would be *relevant* to, but not be *necessary* for, the ascertainment by the court as to whether the victim’s voluntariness in assenting to the transaction had been forced or coerced. Additionally, “manifest disadvantage” would also be relevant to the court’s ruling on the legitimacy (or otherwise) of the pressure as had been applied. Finally, “manifest disadvantage” would be relevant to the court’s ruling on the question of “but-for” causation.

13.68 Importantly, though, as noted above, Jeyaretnam J highlighted in his grounds of decision¹¹⁰ that the ascertainment of the extent or degree of the “disadvantageous-ness” of the disputed contract *vis-à-vis* the victim of the alleged economic duress was an *objective* one.¹¹¹ Hence, a victim’s *subjective* perception that the disputed contract was “manifestly disadvantageous” to its interests would be irrelevant.

13.69 Thus, the learned judge considered the benefits to be had by the claimants under the disputed contract on an entirely objective basis,¹¹² and contrasted them with the *gains* made by the defendants under the same contract: no regard was had as to what the *claimants* themselves might have perceived as shortcomings in the contract so far as their interests were concerned. Instead, the court concluded that the transaction was manifestly disadvantageous by comparing the benefits to the claimants who claimed to have rescinded the contract, and the gains to the defendants, and noting that these were disproportionately in the defendants’ favour.

110 See *Oon Swee Gek v Violet Oon Inc Pte Ltd* [2024] 6 SLR 313 at [60(b)], reproduced at para 13.63 above.

111 The question as to whether the parties seeking to rescind had been affected (*ie*, “pressured”) by the alleged duress is not, however, “objective” in the same way. Where the parties in question are natural persons, their testimony as to the pressure they felt and perceived as a result of the alleged economic duress would be relevant: see *Oon Swee Gek v Violet Oon Inc Pte Ltd* [2024] 6 SLR 313 at [75]–[76] and [88].

112 *Oon Swee Gek v Violet Oon Inc Pte Ltd* [2024] 6 SLR 313 at [85]–[87]. Namely: (a) increases in monthly salaries for two of the claimants; and (b) no threat of winding up of the defendant Company and/or litigation.

(3) *Rescission for economic duress: “self-help” or only upon making of court order?*

13.70 Jeyaretnam J stated as follows:¹¹³ “I find that the elements of economic duress, sufficient for vitiating the 2019 Agreements, are made out. *I set aside the 2019 Agreements.*” [emphasis added]. This was reiterated at the end of his judgment:¹¹⁴

I am satisfied that Mr Murjani exerted economic duress and undue influence in order to change the shareholder arrangements with a view to his taking control of the Company. *While I have set aside the changes*, this does not completely remedy or bring to an end the matters complained of. Moreover, the court should not leave the shareholders to stew in distrust, enmity, and potential deadlock. The appropriate remedy is for the claimants to buy-out the defendants’ interest in the Company at fair value. [emphasis added]

13.71 First, notwithstanding the learned judge’s choice of words in the above extract, it is unlikely that any prayer for an order of rescission for duress (or for undue influence) had been made within the context of the two applications before the court, namely, the application in OC 301 for relief against shareholder oppression, and the winding-up petition in CWU 195. No actual *order* of rescission was made.

13.72 As previously mentioned,¹¹⁵ the learned judge only made an order for compulsory share acquisition in accordance with the Companies Act 1967 in connection with the claimants’ applications for the same, and alternatively, for winding up. It seems probable that no prayers for the disputed transactions to be set aside for economic duress (or, for undue influence) were made, even though these vitiating factors were raised as part of those applications.

13.73 Even so, the learned judge’s grounds of decision¹¹⁶ helpfully serves as a reminder that, so far as the vitiating factor of duress is concerned, a Singapore court is empowered to make *orders* of rescission – and these must be orders of rescission within the court’s equitable jurisdiction. This should be distinguished from rescission at common law (“common law rescission”) for duress – a doctrine which has been recognised in English law since 1604 (given *Whelpdale’s Case*)¹¹⁷ and which was received

113 *Oon Swee Gek v Violet Oon Inc Pte Ltd* [2024] 6 SLR 313 at [90].

114 *Oon Swee Gek v Violet Oon Inc Pte Ltd* [2024] 6 SLR 313 at [133].

115 At para 13.46 above.

116 *Oon Swee Gek v Violet Oon Inc Pte Ltd* [2024] 6 SLR 313 at [90] and [133].

117 (1604) 5 Co Rep 119a; 77 ER 239, which must have been generally received through the Second Charter of Justice 1826 (Letters Patent establishing the Court of Judicature at Prince of Wales’ Island, Singapore and Malacca dated 27 November 1826 and made under the authority of Act 6 Geo 4, c 85). Absent any clear Singapore Court
(cont’d on the next page)

and became Singapore law following the general reception effected by the Second Charter of Justice of 1826. Consequently, the position in Singapore is similar to that in England: a court acting within its equitable jurisdiction has *concurrent* jurisdiction over such matters.¹¹⁸ Hence, as suggested by the learned judge, an *equitable* order of rescission may be ordered in instances of duress.¹¹⁹

III. Mistake as to identity at common law

13.74 The discussion now turns to the decision of the Appellate Division in *Axis Megalink Sdn Bhd v Far East Mining Pte Ltd*¹²⁰ (“*Axis Megalink*”). In the court below,¹²¹ it had been held that a contract set out in an “Engagement Letter” which the defendant, Far East Mining Pte Ltd (“FEM”), had entered into with the first plaintiff, Axis Megalink Sdn Bhd (“Axis”), on the recommendation of the second defendant (“Lee”), whilst ignorant that Axis was beneficially owned by Lee was void at common law for unilateral mistake of identity, given that Lee knew of FEM’s ignorance as to his beneficial ownership of Axis.¹²²

13.75 This was reversed on appeal by the Appellate Division. Delivering judgment in the appeal, Jeyaretnam J observed:¹²³

of Appeal authority overruling that case, either prior to or following 12 November 1993 when the Application of English Law Act 1993 (2020 Rev Ed) came into force, it would appear that that continues to be part of Singapore law.

118 Nelson Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (Sweet & Maxwell, 5th Ed, 2023) at para 28-004: “[B]y virtue of equity’s concurrent jurisdiction, all the vitiating factors that are recognised as grounds for rescission at common law are also grounds for rescission in equity.”

119 See also *Hawes v Wyatt* (1790) 3 Bro CC 156 at 158, which was a case involving duress to the person. The concurrent jurisdiction of equity over contracts induced by duress extends to other forms as well (*Halsbury’s Laws of England* vol 47 (LexisNexis, 5th Ed, 2021) in “Equitable Jurisdiction” at para 37):

Where a part to a transaction enters into it under duress in the strict sense, that is, where he is compelled to it by bodily restraint or fear of bodily harm, the transaction is voidable at law; and in that case it will be set aside in equity. Relief is, however, also granted where the compulsion is not of this extreme nature, and to avoid the transaction that there were such circumstances of pressure, including commercial or domestic pressure, as to prevent the party from being a free agent. [references omitted]

120 [2024] 1 SLR 524.

121 *Axis Megalink Sdn Bhd v Far East Mining Pte Ltd* [2023] SGHC 243.

122 *Axis Megalink Sdn Bhd v Far East Mining Pte Ltd* [2023] SGHC 243 at [39] and [105]–[113].

123 *Axis Megalink Sdn Bhd v Far East Mining Pte Ltd* [2024] 1 SLR 524.

68 The doctrine of unilateral mistake relates to the situation where offer and acceptance do not coincide and so parties do not reach consensus *ad idem*. Where the offeree is mistaken about a term of the contractual offer and purports to accept what is believed to be the offer, and the offeror knows of this mistake, then the offeree cannot be taken to have intended to contract on the terms that he purported to contract upon (see *Quoine Pte Ltd v B2C2 Ltd* [2020] 2 SLR 20 (*'Quoine v B2C2'*) at [81]). This principle applies to both sides of the bargain. Hence, where the non-mistaken party 'snaps up' a purported contractual offer, which he knows to be mistaken concerning the terms of that offer, there is no true consensus between the parties' offer and acceptance (see *Hartog v Colin & Shields* [1939] 3 All ER 566 at 567–568 and *Chwee Kin Keong and others v Digilandmall.com Pte Ltd* [2005] 1 SLR(R) 502 (*'Chwee Kin Keong'*) at [30]–[37]).

69 Thus, where 'Party B' purports to accept an offer made by 'Party A' but believes it to come from 'Party C', there is no agreement. A unilateral mistake of identity arises from a confusion of one person with another. No such confusion happened here. The contract was in writing, and the persons signing on behalf of FEM both knew that the counterparty was Axis. They did not think that FEM was contracting with a different company. Even if they believed that Axis was not owned by Mr Lee when it was, this does not equate to a mistaken belief concerning the entity with whom FEM was contracting.

[emphasis in original omitted]

13.76 In this case, it had not been contended (not even in the court below) that Axis ought to be denied separate legal personality (owing, say, to it being a "sham" or mere alter ego of Lee, so as to justify piercing of the corporate veil).¹²⁴ Accordingly, the "mistake" before the court was merely a mistake as to the ownership and control of Axis (as a distinct legal entity) with whom FEM was contracting, and *not* a mistake as to the identity of the counterparty with whom FEM was contracting. As the Appellate Division made clear, a mistake as to the former would *not* amount to a mistake as to identity.

IV. Unilateral mistake as to terms at common law

13.77 The Appellate Division's decision in *Axis Megalink* also dealt with some other matters. By way of alternative, the contract in the Engagement Letter between FEM and Axis was also held below to be void for *unilateral* mistake as to terms, the relevant term being that Axis

124 As to which, see Chee Ho Tham, "Piercing the Corporate Veil: Searching for Appropriate Choice of Law Rules" [2007] LMCLQ 22.

was *not* beneficially owned by Lee.¹²⁵ However, this was also reversed by the Appellate Division:¹²⁶

79 The difficulty with this point is that the Letter of Engagement did not contain any term concerning Axis's independence nor did FEM mistakenly believe that there was such a term. Even if Axis had warranted that it was independent, and FEM mistakenly believed it was so when it was not, this would not mean the contract was void for mistake. It would only mean that Axis was in breach of a term of the contract. A mistake concerning the fundamental terms of a contract is not a mistake concerning whether such a term has been or will be complied with, but rather a mistake about whether there is such a term or what that term's scope and effect are. The distinction between a mistake that motivates a party to enter into a contract and a mistake as to a term of that contract is critical. The principle is that 'if one party has made a mistake about a *fact* on which he bases his decision to enter into the contract, but that fact does not form a term of the contract itself, then, even if the other party knows that the first is mistaken as to this fact, the contract will be binding' (see *Statoil ASA v Louis Dreyfus Energy Services LP* [2008] EWHC 2257 (Comm) at [88]; see also *Quoine v B2C2* at [88]). [emphasis in original omitted; emphasis added in italics]

13.78 There being no mistake as to the presence/absence of a relevant *term* in the contract, but merely a mistake as to the *fact* of the degree of control which Lee had over Axis, the doctrine of unilateral mistake as to terms at common law was not applicable.

V. Unilateral mistake as to terms in equity

13.79 Counsel for FEM also contended on appeal that the contract set out in the Engagement Letter ought alternatively to be rescinded in *equity* for unilateral mistake as to terms, the relevant term being that Axis was not beneficially owned by Lee and was independent of his influence. However, as the Appellate Division had already pointed out,¹²⁷ there was not a mistake as to terms – merely a mistake as to fact.

13.80 Although the Appellate Division accepted that Singapore law recognises a doctrine of unilateral mistake as to terms in equity, there had still to be a mistake about a *term* of the contract.¹²⁸

[W]e note FEM's alternative argument that the Engagement Letter is voidable in equity due to its unilateral mistake. ... The difference between common law unilateral mistake and equitable unilateral mistake is that the former requires

125 *Axis Megalink Sdn Bhd v Far East Mining Pte Ltd* [2023] SGHC 243 at [111].

126 *Axis Megalink Sdn Bhd v Far East Mining Pte Ltd* [2024] 1 SLR 524 at [78]–[79].

127 See above at para 13.77.

128 *Axis Megalink Sdn Bhd v Far East Mining Pte Ltd* [2024] 1 SLR 524 at [82].

the other party to actually know of the mistake whereas equitable unilateral mistake may be said to be wider, in the sense that the non-mistaken party's constructive knowledge of the mistake might suffice, but subject to there being unconscionable conduct in relation to that mistake (see *Quoine v B2C2* at [80(b)] and *Chwee Kin Keong* at [77]–[78] and [80]). Nevertheless, in either case, the mistake must still relate to a term of the contract (see *Quoine v B2C2* at [82]), not merely a material fact that induced them to enter into it. The independence of Axis's beneficial owner [*sic*] was never a term of the Engagement Letter nor did FEM mistakenly believe there was such a term. Consequently, unilateral mistake in equity does not operate either. [emphasis in original omitted]

VI. Fraudulent misrepresentation at common law or in equity

13.81 Having held that the contract set out in the Engagement Letter was not void for reasons of mistake over Lee's control over Axis, the question arose as to whether the contract might nevertheless be rescinded at common law, or in equity, for fraudulent misrepresentation by reason of Lee's, or Axis's silence on the matter of Lee's shareholding. Though this had not been argued below, the Appellate Division allowed it to be raised before it on grounds that this would not unduly prejudice FEM.¹²⁹ However, it held that rescission at common law *or* in equity would be barred in any event, even if fraudulent misrepresentation by reason of silence were to be established.

13.82 The Appellate Division accepted that a contract induced by fraudulent misrepresentation could be rescinded at common law *or* in equity. But it pointed out some differences between them:¹³⁰

118 As has been noted, it is a condition for the granting of the remedy of rescission that the contracting parties must place each other back in their pre-contracting positions. A party cannot seek to rescind a contract [at common law] without returning (or accounting for) whatever benefits were received by them (see *Salt v Stratstone*^[131] ... at [25]; see also *CDX v CDZ*^[132] ... at [51] and [55]).

119 Nonetheless, rescission in equity may be granted so long as there will be substantial *restitutio in integrum* so as to achieve practical justice between the contracting parties (see *Liberty Sky*^[133] at [30]).

13.83 The Appellant Division accepted that the services which were to be provided by Axis under the Engagement Letter had already been

129 *Axis Megalink Sdn Bhd v Far East Mining Pte Ltd* [2024] 1 SLR 524 at [105]–[116].

130 *Axis Megalink Sdn Bhd v Far East Mining Pte Ltd* [2024] 1 SLR 524 at [118]–[119].

131 *Salt v Stratstone Specialist Ltd* [2015] EWCA Civ 745.

132 *CDX v CDZ* [2021] 5 SLR 405.

133 *Liberty Sky Investments Ltd v Aesthetic Medical Partners Pte Ltd* [2020] 1 SLR 606.

provided by it.¹³⁴ Consequently, even if there had been an actionable fraudulent misrepresentation, *restitutio in integrum* in the strict sense could not be attained since services, once rendered, cannot be “returned” to the provider.¹³⁵ Accordingly, it was not open to FEM to rescind the contract at common law. But what of *equitable* rescission?

13.84 As mentioned above,¹³⁶ there is a concurrent jurisdiction in equity in connection with contracts which have been induced by duress. And English law accepts that the same is true of contracts induced by fraud (of which fraudulent misrepresentation is but a type).

13.85 The English position is set out in *Halsbury’s Laws of England* as follows:¹³⁷

A court of equity has jurisdiction to relieve against every species of fraud, including fraud in regard to wills. The jurisdiction in equity [of the Court of Chancery] was [, prior to the administrative fusion in 1875 effected by the Supreme Court of Judicature Act 1873] concurrent with the common law jurisdiction [of the common law courts such as the court of King’s Bench, the court of Exchequer, or the court of Common Pleas]. [references omitted]

And, as Viscount Haldane LC explained in *Nocton v Lord Ashburton*:¹³⁸ “[I]t is known that in cases of actual fraud the Courts of Chancery and of Common Law exercised a concurrent jurisdiction from the earliest times.”

13.86 The Singapore position appears to be the same, and the Appellate Division in *Axis Megalink* may now be cited as authority for the point. However, as will be explained below, the Appellate Division in *Axis Megalink* may have introduced a hitherto unnoticed constraint by taking the overlapping jurisdictions in equity and at law in instances of fraudulent misrepresentation to operate by way of *alternative*, such that equitable rescission is no longer available once common law damages are awarded in respect of losses caused by that fraudulent misrepresentation.

134 The court below had held that no such services had been provided: *Axis Megalink Sdn Bhd v Far East Mining Pte Ltd* [2023] SGHC 243 at [115]–[119]. This was reversed by the Appellate Division: *Axis Megalink Sdn Bhd v Far East Mining Pte Ltd* [2024] 1 SLR 524 at [85]–[98].

135 *Axis Megalink Sdn Bhd v Far East Mining Pte Ltd* [2024] 1 SLR 524 at [121]–[124].

136 See para 13.73 above.

137 *Halsbury’s Laws of England* vol 47 (LexisNexis, 5th Ed, 2021) in “Equitable Jurisdiction” at para 12.

138 [1914] AC 932 at 951–952.

13.87 Having concluded that common law rescission for fraudulent misrepresentation was not available, the Appellate Division also concluded that rescission in equity was not available – not because practical *restitutio in integrum* was unattainable, nor because any of the other bars to rescission¹³⁹ had arisen, but because common law damages in respect of the fraudulent misrepresentation had been sought and awarded in the court below:¹⁴⁰

120 Counsel for FEM before us contended for equitable rescission as an alternative to legal rescission. This contention did not fit with the successful claim made below for damages for losses flowing from the misrepresentation in the amount of S\$10,210 (see Judgment^[141] ... at [131]). *As we pointed out to FEM during oral submissions before us, equitable rescission cannot be ordered together with the common law remedy of damages.* Damages may only accompany or substitute for common law rescission, which requires precise and complete reversal of the benefits exchanged under a rescinded contract (see *CDX v CDZ*^[142] at [54]). [emphasis added]

13.88 As justification for the proposition that *equitable* rescission was barred, the Appellate Division asserted that this was because “damages may only accompany or substitute for *common law* rescission” [emphasis added]. However, this is only accurate in so far as one is speaking of how the court, when acting within its common law jurisdiction, may only award common law remedies. How a proposition as to the constraints of a court acting within its common law jurisdiction affects the court when acting within *another* of its jurisdictions (*ie*, its equitable jurisdiction), is not obvious.

13.89 In connection with the possibility of a claimant seeking to access the common law *and* equitable jurisdictions of the General Division of the High Court in a single proceeding, s 3(h) of the Civil Law Act 1909¹⁴³ provides as follows:

3. In every civil cause or matter commenced in the court,^[144] law and equity shall be administered by the court in its original jurisdiction and by the Appellate Division of the High Court or the Court of Appeal according to the rules following:

...

139 Namely, affirmation by the representee, laches, or where third-party interests had intervened.

140 *Axis Megalink Sdn Bhd v Far East Mining Pte Ltd* [2024] 1 SLR 524 at [120].

141 *Axis Megalink Sdn Bhd v Far East Mining Pte Ltd* [2023] SGHC 243.

142 *CDX v CDZ* [2021] 5 SLR 405.

143 2020 Rev Ed.

144 For the purposes of the Civil Law Act 1909, unless the context demands otherwise, “court” means the General Division of the High Court: see s 2 of the Civil Law Act 1909 (2020 Rev Ed).

(h) the court in the exercise of its original jurisdiction and the Appellate Division of the High Court or the Court of Appeal, in every cause or matter pending before it, shall grant, either absolutely or on such reasonable terms and conditions as to it seems just, all such remedies whatsoever as any of the parties thereto appear to be entitled to, in respect of any and every legal or equitable claim properly brought forward by them respectively in such cause or matter; so that, as far as possible, all matters so in controversy between the said parties respectively may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided.

13.90 If facts which entitle a claimant to make claims at law and in equity are established, s 3(h) empowers the courts mentioned therein to grant “all such remedies whatsoever as any of the parties thereto appear to be entitled to, *in respect of any and every legal or equitable claim properly brought forward by them ... so that ... all matters so in controversy between the said parties respectively may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided*” [emphasis added]. Nothing is mentioned as to how, if relief were granted within one jurisdiction, no other relief might be granted in respect of the other.

13.91 In this, Singapore law tracks English law, as s 3(h) of the Civil Law Act 1909¹⁴⁵ reproduces and is *in pari materia* with s 24(8) of the UK Supreme Court of Judicature Act 1873.¹⁴⁶ Section 24(8) was one of a number of provisions which effected the administrative fusion of the courts of common law and the Court of Chancery in England and Wales with effect from 1875.

13.92 Unsurprisingly, given s 24(8), English case law has not found much difficulty with the proposition that, where the facts of a case establish that a contract had been induced by misrepresentation, and where that misrepresentation was fraudulent, it is entirely possible for the representee to seek equitable relief in the form of an order of rescission (in light of the misrepresentation) together with an order for common law damages to compensate the representee for losses caused by the representor’s deceit in making the misrepresentation fraudulently, such that where the latter is time-barred by reason of statutes of limitation, that statutory limitation period will be applied by analogy to bar the equitable relief, also.¹⁴⁷

145 2020 Rev Ed.

146 c 66 (UK).

147 See *Molloy v Mutual Reserve Life Insurance Co* (1906) 94 LT 756 as explained in *Revenue and Customs Commissioners v IGE USA Investments Ltd* [2021] Ch 423; (cont’d on the next page)

13.93 Local authority pre-dating the Appellate Division's account of the law in *Axis Megalink* seems to accept that there is nothing to preclude a court from granting equitable *and* common law relief in connection with a case of fraudulent misrepresentation. For example, in *Liberty Sky Investments Ltd v Goh Seng Heng*,¹⁴⁸ equitable rescission and common law damages for fraudulent misrepresentation were both sought, although the General Division ultimately declined to order rescission in equity because the party seeking rescission failed to prove that it was possible to effect substantial *restitutio in integrum*.¹⁴⁹ Indeed, as will be explained below,¹⁵⁰ the decision of the General Division in *CDX v CDZ*¹⁵¹ (“CDX”) arguably adopts a similar position as to the possibility that equitable rescission and common law damages might potentially be granted in the same proceeding.

13.94 Although the Appellate Division referred to [54] of Vinodh Coomaraswamy J's judgment in *CDX*, [54] merely supports the Appellate Division's observation that precise and complete reversal of benefits received under a contract rescinded at common law for fraudulent misrepresentation is required. There is nothing within it which suggests that *equitable* rescission for misrepresentation, and the seeking (and award) of damages at common law for fraud giving rise to the tort of deceit might not both be concurrently granted by the High Court.

13.95 Indeed, parts of Coomaraswamy J's judgment in *CDX* directly contradict the proposition which the Appellate Division made in [120] of *Axis Megalink*. After pointing out how an order for equitable rescission for fraudulent misrepresentation might still be sought so long as “substantial *restitutio in integrum* [be effected such that] ‘practical justice’ can be done in restoring the misrepresentee and misrepresenter to their pre-contractual positions”,¹⁵² and that equitable rescission may be supplemented by other equitable remedies such as the taking of an

[2021] EWCA Civ 534 on the application of the Limitation Act 1980 (c 58) (UK) to bar the availability of equitable relief in the form of an equitable order of rescission by analogy. The analogy presupposes that, but-for the time bar, *both* the common law action in damages and the equitable relief would be available: if English law had taken the position that the two jurisdictions might only be accessed in the alternative and were mutually inconsistent, extension of the limitation period at law by analogy would not be possible.

148 [2020] 3 SLR 335.

149 *Liberty Sky Investments Ltd v Goh Seng Heng* [2020] 3 SLR 335 at [98]–[104].

150 See para 13.95 *ff* below.

151 [2021] 5 SLR 405.

152 *CDX v CDZ* [2021] 5 SLR 405 at [55].

account, or the grant of an equitable indemnity,¹⁵³ Coomaraswamy J observed:¹⁵⁴

57 Equity cannot, however, accompany rescission with an award of ‘damages’ *stricto sensu*. Damages are solely a common law remedy. Equity cannot award damages save where expressly permitted by statute. ... There is no general statutory power which permits equity to award damages in addition to or in lieu of equitable rescission and, in particular, for fraudulent misrepresentation. The pecuniary compensation which equity awards is not ‘damages’ but ‘equitable compensation.’ And even then, equity awards equitable compensation only for an equitable wrong such as a breach of fiduciary duty. Inducing a misrepresentee to enter into a contract may yield the remedy of rescission in equity but is not an equitable wrong.

58 This historical anomaly creates no remedial gap, only a terminological gap. Our courts administer both law and equity concurrently and can therefore award every type of relief for misrepresentation, whether at common law or in equity, in every civil cause or matter (see s 3(h) of the Civil Law Act (Cap 43, 1999 Rev Ed)). *So it is indeed now possible for a misrepresentee to seek rescission and damages from the same court and in the same action. But it remains the case that equitable rescission and common law damages are two remedies which come from two different historical sources. The court invokes two separate jurisdictions to grant the two remedies and any associated remedies. To put it another way, equitable rescission can be accompanied only by other equitable relief. Common law rescission can be accompanied only by other common law relief. It is therefore only in a claim in fraudulent misrepresentation that a prayer which seeks both rescission and ‘damages’ can seek them cumulatively. That is because only the common law can grant rescission in addition to ‘damages’ stricto sensu and because it is only for fraudulent misrepresentation that common law rescission is available.* In all other cases, a prayer which seeks both rescission and “damages” must necessarily be seeking them as mutually exclusive alternatives.

[emphasis added in italics and bold italics]

13.96 At [57], Coomaraswamy J explained that a court acting within its equitable jurisdiction may not award common law damages *within* that jurisdiction. Thus, where a fraudulent misrepresentation had been committed, although the misrepresentee might have committed the common law tort of deceit, absent any corresponding equitable wrong as to which equitable compensation might be awarded, the only monetary order which might be made would be in the court’s common law jurisdiction to order damages to compensate the representee for losses arising from the representor’s deceit.

153 *CDX v CDZ* [2021] 5 SLR 405 at [56].

154 *CDX v CDZ* [2021] 5 SLR 405 at [57]–[58].

13.97 Turning to [58] of the learned judge's grounds of decision, Coomaraswamy J explained (in the sentences highlighted above at para 13.95 in italics) that the import of s 3(h) of the Civil Law Act¹⁵⁵ was that, where a contract had been induced by fraudulent misrepresentation, it was possible for a claimant to:

... seek rescission [in equity] *and* [common law] damages from the same court. But it remains the case that equitable rescission and common law damages are two remedies which come from two different historical sources. *The court invokes two separate jurisdictions to grant the two remedies* and any associated remedies. [emphasis added]

This is why the learned judge observed at the first sentence of [58] that there was not any remedial gap as a matter of Singapore law, merely a terminological one.

13.98 Admittedly, the rest of [58] seems to contradict what had previously been set out by the learned judge. Looking at the sentence therein (and which has been reproduced above and highlighted in bold italics at para 13.95), this could be taken to suggest that it is *not* permissible for a claimant to seek equitable relief by way of an order of rescission in a case of fraudulent misrepresentation *and* to seek common law damages for losses arising from such deceit and fraud in the same proceeding. But, with respect, no reasoned basis for such a reversal from the first half of [58] is provided.

13.99 Taken literally, the self-evident contradictions set out in the latter part of Coomaraswamy J's proposition in [58] highlighted in bold italics in the above extract would dissolve the learned judge's careful reasoning into incoherence. It is therefore respectfully suggested that these words should not be taken at face value. One tentative alternative reading might be that these were statements that, when considering the different types of misrepresentation (eg, fraudulent, negligent, and innocent misrepresentations), *only* fraudulent misrepresentations will attract common law rescission.

13.100 As to the initial part of the sentence which has been highlighted in bold italics, that "only the common law can grant rescission in addition to 'damages' *stricto sensu*", a court acting within its common law jurisdiction does not *grant* rescission if, by that expression, one is referring to the granting of an order of rescission: rescission at common law is by way of election – *ie*, it is a matter of "self-help" – and rescission at common law does *not* depend on the making of an order of rescission.

155 Cap 43, 1999 Rev Ed; which is identical to s 3(h) of the Civil Law Act 1909 (2020 Rev Ed), reproduced at para 13.89 above.

13.101 If so, Coomaraswamy J must have been referring to how a court at common law could well be called on to rule on and confirm that the representee did have the power to rescind at common law owing to the representor's fraudulent misrepresentation, *and* had validly exercised that power so as to rescind the contract by election. The court might also make consequential orders. But, when acting within its common law jurisdiction, it would not be *granting* an order of rescission: that only occurs with rescission *in equity*.

13.102 While it would certainly be the case that common law damages (*ie*, “damages’ *stricto sensu*”) might also be ordered by the court if the facts establishing that the representor's misrepresentation had been made fraudulently also made out the elements of the tort of deceit, none of this touches on the proposition as to whether the representee might seek an *equitable* order of rescission within the court's *equitable* jurisdiction, cumulatively and together with an order of *common law damages* to compensate the representee for losses caused by the representor's fraudulent misrepresentation, so far as such fraud amounted to the commission of the tort of deceit, within the court's *common law* jurisdiction, as provided for by s 3(*h*) of the Civil Law Act 1909.¹⁵⁶

13.103 The analysis above suggests that *CDX* is better understood as providing support for the proposition that the General and Appellate Divisions of the High Court, and the Court of Appeal, each have parallel jurisdictions at common law and in equity, and that there is no intrinsic bar to a claimant seeking the grant of common law relief within the relevant court's common law jurisdiction, *as well as* equitable relief with that court's equitable jurisdiction, so long as the facts before the court support common law *and* equitable claims for which those reliefs are to remedy.

13.104 As mentioned above,¹⁵⁷ rescission at common law was denied by the Appellate Division in *Axis Megalink* on grounds that *restitutio in integrum* was not possible as the services under the contract in question had already been provided, and services once rendered cannot be “returned”. However, as to *equitable* rescission, apart from the reason set out in [118], no other bar was mentioned in the Appellate Division's grounds of decision.

156 2020 Rev Ed. Section 3(*h*) of the Civil Law Act 1909 (2020 Rev Ed) applies to the General and Appellate Divisions of the High Court, as well as the Court of Appeal. However, the position set out in the main text above will apply in broadly similar fashion to the District Court since it has, “all the jurisdiction of the General Division of the High Court”: State Courts Act 1970 (2020 Rev Ed) s 19(2), subject to the requirements and qualifications set out in the rest of s 19 being satisfied.

157 At para 13.83 above.

13.105 While the Appellate Division is by no means bound by decisions handed down by the General Division, it is unfortunate that no clear reasons were set out for a seeming departure from the contrary position mandated in s 3(h) of the Civil Law Act 1909.¹⁵⁸ It is to be hoped that if the Appellate Division had recognised a new bar to rescission in equity for fraudulent misrepresentation where common law damages had been sought and awarded, further opportunities for explaining why this is so, notwithstanding s 3(h), will arise in the not-too-distant future.

VII. Deposits, forfeitures and relationship with penalty rule

13.106 In *Li Jialin v Wingcrown Investment Pte Ltd*¹⁵⁹ (“*Li Jialin*”), the appellants-purchasers had initially entered into a sale and purchase agreement with the respondent-property developer for an apartment unit, with the purchase price set at \$1,785,000. The appellants defaulted on their instalment payments after having paid \$1,217,550 to the respondent, leading to the respondent’s termination of this agreement and issuance of a notice purporting to deduct \$379,195.58 from the instalments paid (consisting of \$357,000 representing 20% of the purchase price, and the remainder in interests, taxes and other expenses).

13.107 As the appellants remained interested in purchasing the property, the parties then entered into a second option to purchase, pursuant to which the respondent would issue the appellants a fresh option at the purchase price of \$1,900,000. Parties agreed that the sum of \$357,000 would not be forfeited but credited instead as the option fee payable under the second option to purchase, and the balance of the total sum initially paid (\$838,354.42) credited towards the deposit payable under the second option in the event of its exercise. Upon its exercise, a binding agreement for the sale and purchase of the property would come into being on the terms of sale set out in the second option.

13.108 The “Deposit” under the terms of sale of the second option was expressly defined as the sum of \$1,195,354.42 (the total of \$357,000 and \$838,354.42). In other words, the sums paid under the first option (excluding interests, taxes and other expenses) went to the Deposit under the second option. This Deposit amounted to about 63% of the purchase price of \$1,900,000 under the second option, an amount that indisputably exceeded the usual deposit for a conveyancing transaction.¹⁶⁰

158 2020 Rev Ed.

159 [2024] 2 SLR 372.

160 *Li Jialin v Wingcrown Investment Pte Ltd* [2024] 2 SLR 372 at [6]–[11].

13.109 Moreover, the widely used Law Society of Singapore's Conditions of Sale 2012 were incorporated into the transaction. Importantly, under Condition 15.9(c)(i), if the purchaser failed to comply with the terms of any effective "Notice to Complete", the vendor would be entitled to "forfeit and keep any deposit paid by the Purchaser".

13.110 When the appellants failed to complete despite extensions, the respondent served a Notice to Complete and asserted its entitlement to forfeit the stipulated Deposit in the sum of \$1,195,354.42 (despite the appellants' protestations), eventually reselling the property to another purchaser. Subsequently, in response to a letter of demand issued by the appellants' solicitors for repayment of the entire Deposit sum, the respondent changed its stance and purported to exercise a right to forfeit \$380,000, representing 20% of the purchase price. It also took the position that it was entitled to a further \$326,397.38 as expenses incurred in relation to the abortive attempts to purchase the property. The appellants consequently commenced proceedings seeking declarations that the Deposit of \$1,195,354.42 was not in fact a true deposit and amounted to an unenforceable penalty, and claiming a refund (with interest) of the sums not returned to them.

13.111 In the proceedings below, the judge applied the framework in *Hon Chin Kong v Yip Fook Mun*¹⁶¹ ("*Hon Chin Kong*") to conclude that the "true deposit test" (elaborated below) was applicable only to the *actual* sum forfeited by the respondent (\$380,000) as opposed to the contractually stipulated sum of \$1,195,354.42. The judge took the view that Condition 15.9(c)(i) was worded broadly enough to confer upon the respondent a discretion to forfeit a lesser part of any contractually stipulated deposit. The judge thus found that the sum of \$380,000 was reasonable as an earnest and therefore a true deposit, the forfeiture of which was held not to be subject to the penalty rule.¹⁶²

13.112 On appeal, the Court of Appeal (with Steven Chong JCA delivering the decision) addressed a number of issues, including the following (the first three of which will be the primary focus):¹⁶³

- (a) Did Condition 15.9(c)(i) entitle the respondent to forfeit a reduced sum of the deposit?
- (b) Should the framework established in *Hon Chin Kong* be affirmed with or without revisions?

161 [2018] 3 SLR 534.

162 See discussion in *Li Jialin v Wingcrown Investment Pte Ltd* [2024] 2 SLR 372 at [19]–[22].

163 *Li Jialin v Wingcrown Investment Pte Ltd* [2024] 2 SLR 372 at [33].

(c) If there was no right to forfeit the deposit, was the respondent entitled to set off any claim against that deposit?

(d) In the event that any part of the deposit is ordered to be returned to the appellants, at what rate and from which period should the interest be calculated?

A. *Deposits and penalties*

13.113 In order to unpack these issues, the Court of Appeal traced the historical roots of the law of deposits and penalties in a very clear and insightful discussion.¹⁶⁴ Though the function of the deposit as earnest was distinctively recognised from early on,¹⁶⁵ the language of reasonableness began to be introduced, to the effect that a reasonable deposit would be regarded as a guarantee of performance and not as a penalty.¹⁶⁶ Courts began to merge the terminology used by these doctrines over time such that in *Workers Trust & Merchant Bank Ltd v Dojap Investments Ltd*,¹⁶⁷ (“*Workers Trust*”) Lord Browne-Wilkinson considered the forfeiture of a conventional deposit (10% in the context of a sale of land) an *exception* to the penalty rule then requiring liquidated damages to be a genuine pre-estimate of loss. An unreasonable or excessive deposit (25% in that case), however, would not be earnest but a “penalty intended to act in terrorem”. As summarised by the Court of Appeal in *Li Jialin*:¹⁶⁸

[T]he law of deposits and the law of penalties have very different lineages, the former being a far older feature of Greek and Roman law which was later incorporated into the common law. It was in the common law courts that a requirement of reasonableness was introduced. This was the True Deposit Test, a mechanism to control against an abuse of the deposit. The law of penalties developed separately in the courts of equity and later in the common law. Given their different lineages, the courts have always strived to keep the two areas of law separate and distinct. Ironically, it was this very effort which led to suggestions of a melding of the two areas of law, as the former came to be defined in contradistinction to the latter, and later as an exception to the latter, using the language of *Workers Trust*. We emphasise, however, that while the Privy Council referred to the law of penalties in describing an unreasonable deposit, their Lordships did not purport to apply the classic test in *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79 ... of whether the sum paid was a genuine pre-estimate of loss.

164 *Li Jialin v Wingcrown Investment Pte Ltd* [2024] 2 SLR 372 at [34]–[42].

165 *Howe v Smith* (1884) 27 Ch D 89.

166 *Linggi Plantations Ltd v Jagatheesan* [1972] 1 MLJ 89.

167 [1993] AC 573.

168 *Li Jialin v Wingcrown Investment Pte Ltd* [2024] 2 SLR 372 at [42].

13.114 As a matter of the modern law, the Court of Appeal in *Li Jialin* observed that the function of a deposit as an earnest has continued relevance and utility. It provides practical assurance of the purchaser's performance, demonstrating that a purchaser is serious about the purchase and is a sign of good faith. Having parted with his money upfront, the purchaser is thus likely to have a greater impetus to perform.¹⁶⁹

13.115 Importantly, the Court of Appeal clarified that the penalty rule and its function have no application to the law of deposits.¹⁷⁰ Readers will recall that *Denka Advantech Pte Ltd v Seraya Energy Pte Ltd*¹⁷¹ (“*Denka*”) declined to follow the approach adopted by the UK Supreme Court in *Cavendish Square Holding BV v Makdessi*,¹⁷² (“*Cavendish*”) where the latter had adopted an expanded “legitimate interest” test for liquidated damages, to the effect that such a clause would only be a penalty if it amounted to a secondary obligation that imposed a detriment out of proportion to any legitimate interest of the innocent party (extending beyond compensation for loss). This suggested a “natural alignment between deposits and penalties”,¹⁷³ since a deterrent deposit might be justifiable on some conception of legitimate interest in performance. But the Court of Appeal in *Denka* rejected *Cavendish*'s more nebulous legitimate interest test in favour of the traditional approach to penalties in *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd*¹⁷⁴ that requires liquidated damages to be purely compensatory and a genuine pre-estimate of loss.

13.116 Moreover, as the Court of Appeal in *Li Jialin* highlights, the penalty rule operates in the sphere of secondary obligations to pay liquidated damages upon breach of a primary obligation to perform. Deposits instead operate as primary obligations and their forfeiture is not to substitute for damages, but to preclude any claim for restitution of a sum functioning as earnest. A vendor forfeiting a deposit may still sue separately for damages provided credit is given for any deposit forfeited.¹⁷⁵

13.117 Indeed, the Court of Appeal found pertinent the remarks of Bohkary PJ in the Hong Kong Court of Final Appeal decision of *Polyset Ltd v Pandahat Ltd*,¹⁷⁶ (“*Polyset*”) which consciously avoided the

169 *Li Jialin v Wingcrown Investment Pte Ltd* [2024] 2 SLR 372 at [42]–[46].

170 *Li Jialin v Wingcrown Investment Pte Ltd* [2024] 2 SLR 372 at [43]–[52].

171 [2021] 1 SLR 631.

172 [2016] AC 1172.

173 *Li Jialin v Wingcrown Investment Pte Ltd* [2024] 2 SLR 372 at [47].

174 [1915] AC 79.

175 *Li Jialin v Wingcrown Investment Pte Ltd* [2024] 2 SLR 372 at [49].

176 [2002] HKCFA 15.

terminology of “penalty” and “penal”, when speaking of deposits, in order to avoid confusion with the operation of the penalty rule:¹⁷⁷

This ... analysis avoids the use of the words ‘penalty’ and ‘penal’. It may be just as well to avoid those words ... It is true ... that Lord Browne-Wilkinson said [in Workers Trust] that the provision for the forfeiture of the deposit of 25 per cent was a ‘plain penalty’. But why? His Lordship did not say that the forfeiture clause was a plain penalty because the 25 per cent deposit was not a genuine or reasonable pre-estimate of loss. As we have seen, his Lordship said that the forfeiture clause was a plain penalty because the 25 per cent deposit was not a ‘true deposit by way of earnest’. [emphasis added]

13.118 In effect, deposits serve a different function from liquidated damages. As a *sui generis* tool with an earnest function, there is “little reason in principle or pragmatism for the law of deposits to be subsumed within the law of penalties”¹⁷⁸

B. Discretionary forfeiture

13.119 Turning to the Law Society of Singapore’s Conditions of Sale 2012, the Court of Appeal held that Condition 15.9(c)(i) was *not* a discretionary forfeiture clause.¹⁷⁹ The wording of the condition referring to the right to “forfeit and keep any deposit paid by the Purchaser” was, as a matter of plain reading, quite different from the notion that the Vendor may forfeit “any *part* of the amount paid as a deposit” [emphasis in original].

13.120 Importantly, a discretionary forfeiture clause would not serve the earnest function of a deposit, or any other recognised purpose. The consequences of non-performance should be clear to a buyer at the point of contract. The chances of performance by the buyer would not be improved by the lack of knowledge as to whether the deposit may be lost in part or in full. As the Court of Appeal stressed, the “only conceivable benefit of a discretionary forfeiture clause would be the fact that it allows an unscrupulous vendor a chance at retrospectively saving what would otherwise be an unreasonable deposit”¹⁸⁰

13.121 The Court of Appeal added the important caveat that the respondent was not precluded as a matter of goodwill from forfeiting a lesser sum of a (reasonable) deposit. This presupposed, however, that

177 *Polyset Ltd v Pandahat Ltd* [2002] HKCFA 15 at [18], cited in *Li Jialin v Wingcrown Investment Pte Ltd* [2024] 2 SLR 372 at [50].

178 *Li Jialin v Wingcrown Investment Pte Ltd* [2024] 2 SLR 372 at [52].

179 *Li Jialin v Wingcrown Investment Pte Ltd* [2024] 2 SLR 372 at [54]–[61].

180 *Li Jialin v Wingcrown Investment Pte Ltd* [2024] 2 SLR 372 at [58].

it was entitled as a matter of right to forfeit the entire deposit sum: “What the respondent could not do was to forfeit a lesser sum in order to *retrospectively justify the deposit as reasonable*.” [emphasis in original].¹⁸¹

13.122 Consequently, there was no discretion to forfeit conferred by Condition 15.9(c)(i), and the reasonableness of the deposit had to be determined at the time of contracting, rather than at the time the respondent purported to exercise any discretionary right of forfeiture.

C. *The revised framework for assessing deposits*

13.123 As the Court of Appeal noted, the previous framework for assessing deposits was set out by Ramesh J in *Hon Chin Kong*, which laid out the following steps:¹⁸²

- (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 ... and may be express or inferred ... The character of the payment depends on the parties’ intentions, to be ascertained by construing their agreement ... 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 ... 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 ... 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’. 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’ ... If the deposit is higher than customary, it is up to the vendor to show “special circumstances” to justify the amount ... 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

181 *Li Jialin v Wingcrown Investment Pte Ltd* [2024] 2 SLR 372 at [60].

182 See *Hon Chin Kong v Yip Fook Mun* [2018] 3 SLR 534 at [143], cited in *Li Jialin v Wingcrown Investment Pte Ltd* [2024] 2 SLR 372 at [64].

or conventional deposit may be discerned, the approach set out in *Polysat* 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. ...

(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.*

[emphasis added]

13.124 While the Court of Appeal agreed with most of the steps in Ramesh J's clear exposition, it provided further clarification on the last-mentioned [143(f)] of Ramesh J's summary.¹⁸³ Firstly, it took the position (differing from Ramesh J) that express and implied forfeiture clauses should be given the same treatment in being subject to the test of reasonableness. Secondly, in so far as [143(f)] had linked the law of deposits with the penalty rule, the Court of Appeal held that a cumulative test of reasonableness and the penalty rule was artificial and unnecessary.

13.125 If the intention of the deposit was not compensatory in the first place, but as an earnest (whether reasonable or unreasonable), there is no further need to subject a deposit to an additional test of being a genuine pre-estimate of loss. The latter is relevant only if the sum stipulated was intended in the first instance to compensate for loss:¹⁸⁴

To put it another way, because a deposit is not meant to be compensatory, an application of the penalty rule to an unreasonable deposit would take one no further than an application of the rule to a reasonable deposit. In either case, the court would be forced into a search for a function of compensation which did not otherwise exist.

183 *Li Jialin v Wingcrown Investment Pte Ltd* [2024] 2 SLR 372 at [65]–[72].

184 *Li Jialin v Wingcrown Investment Pte Ltd* [2024] 2 SLR 372 at [71].

13.126 The Court of Appeal therefore set out a revised framework with an explanatory preamble and simplified three-step test:¹⁸⁵

Preamble

1 The penalty rule operates in the sphere of secondary obligations, and in particular, the obligation on the part of the defendant to pay damages to the claimant (*Denka* ... at [92]). It is focused on *compensation*, which constitutes the broad policy underlying the award of contractual remedies (*Denka* at [93]). Thus, where an agreed remedies clause (most commonly, a liquidated damages clause) purports to operate as a substitute for the court's determination of the appropriate extent of compensation, such a clause is subject to judicial scrutiny (*Denka* at [93]). Consistent with the underlying rationale of compensation, the question asked is whether such a clause is a genuine pre-estimate of loss. If it is not, then it is not truly compensatory and is unenforceable as a penalty.

2 Deposits, however, are not intended to be compensatory. As the court in *Hon Chin Kong* observed, a deposit serves an important signalling function. It shows the vendor that the purchaser is serious about the purchase and will not leave him high and dry. It is a sign of good faith and sieves out frivolous or fickle purchasers. At the same time, it motivates the purchaser to follow through with the contract (*Hon Chin Kong* at [124]). This motivation is inherent in the key feature of a deposit – that the vendor may forfeit it if the purchaser does not perform. In this light, it is clear that the policy considerations of compensation do not apply to deposits. Deposits do not operate in the sphere of secondary obligations and are not intended to be a substitute for damages. They are *sui generis* and operate outside the scope of the penalty rule.

3 This does not mean that parties are free to agree to excessive and extravagant deposits. The law places a limit on this freedom with the principle that the deposit must be reasonable as an earnest. Where a deposit is not reasonable as an earnest, the right to forfeiture is unenforceable, regardless of whether it is express or implied. It is not open to the court to recharacterise the right of forfeiture into a right to liquidated damages which remains enforceable subject to the penalty rule – to do so would be to impute an element of compensation which did not otherwise exist. As Prof Yeo [the independent counsel appointed in *Li Jialin*] has put it, if a deposit is not compensatory when reasonable, it is also not compensatory when unreasonable. The purchaser may therefore seek a recovery of the sum paid under the general law.

Revised framework

Thus, where the claimant sues for the return of a sum alleged to be a deposit, the proper framework to apply is as follows:

- (a) First, the court determines whether there is a contractual right to forfeit the sum alleged to be a deposit upon the payer's breach. This will involve consideration of the parties' intentions and the terms of the contract, and may be *express or implied*. Where there is an express forfeiture clause to this effect, this will be sufficiently

185 *Li Jialin v Wingcrown Investment Pte Ltd* [2024] 2 SLR 372 at [73].

clear. Where there is no such clause, the right of forfeiture may nonetheless be implied from the use of words such as 'deposit'. A reference to a sum described as a deposit being compensatory as liquidated damages could displace the inference that it is intended to be a deposit which is forfeitable upon breach. If there is no contractual right to forfeit, then there is no need to make any further inquiry as to the reasonableness of the sum. Its recoverability will be determined under the general law notwithstanding the payer's breach.

(b) Second, where there is a contractual right to forfeit, the court determines whether the sum is a true deposit. The test is whether the sum is reasonable as an earnest. The sum will be reasonable if it is customary or conventional. If it is higher than customary, it may nevertheless be reasonable if the vendor can show special circumstances to justify the deposit.

(c) Third, if the sum is reasonable as an earnest, it is a true deposit and can be forfeited. However, if the sum is not reasonable as an earnest, it is not a true deposit and cannot be forfeited. The right to forfeit, whether *express or implied*, is thus unenforceable and the claimant's right to recovery of the deposit will be left to be decided under the general law.

[emphasis in original]

D. Conclusion on reasonableness of deposit and alternative bases for withholding part of sums paid

13.127 Applying the revised framework to the facts, the Court of Appeal concluded that the Deposit of \$1,195,354.42, amounting to 63% of the purchase price under the second option, was not reasonable as an earnest. It was not a true deposit and could not be forfeited.¹⁸⁶

13.128 Moreover, the respondent could not justify partial forfeiture through the invocation of the equitable doctrine of relief against forfeiture.¹⁸⁷ The Court of Appeal noted that it was unclear if the jurisdiction to grant relief against forfeiture existed in the context of deposits, citing in passing the recent decision of *TG Master Pte Ltd v Tung Kee Development (Singapore) Pte Ltd*¹⁸⁸ ("TG Master") by the Appellate Division. Moreover, even if it existed, equitable relief would not have been available. Such relief was paradigmatically granted against the exercise of a valid and enforceable legal right by a right-holder, in favour of a party against whom the right was to be exercised, in so far as

186 *Li Jialin v Wingcrown Investment Pte Ltd* [2024] 2 SLR 372 at [74]–[75].

187 *Li Jialin v Wingcrown Investment Pte Ltd* [2024] 2 SLR 372 at [76]–[79].

188 [2024] 1 SLR 690 at [102].

the right-holder should not be permitted to exercise it unconscionably.¹⁸⁹ In the present case, it was not for the respondent to ask the court to grant relief to permit a partial exercise of an unenforceable right of forfeiture. Such relief could only be contemplated were the appellants to seek relief against forfeiture of the deposit at the instance of the respondent.

13.129 Finally, the Court of Appeal determined that while the respondent had no basis for forfeiting the Deposit of \$1,195,354.42, it was entitled to retain the option fee of \$357,000 as consideration for the grant of the second option and holding the property off the market for the option period. Under general law, the appellants would have a claim in unjust enrichment on the ground of failure of basis for other sums withheld apart from the option fee earned by the respondent. Having withheld and retained \$380,000 (20% of the purchase price) by the time of the appeal, the respondent was ordered to refund the balance sum of \$23,000 to the appellants.

E. Observations on decision in *Li Jialin v Wingcrown Investment Pte Ltd*

13.130 The Court of Appeal's decision in *Li Jialin*¹⁹⁰ is most welcome in its clarification of the law on deposits and penalties, as well as its practical application of the revised legal framework to reach a fair and equitable outcome on the facts of the case. A few observations are perhaps warranted.

(1) Function of deposit

13.131 Firstly, the decision re-affirms the critical “signalling” function of a deposit, a ubiquitous device in commercial as well as consumer transactions. There is no great conceptual difficulty in permitting parties to agree upon a deposit as a signal of genuine interest and good faith from the purchaser, and concomitantly, an assurance to the vendor of ability and motivation to follow through with the transaction.

(2) Penalties and forfeitures

13.132 Secondly, the perspicacious discussion on penalties and forfeitures is welcomed, as well as the admonition by the Court of Appeal that these two streams of jurisprudence should be kept separate under its revised framework. It might, nonetheless, be useful to see why

189 *Pacific Rim Investments Pte Ltd v Lam Seng Tiong* [1995] 2 SLR(R) 643 at [60].

190 *Li Jialin v Wingcrown Investment Pte Ltd* [2024] 2 SLR 372.

the UK Supreme Court in *Cavendish Square Holding BV v Makdessi*¹⁹¹ (“*Cavendish*”) contemplated merging these. For example, Lord Hodge in his concurring judgment in *Cavendish* had commented on *Polyset Ltd v Pandahat Ltd*¹⁹² (“*Polyset*”) as follows:¹⁹³

236 ... Because Bokhary PJ and Ribeiro PJ considered that the test of ‘genuine pre-estimate of loss’ applied in the rule against penalties when considering whether a sum was liquidated damages, they did not view the ‘reasonable as earnest money’ test as part of the law of penalties. But if, as I think correct, the true test for penalties is wider than the ‘genuine pre-estimate of loss’ test ... the Hong Kong court’s conclusions were wholly consistent with Lord Browne-Wilkinson’s approach in the *Workers Trust* case [1993] AC 573.

...

246 [T]he overriding test of exorbitance fits the wider range of circumstances in which the rule against penalties has been applied, including enhanced interest charges (the *Lordsvale Finance* case [1996] QB 752), the agreement to pay an employee sums in excess of common law damages (the *Murray* case [2005] IRLR 946), and deposits: the *Workers Trust & Merchant Bank Ltd* case [1993] AC 573. Lord Robertson’s focus in the *Clydebank Engineering* case [1905] AC 6, 20, on the innocent party’s interest in the due performance of the principal obligation and his posing of the question – ‘had the respondents no interest to protect by that clause, or was that interest palpably incommensurate with the sums agreed on?’ – provide the framework for the application of the exorbitance test to those wider circumstances.

13.133 The authors believe that the difference between these approaches boils down to what academics have called the question of “lumping and splitting”,¹⁹⁴ or the balance between finding general unifying principles and sufficiently fine-grained or contextualised concepts, categories, and taxonomies.

13.134 Essentially, Lord Hodge in *Cavendish* takes the view that “legitimate interests” presents a workable “umbrella” concept for unifying certain areas of law. A legitimate interest is one that merits protection under contract law; any attempt to stipulate a right of recovery beyond this (whether one is speaking of damages or forfeitures of sums prepaid) is for that reason excessive, exorbitant, unnecessary, and (possibly) punitive. Yet while the notion of “legitimate interests” appears as something of a common thread, the authors agree it appears too general and abstract to police the specific functions served by deposits

191 [2016] AC 1172.

192 [2002] HKCFA 15.

193 *Cavendish Square Holding BV v Makdessi* [2016] AC 1172 at [236] and [246].

194 See, eg, Robert Stevens, *The Laws of Restitution* (Oxford University Press, 2023) at p 417.

(as earnest) and liquidated damages (as genuine pre-estimate of loss). Moreover, it threatens to confuse lawyers and courts by suggesting that the *same* test, or a *cumulative* test, is applicable. Analytically, there are thus good reasons for the Court of Appeal in *Li Jialin* to advise different tests for these two doctrinal areas. Whatever the normative standard used – “reasonableness”, “legitimacy”, “enforceability”, and so on – it must be applied with reference to the specific function of deposits and liquidated damages, as the case may be.

(3) *Discretionary forfeiture*

13.135 Thirdly, by denying discretionary forfeiture, the Court of Appeal achieved a fair and just result, preventing the respondent from opportunistically acting.¹⁹⁵ If it were otherwise, a vendor could impose on a purchaser the obligation to place a very large deposit (in proportion to the contract price) in the knowledge of its likely unenforceability, and hope thereafter to unilaterally forfeit as much of this as is legally permitted at the time of exercise of such a discretion. Alternatively, even if the vendor were not so “unscrupulous” in premeditating such an outcome, it could have (without much thought or negotiation) imposed this large deposit amount beyond any interest in assurance of performance, and then sought to avail itself of a second bite of the cherry by adjusting the actual amount forfeited, in order to retrospectively justify its action. Such conduct was rightly proscribed by the Court of Appeal.

13.136 In light of the above, one further clarification that might be worth making is whether discretionary forfeiture can ever be a matter of contractual agreement, or whether it is simply and straightforwardly prohibited on grounds of public policy. In *Li Jialin*, the Court of Appeal read Condition 15.9(c)(i) not as a discretionary forfeiture clause since it referred to the amount paid as the deposit and not “any part” of that amount. Moreover, the respondent had exercised this discretion only five years after terminating the sale and agreement and in response to the appellants’ threat of legal action, which could not be what the parties had intended.¹⁹⁶

13.137 If, however, parties were to have drafted a clause (in a hypothetical setting) that did allow the vendor express discretion to forfeit the whole or any lesser part of the deposit amount, how would a court adjudicate such a clause? This would then be transparently a question of policy

195 On opportunism, see Tan Zhong Xing, “Equity and Opportunism in the Law of Contract: A Case Study in Fusion by Diffusion” (2018) 30 SAclJ 305.

196 *Li Jialin v Wingcrown Investment Pte Ltd* [2024] 2 SLR 372 at [59].

rather than contractual construction. Given the Court of Appeal's robust stance on such clauses as a matter of public policy, and their differences from other forms of discretionary clauses in contracts,¹⁹⁷ one reading of *Li Jialin* would be that such clauses will simply have to be invalidated. The entire deposit sum must thus always pass the test of a true deposit under the revised framework in *Li Jialin*. It is only then that a vendor can forfeit a lesser amount as a matter of goodwill. A vendor can never – notwithstanding express drafting – have the benefit of a unilateral right to forfeit a smaller sum post-formation and require the question of reasonableness to be adjudicated at that juncture.

(4) *Correct characterisation, option fees and alternative bases of withholding*

13.138 In *Li Jialin*, while the Court of Appeal disallowed partial forfeiture by the respondent of the sum of \$380,000, it held that the respondent was indeed entitled to the option fee of \$357,000 as consideration for the grant of the second option to the appellants.

13.139 Interestingly, in the above-mentioned decision of *TG Master*,¹⁹⁸ the Appellate Division also faced an issue of characterisation in considering eight options to purchase properties at Miltonia Close that were eventually not exercised by the prospective buyers. While this judgment is fact-intensive, the issue for present purposes concerns certain “Further Sums” that were required to be paid before each option could be exercised, failing which the option would lapse.¹⁹⁹

13.140 For each property, there was a designated “Option Fee” of \$59,375 and “Further Sum” of \$500,000, which could not be divorced from each option. The Further Sum was contractually described as the balance of 20% the sale price of each property. The Appellate Division found that the Option Fee and Further Sum were both parts of a larger “true option fee” of \$559,375 per property.²⁰⁰

13.141 The upshot of this characterisation was that the *Hon Chin Kong* framework was not applicable to the Further Sums, since it applied to deposits and part payments, and *not* to a true option fee. The option fee was paid in consideration of an exclusive right to purchase the property.

197 See, eg, Ong Ken Wei, “The Limits to Contractual Discretion” (2021) 33 SAcLJ 919.

198 *TG Master Pte Ltd v Tung Kee Development (Singapore) Pte Ltd* [2024] 1 SLR 690.

199 *TG Master Pte Ltd v Tung Kee Development (Singapore) Pte Ltd* [2024] 1 SLR 690 at [66]–[101].

200 *TG Master Pte Ltd v Tung Kee Development (Singapore) Pte Ltd* [2024] 1 SLR 690 at [74].

It did not secure and was not paid pursuant to any obligation to complete a purchase. As the Appellate Division explained:²⁰¹

The *Hon Chin Kong* framework applied only to a sum that could properly be classified as a *deposit* or as a *part payment* towards the acquisition of the subject matter of a *sale*. The binary characterisation of a sum as being *either* a true deposit *or* a part payment presupposed an obligation to complete a *purchase*. A deposit secures the obligation to complete the purchase, and a payment is partial because it is made towards the whole purchase price. The *Hon Chin Kong* framework therefore did not apply to a sum that was *neither* a deposit *nor* a part payment, such as where the payment constituted a *full* payment made in consideration of the transaction. This must be so *a fortiori* where the sum was paid for an entirely distinct contractual objective from completing a purchase and where there was no obligation to complete any purchase at all, as such payments cannot meaningfully be described as either a deposit or a part payment *towards a purchase*. [emphasis in original]

13.142 In effect, since the seller had granted to prospective buyers the right to exercise the options, it had earned the true option fee and there was no basis for recovery of the Further Sums.

13.143 The conceptual and practical import of *TG Master* and *Li Jialin* is that option fees are typically a creature of freedom of contract. They constitute the price for keeping the property off the market and allowing the prospective purchaser an exclusive right to purchase the property. While typically the option fee will be credited towards payment of the purchase price if and when the option is exercised, it has a distinctive function as a “non-returnable booking fee that the vendor is entitled to keep”.²⁰² That being the case, it is exempt from scrutiny under the rules regarding true deposits, as well as penalties (concerning liquidated damages), and equitable relief from forfeiture as well (see below).

(5) *Relief from forfeiture*

13.144 Lastly, on the issue of relief from forfeiture, the earlier decision of the Court of Appeal in *Pacific Rim Investments Pte Ltd v Lam Seng Tiong*²⁰³ (“*Pacific Rim*”) has made it clear that:²⁰⁴

[E]quitable relief has also not been granted to purely commercial contracts unconnected with any interests in land ... There is no general principle that whenever a party to a contract is given a contractual right to terminate

201 *TG Master Pte Ltd v Tung Kee Development (Singapore) Pte Ltd* [2024] 1 SLR 690 at [94].

202 *TG Master Pte Ltd v Tung Kee Development (Singapore) Pte Ltd* [2024] 1 SLR 690 at [84].

203 [1995] 2 SLR(R) 643.

204 *Pacific Rim Investments Pte Ltd v Lam Seng Tiong* [1995] 2 SLR(R) 643 at [42].

or rescind the contract for a breach which consists only of non-payment of a sum of money and where the purpose of incorporating such right is to secure payment of that sum, there is an equitable jurisdiction to grant relief against the exercise of such right of termination or rescission.

13.145 In *Pacific Rim*, the purchasers of a \$1m property sought relief against forfeiture where they had in breach of contract failed to pay late payment interest (a relatively small sum of about \$900) on an instalment payment, and the vendor purported to exercise a termination right to resell the property and forfeit 20% of the purchase price. While the Court of Appeal agreed with the trial court that the contract had not been properly terminated, it observed in *obiter* that equitable relief against forfeiture could have been granted in this context where the purchaser had paid 90% of the purchase price, and the breach by the purchasers was trivial in comparison with possible financial loss and the sums already paid.²⁰⁵ In *TG Master*, the Appellate Division considered *Pacific Rim* to have allowed relief in circumstances concerning a purchaser's proprietary interest in land, as opposed to an interest in a deposit paid, and where the circumstances of a case revealed "elements of unconscionability and injustice".²⁰⁶

13.146 On the facts of *Li Jialin*, it was clearly incorrect for the respondent to invoke equitable relief from forfeiture. The respondent was in fact attempting to obtain relief *in order* to exercise a partial right of forfeiture. Unconscionability or injustice might instead result from an order that effectively allowed the respondent a unilateral discretionary right of forfeiture, for the reasons mentioned above.

13.147 Had the purchasers been the party seeking relief from forfeiture assuming the vendor's right to forfeit, that might be a more appropriate case for contemplating the scope of this equitable jurisdiction. As it stands, the suggestion is that such a jurisdiction may not even exist in the context of deposits.²⁰⁷ In principle, if a true deposit serving the function of an earnest is forfeited as of right, it would be rather difficult to plead (barring truly exceptional facts) that such a forfeiture is unconscionable or unjust. The party receiving the deposit as assurance of performance has an interest in forfeiting it where such performance is not forthcoming. The party making the deposit would be hard pressed to claim any residual proprietary interest in the sum paid as earnest. The situation

205 *Pacific Rim Investments Pte Ltd v Lam Seng Tiong* [1995] 2 SLR(R) 643 at [61].

206 See *TG Master Pte Ltd v Tung Kee Development (Singapore) Pte Ltd* [2024] 1 SLR 690 at [103], citing *Pacific Rim Investments Pte Ltd v Lam Seng Tiong* [1995] 2 SLR(R) 643 at [60].

207 See *Li Jialin v Wingcrown Investment Pte Ltd* [2024] 2 SLR 372 at [77], citing *TG Master Pte Ltd v Tung Kee Development (Singapore) Pte Ltd* [2024] 1 SLR 690 at [102].

is thus quite different from *Pacific Rim* where the purchasers were claiming a proprietary interest in land for which most of the purchase price had been paid, and this was at risk of being forfeited for a trivial breach.

VIII. Illegality, public policy and restraint of trade

13.148 In *MoneySmart Singapore Pte Ltd v Artem Musienko*²⁰⁸ (“*MoneySmart*”), the General Division discharged interim injunctions initially granted *ex parte* in favour of the claimant-employer, preventing the defendant-former employee (the Head of Technology at the claimant’s “Bubblegum” division) from working from a rival firm. The litigation arose out of restrictive covenants relating to non-competition and confidentiality in the employment agreement between the parties. In considering whether there was a good arguable case that these clauses were valid and enforceable, and whether they were breached, Tan Siong Thye SJ answered in the negative, with the effect that the balance of convenience did not lie in favour of maintaining the injunctions.

13.149 The non-competition clause (cl 8 of the agreement) stated that:²⁰⁹

... The Employee covenants and agrees that during the term of the Employee’s employment with the Company and for the following Restraint Period, the Employee shall not directly or indirectly engage with any business or organisation in South-East Asia or any other country where MoneySmart (or associated companies) operates which provides *online financial product comparison services* (the ‘Business’) and thereby engages in competition with the Company or the Company’s holding companies or subsidiaries (if any). [emphasis in original]

13.150 Moreover, the clause contained a “cascading” component in its definition of the restraint period, which was defined as:²¹⁰

...

(a) a period of twelve (12) months from the date of termination of your Employment; but if a court of competent jurisdiction determines that any restriction in this clause 8 is unenforceable for such a period, then

(b) a period of six (6) months from the date of termination of your Employment; but if a court of competent jurisdiction determines that any restriction in this clause 8 is unenforceable for such a period, then

208 [2024] SGHC 94. As the reported version does not contain the complete text of the judgment, this review will be referring to the unreported full version of the judgment in [2024] SGHC 94.

209 *MoneySmart Singapore Pte Ltd v Artem Musienko* [2024] SGHC 94 at [10].

210 *MoneySmart Singapore Pte Ltd v Artem Musienko* [2024] SGHC 94 at [10].

- (c) a period of three (3) months from the date of termination of your Employment.

13.151 For the purposes of this chapter, comment will be directed to the non-competition clause, and its controversial cascading component. The General Division applied the two-step test in *Man Financial (S) Pte Ltd v Wong Bark Chuan David*²¹¹ for determining the enforceability of a restraint of trade clause: (a) first, the court will consider whether the restraint of trade protects a legitimate interest of the employer; and (b) if so, then the restraint of trade will be enforceable if it is reasonable in the interests of the parties and reasonable in the public interest.²¹²

13.152 Legitimate proprietary interests can exist in trade secrets, confidential information, special trade connections, and the maintenance of a stable and trained workforce. Where confidential information or trade secrets are protected by another clause, it would be important for the employer to demonstrate that the restraint of trade clause in question covers a legitimate proprietary interest over and above the protection of confidential information or trade secrets.²¹³

13.153 In respect of the non-competition clause, the General Division found that there was no legitimate proprietary interest to be protected.²¹⁴ Any confidential information or trade secrets were covered by the confidentiality clause, so this could not be a legitimate interest supporting the non-competition clause. Neither was the maintenance of a stable and trained workforce. Unlike the decision of *PH Hydraulics & Engineering Pte Ltd v Intrepid Offshore Construction Pte Ltd*,²¹⁵ (“PH Hydraulics”) in which the court found that the employee in question had received extensive specialised training by his employer operating in a relatively small and specialised industry, the defendant in *MoneySmart* operated in the digital insurance industry, which was not considered small in size or number of market participants. The same conclusion would be obtained even if the industry was defined as the online financial product comparison services industry. And there was no evidence that the claimant had expended substantial resources and money to train the defendant, as the defendant had created and led the team to launch the Bubblegum online platform three months after commencing employment.

211 [2008] 1 SLR(R) 663.

212 *MoneySmart Singapore Pte Ltd v Artem Musienko* [2024] SGHC 94 at [23].

213 See *MoneySmart Singapore Pte Ltd v Artem Musienko* [2024] SGHC 94 at [23], citing *Man Financial (S) Pte Ltd v Wong Bark Chuan David* [2008] 1 SLR(R) 663 at [92], [94] and [121].

214 *MoneySmart Singapore Pte Ltd v Artem Musienko* [2024] SGHC 94 at [28]–[41].

215 [2012] 4 SLR 36.

13.154 The non-competition restriction was also not reasonable. Its scope of activity was considered too wide because there was at best a tenuous connection between the restriction against engaging with any business which provides online financial product comparison services, and the work done by the defendant while employed by the claimant. The defendant's employment primarily concerned Bubblegum and digital insurance-related matters, rather than MoneySmart's provision of online financial product comparison services. As the court noted, the clause prohibited the defendant from engaging with any business providing online financial product comparison services; it was not adequately confined to engagements in the same or similar capacity as that in which the defendant was working when employed by the claimant, as the Head of Technology of Bubblegum, MoneySmart's digital insurance platform.²¹⁶

13.155 Geographically, the restriction was too wide in extending to any business or organisation in Southeast Asia or any other country where the claimant (or associated companies) operated. The defendant's scope of work was only in respect of Bubblegum, which offered products to Singapore residents only. He was not involved in MoneySmart's online financial product comparison services, covering products in Singapore and Hong Kong, nor was he involved in any other geographical market in Southeast Asia, which the court found at most to be the potential (not actual) business territory of the claimant. Analogies were drawn with *Buckman Laboratories (Asia) Pte Ltd v Lee Wei Hoong*²¹⁷ and *Lek Gwee Noi v Humming Flowers & Gifts Pte Ltd*,²¹⁸ ("Lek Gwee Noi") cases where the geographic scope of the restriction was deemed too wide in extending to countries in which the employer had no established business presence.

13.156 In terms of the cascading temporal restriction, Tan SJ took a dim view of its enforceability, stating that:²¹⁹

I observe that the clause has indeed been drafted in a cascading manner which appears to be calculated to accommodate, or even invite, the court to apply the doctrine of severance and arrive at the longest permissible restraint period. As the court noted in *Lek Gwee Noi* at [197], a clause containing cascading covenants 'leaves the vulnerable employee uncertain as to which cascading restriction binds him in law until the issue is actually determined by a court'. To that extent, such a covenant would have an *in terrorem* effect on a reasonable employee in the defendant's position. Further, cl 8.3(c) is plainly

216 See also *Powerdrive Pte Ltd v Loh Kin Yong Philip* [2019] 3 SLR 399 at [40]–[46] (where the restriction was deemed to be too wide because it was not confined to working for a rival in the same or similar capacity as that in which the employee was working when previously employed).

217 [1999] 1 SLR(R) 205.

218 [2014] 3 SLR 27.

219 *MoneySmart Singapore Pte Ltd v Artem Musienko* [2024] SGHC 94 at [56].

unjust in trying to impose the prohibitions in the Non-Compete Clause for three months, even if ‘a court of competent jurisdiction determines that *any* restriction in [the Non-Compete Clause] is unenforceable’ for a period of six or 12 months. There is simply no room for cl 8.3(c) to operate if the Non-Compete Clause is determined to be unenforceable for such a period. It appears that the claimant will have multiple bites of the cherry in relation to determining the duration of the Non-Compete Clause. [T]he Non-Compete Clause cannot be said to be reasonable as between the parties or in the interests of the public. [emphasis in original]

13.157 In light of the above, it was unlikely that the claimant’s attempts to rescue the non-competition clause through the doctrine of severance would pass muster. As the court noted, the applicable test in this regard is the well-known “blue pencil test”, requiring that:²²⁰

- (a) the unenforceable provision must be capable of being removed without adding to or modifying the wording of what remains with the remainder continuing to make grammatical sense;
- (b) the remaining contractual terms must continue to be supported by adequate consideration; and
- (c) the severance must not change the fundamental character of the contract between the parties.

13.158 The court added that: “Fair play is a cardinal principle in construing an employment contract, especially when the employer is in an advantageous position compared to the employee who has not much choice but to sign the employment contract on an as-is basis.”²²¹

13.159 In applying the severance test, the court held that amending the scope of prohibited activities from “online financial product comparison services” to “digital insurance products” would go beyond narrowing or limiting the express wording in the clause, and moreover change its fundamental character to something different in kind. Moreover, it concluded that:²²²

[A]llowing the doctrine of severance to operate in these circumstances would be contrary to the underlying public policy in employment contracts. It is vital that trade restraint clauses are drafted precisely, clearly and unequivocally with respect to the scope of the work of each employee. The practice of imposing wide and general restrictive clauses in employment contracts in a manner that would later support the ‘blue pencil test’ should be discouraged as it is

220 *MoneySmart Singapore Pte Ltd v Artem Musienko* [2024] SGHC 94 at [61]; *Lek Gwee Noi v Humming Flowers & Gifts Pte Ltd* [2014] 3 SLR 27 at [155].

221 *MoneySmart Singapore Pte Ltd v Artem Musienko* [2024] SGHC 94 at [61]; *Lek Gwee Noi v Humming Flowers & Gifts Pte Ltd* [2014] 3 SLR 27 at [155].

222 *MoneySmart Singapore Pte Ltd v Artem Musienko* [2024] SGHC 94 at [63].

unfair and inequitable to the employee. Further, it is against public policy. This is especially because of the overriding principles of the individual freedom to trade and liberty of action. In this case, I cannot allow severance to rectify the Non-Compete Clause, which is an exceedingly wide trade restraint clause that was drafted strongly in favour of the claimant to the disadvantage of the defendant. Doing so would be an endorsement of the abusive process of imposing unreasonable restraints in employment contracts.

13.160 A few brief remarks on this decision are made. Firstly, the court in *MoneySmart* is astute to question the precise legitimate interest underlying the restrictive covenant. In particular, in respect of bare non-compete restriction, there can be little reason to have such a clause and limit the mobility of an employee if the interests of an employer are protected or protectable by confidentiality, non-solicitation, and other more targeted clauses.

13.161 Secondly, the anxious scrutiny accorded in *MoneySmart* to the non-competition clause is in no small part due to its place in an *employment* agreement. In *Lek Gwee Noi*, the court contrasted this more protective stance with the flexibility accorded in sale of business scenarios:²²³

- (a) Employees tend to lack bargaining power as against employers.
- (b) An employee's ability to sell his labour may be his only asset whereas a vendor will have capital in hand from the sale of business.
- (c) A business will often be valueless to a purchaser without the vendor's covenant not to compete.
- (d) Once an employee accepts a restrictive covenant, the employer's bargaining position during the employment is much increased because the employee's ability to withdraw his services and seek work elsewhere is inhibited.
- (e) It is in the public interest for employees to possess freedom of movement and occupation.

These considerations clearly influenced the decision in *MoneySmart*, with its references to the need for fair play, and controlling abusive and unreasonable employer conduct in drafting wide restrictions.

13.162 Thirdly, it is not always easy to draw generalised conclusions as to the enforceability of activity, geographic, and time restraints.

223 *Lek Gwee Noi v Humming Flowers & Gifts Pte Ltd* [2014] 3 SLR 27 at [36].

This may thus present a challenge for lawyers advising their clients, since each industry is quite different. As discussed above, in the *PH Hydraulics* decision, a two-year non-competition restraint extending to Singapore and Malaysia was upheld given the legitimate interest of the plaintiff in maintaining a skilled workforce for which it had invested in, the plaintiff's business presence in those jurisdictions, and the fact of a small and specialised marine winch industry. But in *HT SRL v Wee Shuo Woon*,²²⁴ the one-year non-competition restraint was not: it was unlimited in geographic scope, overly restrictive of the employee's activities in any part of the cybersecurity industry, and in any event unsupported by any legitimate interest in confidential information or trade connections (covered by other clauses).²²⁵ Hence, even within the realm of employment restraints, one cannot simply take the outcomes of previous cases as reference points to conclude that a certain length of restraint is enforceable. It will all depend on the facts.

13.163 Fourthly, *MoneySmart* takes a strong and welcome stance on severance and cascading clauses. To be clear, the kind of severance contemplated by drafters of cascading clauses is not discretionary or notional severance. As explained in *Lek Gwee Noi*, the “doctrine of notional severance is not part of Singapore law and, it would appear, faces significant difficulties in so becoming,”²²⁶ not least because it “amounts to a unilateral variation of the parties’ obligations imposed by the court with the benefit of hindsight.”²²⁷ But the very point of drafting the cascading clause is indeed to effect a rescue of an otherwise unenforceable clause with the benefit of hindsight. Academic opinion on cascading clauses has been somewhat mixed. There are suggestions that the case law in the common law world is not free from difficulty;²²⁸ but as a matter of policy, what stands out are strong academic voices (such as the following) condemning such clauses:²²⁹

224 [2019] 5 SLR 245.

225 *HT SRL v Wee Shuo Woon* [2019] 5 SLR 245 at [74]–[84]. See also *Shopee Singapore Pte Ltd v Lim Teck Yong* [2024] SGHC 29 (interim injunction not granted, as the court found no serious question to be tried that a one-year non-competition restriction was valid, since any alleged legitimate proprietary interest in confidential information was already protected by a separate confidentiality clause; nor that a non-solicitation restriction was going to be breached).

226 *Lek Gwee Noi v Humming Flowers & Gifts Pte Ltd* [2014] 3 SLR 27 at [186].

227 *Lek Gwee Noi v Humming Flowers & Gifts Pte Ltd* [2014] 3 SLR 27 at [179].

228 See Andrew Fell & Elizabeth Rudz, “Employee Non-Compete Restraints: Resolving Uncertainty” (2023) 46 *UNSW Law Journal* 1252; and David Cabrelli & Louise Floyd, “New Light through Old Windows: Restraint of Trade in English, Scottish, and Australian Employment Laws – Emerging and Enduring Issues” (2010) *International Journal of Comparative Labour Law and Industrial Relations* 167.

229 Andrew Stewart, “Drafting and Enforcing Post-Employment Restraints” (1997) 10 *Australian Journal of Labour Law* 181 at para 106.

[A]ll step clauses should be struck down on the ground of uncertainty. Employers and other covenantees should be compelled to be clear as to what activities they wish to restrain, in what location and for what period. If they exceed the limits set by the law, and find that they cannot enforce the restraint in the face of conduct that could on any basis have been the subject of a reasonable covenant, then so be it. That is the price to be paid for taking insufficient care or being overly ambitious as to the scope of the restraint. The risk of losing out in that way does no more than balance the natural advantage that most employers enjoy through superior resources, access to legal advice and the intimidatory effect of the mere presence in a contract of a restraint, valid or not.

13.164 The authors agree with the decision in *MoneySmart* to reject the drafting of cascading clauses on grounds of party interest and public policy. Such a clause (as in *MoneySmart*) can give an employee no clear guidance on her obligations, being highly uncertain. Moreover, a varying set of time restrictions, for example, cannot be said to be reasonably necessary to protect any legitimate interest. The employer has effectively sought to impose fuzzy parameters on the restriction to rope in the court in legitimating the clause at the point of hearing, rather than (as it is should have done) fixing the relevant parameters for the benefit of both parties at the time of formation of contract.

13.165 To circle back to the *Li Jialin* decision concerning a discretionary forfeiture clause, one sees the same theme recurring throughout contract law: courts do and should not permit opportunistic drafting of a clause (a forfeitable deposit or non-compete) where the drafter is conscious of its probable unenforceability, in order to gain an *in terrorem* advantage over another party, and in the hope that the court will sanction this behaviour subsequently by rescuing (through some technique of construction or severance) whatever portion it deems legally valid.
