10. CONTRACT LAW

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Formation of contract

Offer and acceptance

10.1 It is trite law that a contract may be concluded by conduct, and in such cases the precise point at which *consensus ad idem* occurs is essentially a question of fact. In *Singh Chiranjeev v Joseph Mathew* [2008] SGHC 222, the High Court held that an owner of a condominium unit was bound by his consent to an option agreement once he had accepted the deposit of the option moneys into his bank account. Not being made "subject to contract", it was irrelevant that the option agreement had not been signed at that point.

10.2 In contrast, an attempt to infer a contract from the parties' conduct failed in *Sitt Tatt Bhd v Goh Tai Hock* [2008] SGHC 220. Here, the plaintiff alleged that the defendant, the sole director and shareholder of Prime International Consultants Pty Ltd ("Prime"), had by his conduct contracted with the plaintiff to procure Prime to fulfil its various undertakings to the plaintiff. In substance, the plaintiff argued that such inference was justified because Prime, being an artificial entity, would not be in the position to discharge any of its responsibilities except through the defendant, its *alter ego*. As such, the defendant must be taken have accepted personal responsibility for Prime's obligations. Judith Prakash J had no difficulty in dismissing these arguments. On the evidence adduced, it was clear that the plaintiff was at all material times aware that it was dealing with the defendant as the representative of Prime. The recognition that the defendant was *factually* responsible for Prime's discharge of its contractual obligations could not lead to the implication of a direct contract between the plaintiff and the defendant. If the plaintiff's arguments were right, it would "have the potential to impose liability by way of a collateral contract between the directors

who control any company and third parties who contract with the company" (at [29]), which was plainly unacceptable.

10.3 In *Econ Piling Pte Ltd v NCC International AB* [2008] SGHC 26, the High Court was asked to determine if two partners had, over a period of protracted negotiations, entered into a binding agreement to dissolve the partnership. Chan Seng Onn J emphasised that the issue was to be determined by an objective assessment of the parties' conduct in the course of the negotiations as well as the surrounding circumstances. Where the evidence demonstrated that the parties had reached agreement on the material terms of dissolution, the parties were bound even if one partner subsequently refused or neglected to execute the deed of dissolution setting out the terms of the agreement. In such circumstances, the failure to execute the deed was only an incompleteness in form but not substance.

Consideration

10.4 Various aspects of formation issues arose in relation to compromises in *Gay Choon Ing v Loh Sze Tie Terrence Peter* [2009] SGCA 3. In this case, the appellant claimed the beneficial ownership of 1.55 million ordinary shares ("the GLS shares") in the capital of a company known as Gay Lip Seng & Sons (Pte) Ltd ("GLS") and various remedies in consequence of the respondent's alleged breach of trusts.

10.5 The parties had been close friends for over 30 years. The respondent, Loh, was the managing director and shareholder of a company known as ASP Co Ltd ("ASP") operating in Nairobi, Kenya. The appellant, Gay, joined ASP as its general manager in 1981 and had continued in its employment until 2004. In 1994, Gay subscribed for the GLS shares using funds provided by Loh. A trust deed was subsequently executed, under which Gay undertook to hold the GLS shares on trust for Loh.

10.6 At the trial, Loh claimed that he had extended the subscription moneys to the appellant as an *investment* in GLS, and was therefore the beneficial owner of the GLS shares. Gay, however, argued that the moneys were a loan from Loh and the trust was created as security for the loan. As a subsidiary defence, Gay also contended that Loh's rights in relation to the GLS shares had in fact been extinguished under a compromise agreement constituted by two documents, *viz*, a "points of agreement" dated 27 October 2004 ("POA") under which Loh agreed to sell his entire stake in GLS to Gay for a sum of $1.5m; and a letter of waiver signed on the same day by Gay and Loh (in his capacity as managing director of ASP), pursuant to which Gay agreed to forego any claim for severance pay as against ASP.

10.7 Before the High Court (see *Loh Sze Ti Peter v Gay Choon Ing* [2008] SGHC 31), both parties accepted that the proper construction of the trust deed was central to the resolution of the dispute. Looked at in its entirety, Justice Belinda Ang concluded that the trust deed created an express trust in favour of Loh, who was therefore the beneficial owner of the GLS shares. Significantly, Ang J also rejected Gay's "subsidiary" argument that the POA and waiver letter resulted in a binding compromise on three grounds.

10.8 First, no compromise had arisen because the POA and waiver letter were two independent transactions binding different parties. While the POA dealt with the rights and liabilities of Loh and Gay, the waiver letter was concerned with Gay's claims against ASP. Even though Loh was a signatory to the waiver letter, he did so in his capacity as managing director of ASP and there was no evidence to suggest that Loh was the *alter ego* of ASP. Second, even if it was accepted that the parties had entered into a compromise, the POA was, nevertheless, tainted by the breach of the fair-dealing rule and hence liable to be rescinded. Finally, Gay's own assertions for severance pay *after* the execution of the POA and the waver letter amounted to clear evidence of there being no concluded compromise.

10.9 In the Court of Appeal, however, the analysis of the issues took a decided turn. For the appeal court, the crux of the issue laid in the legal effects of the POA and the waiver letter rather than the legal status of the trust deed. Contrary to the findings in the court below, the Court of Appeal found that a valid compromise agreement had arisen by virtue of the contemporaneous execution of the POA and the waiver document. Taken together, the two documents had the effect of releasing Gay from all his obligations under the trust deed, while Loh was released from any obligation relating to the payment of severance fees to Gay. In effect, the settlement put an end to both parties' claims, and Loh's interests in the GLS shares, which had been lawfully sold to Gay under the terms of the POA, had to fail.

10.10 Delivering the judgment of the court, Justice of Appeal Andrew Phang took the opportunity to clarify the law on compromises and settlements. Compromises, the learned judge observed (*Gay Choon Ing v Loh Sze Tie Terrence Peter* [2009] SGCA 3 at [45]), are predicated on there being a pre-existing dispute. Once it is clear that the parties are negotiating to settle a dispute, the question whether a binding compromise arises will be determined by applying the general principles of contract law. These would, of course, include the usual principles relating to offer, acceptance, consideration and intention to create legal relations.

10.11 In the High Court, one of the reasons cited for invalidating the compromise agreement was that the POA and the waiver letter bound different parties. In particular, whilst Loh relinquished his rights under the trust deed, he appeared to have derived no direct benefit in Gay's promise to forego his claims for severance pay against ASP. However, the Court of Appeal did not regard this as an insuperable difficulty.

10.12 As Andrew Phang JA explained (*Gay Choon Ing v Loh Sze Tie Terrence Peter* [2009] SGCA 3 at [78]–[79]), the more critical issues raised by these facts were whether the parties *intended* to create a binding compromise, and whether there was adequate *consideration* to support their respective promises. Both questions were answered in the affirmative. In particular, the court was satisfied that Gay had given adequate consideration for Loh's promises under the POA because Gay's promise to waive his claims against ASP was given *at the request of Loh*. Loh's request crucially demonstrated that the POA and the waiver were part and parcel of one compromise rather than two unrelated transactions.

10.13 Although Andrew Phang JA emphasised (*Gay Choon Ing v Loh Sze Tie Terrence Peter* [2009] SGCA 3 at [81]) that consideration could take the form of *either* detriment to the promisor or benefit for the promise, the signing of the waiver letter fulfilled both conditions. Loh clearly had a personal interest in ensuring that Gay gave up his claims against ASP and to that extent, Gay's promise conferred a benefit on Loh inasmuch as it was a detriment to Gay. Thus viewed through the lens of contract law, the parties' conduct amounted to a settlement which, having been fully executed, had the effect of extinguishing their prior claims and liabilities. (For another case decided on similar grounds, see *Tsu Soo Sin v Ng Yee Hoon* [2008] SGHC 30, where an attempt to invalidate an agreement on the ground of lack of consideration failed because the plaintiff's promise was in fact given in exchange for the other parties' promises to confer benefits on *third parties*.)

10.14 Apart from analysing the specific facts and issues arising in *Gay Choon Ing v Loh Sze Tie Terrence Peter* [2009] SGCA 3, Andrew Phang JA also commented broadly on the conceptual and doctrinal difficulties surrounding the contractual formation rules. One such comment related to Lord Denning's suggestion (in *Butler Machine Tool Co Ltd v Ex-Cell-O Corp (England) Ltd* [1979] 1 WLR 401) to substitute the rigid adherence to offer and acceptance rules with a more fluid approach that focuses on the finding of agreement on material points.

10.15 Whilst acknowledging that the traditional application of formation rules do, on occasion, result in excessive technicality and artificiality, Andrew Phang JA was, nevertheless, of the view that Lord Denning's approach was too radical (*Gay Choon Ing v Loh Sze Tie*

Terrence Peter [2009] SGCA 3 at [62]). For the Court of Appeal, the defects of the traditional approach could be cured by, "a less mechanistic and dogmatic application of these [offer and acceptance] concepts and this [could] be achieved by having regard to the *context* in which the agreement was concluded" (at [63]).

10.16 Andrew Phang JA also embarked on an extensive evaluation of the proposition that the doctrine of consideration is now a redundant tool that has outlived its function. In a meticulous account, Phang JA traced the root of this view to the English Court of Appeal decision in *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1990] 1 All ER 512. Essentially, the learned judge acknowledged that by extending the notion of benefit beyond legal benefit to include factual or practical benefits, the decision in *Williams* had so enlarged the concept of consideration as to render it an ineffectual tool for limiting the types of enforceable agreements. In the ultimate analysis, however, Phang JA favoured the maintenance of the *status quo*.

10.17 In the view of the Court of Appeal, the doctrine of consideration is, notwithstanding its weaknesses, an entrenched part of contract law in Singapore. Given that there is as yet no alternative that could satisfactorily replace it, the continued application of the doctrine buttressed by other concepts that perform a similar limiting function is perhaps the "*most practical* solution inasmuch as it will afford the courts *a range of legal options* to achieve a fair and just result in the case concerned" [emphasis in original]: *Gay Choon Ing v Loh Sze Tie Terrence Peter* [2009] SGCA 3 at [118]. This would mean, in practical terms, that a contract could rarely be invalidated for lack of consideration.

10.18 Indeed, a telling illustration of the breadth of the concept may be observed in *Teo Seng Kee Bob v Arianecorp Ltd* [2008] 3 SLR 1135, where Justice Lai Siu Chiu held (applying *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1990] 1 All ER 512) that an agreement to vary a contract was supported by consideration because the promisor had received part payment of the original consideration price at the time of the variation. The use of the moneys so received undoubtedly conferred a factual benefit on the promisor. By parity of reasoning, however, the same could be said of almost every part performance of the original undertaking.

10.19 The decision in *Gay Choon Ing v Loh Sze Tie Terrence Peter* [2009] SGCA 3 is also an interesting illustration of the complications that may arise when legal and equitable doctrines collide. In reaching its conclusion, the Court of Appeal did not explicitly articulate the relevance, if any, of the High Court's findings on Gay's breaches of trust. A couple of alternative inferences may be drawn from the approach taken by the court.

10.20 The first is to understand the compromise as having effectively put an end to the trust. But this does not explain why the compromise agreement (and not merely the POA) was not itself tainted by Gay's breach of the fair-dealing rule. The argument could conceivably be (though it appeared not to have been) made that Gay, in "purchasing" a release from his duties as trustee, was subject to the usual strictures of trusteeship. A plausible answer to this argument is to understand the compromise as comprising a termination of the trust *followed by* the transfer of non-trust assets. On this analysis, the trustee (Gay) would, by reason of the prior termination, have been freed from his trustee duties in his subsequent dealing with the assets.

10.21 The alternative view is that implicit in the Court of Appeal's approach is the assumption that the legal status of the trust (and the alleged breaches of trust) was irrelevant to the ultimate resolution of the dispute. Once it was established that the parties had intended to enter into a compromise, the legal effect of the transactions fell entirely within the province of contract. The parties' precise legal positions *prior to* the compromise were inconsequential because those were the very subject matter of the parties' dispute and of their eventual compromise.

Formalities

10.22 The formality requirements applicable to the enforcement of property transactions under s 6(*d*) of the Civil Law Act (Cap 43, 1999 Rev Ed) were considered in *Singh Chiranjeev v Joseph Mathew* [2008] SGHC 222 (see para 10.1 above on "Offer and acceptance"). In this case, Justice Andrew Ang held that the requirements for a written memorandum under that provision were satisfied by a number of emails that should be read together as a chain of correspondence. It did not matter that some of the emails containing the terms of the agreement did not emanate from the seller so long as the emails contained all the material terms of the agreement. In that connection, it was noted that the relevant property was not clearly identified in the emails. However, the full address of the property was in fact written on the back of the cheque issued by the plaintiff in favour of the defendant, and this was found to be sufficient for the purposes of s 6(*d*).

The terms of the contract

Construction of terms

10.23 While the Court of Appeal has in the recent decision of *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR 1029 (see para 10.36 on "Parol evidence rule") put it beyond all doubt that the contextual approach to the interpretation of

contracts is here to stay, this next case is a poignant illustration of the difficulties or, more specifically, the *uncertainty* that could be generated by such an approach.

10.24 In *Yamashita Tetsuo v See Hup Seng Ltd* [2008] SGCA 49, the respondent company, See Hup Seng Ltd ("the company"), was on the brink of insolvency in 2003. Fortunately, it succeeded in persuading Meadow Springs Enterprises Ltd ("Meadow Springs") to come to its rescue through the injection of fresh capital. Under the rescue plan, Meadow Springs agreed, *inter alia*, to acquire the equity stake held by SHS Holdings (Pte) Ltd ("SHSH"), then one of the company's major shareholders, at $0.0475 per share. In addition, Meadow Springs also requested that the company enter into a deed of settlement to restructure the debts that the company owed to SHSH.

10.25 Under the deed, the loan owing to SHSH was split into two loans comprising $1,773,337.50 ("warrant liability amount") and $2,270,000 ("SHSH convertible loan"). Clause 3 of the deed provided that the warrant liability amount could be applied to pay for the exercise of certain warrants to subscribe for shares in the company at $0.11 per share. Clause 4.1 further provided that any portion of the warrant liability amount that had not been applied towards the exercise of the warrants shall be deemed to be discharged at the end of seven months from the date of the deed. The SHSH convertible loan, on the other hand, was to be repaid through a combination of cash and issue of new shares by the company (and hence the "convertible" feature). The critical provisions, being the subject matter of the parties' dispute, were as follows (as set out in *Yamashita Tetsuo v See Hup Seng Ltd* [2008] SGCA 49 at [11]:

> 5.1 The SHSH Convertible Loan is interest-free …
>
> 5.2 Subject to [c]lause 5.3 below, *75% of the SHSH Convertible Loan* shall be repaid in cash on the Repayment Date.
>
> 5.3 *In the event [that] the Company is unable to obtain all relevant approvals* for the Conversion Feature or SHSH is unable to exercise the Conversion Feature by reason of such Conversion Feature not being valid or enforceable or otherwise not in full force and effect for any reason whatsoever, the SHSH Convertible Loan, *100% of the SHSH Convertible Loan shall be repaid in cash on the Repayment Date.*
>
> 5.4 …
>
> 5.5 Subject to clause 5.6 below, the SHSH Convertible Loan shall have a conversion feature ('Conversion Feature') whereby SHSH may, but shall not be obliged to, at any time and from time to time from the date of this Deed up to and including the Repayment Date, convert the SHSH Convertible Loan *in whole or in part* into Shares subject to the following terms:

> (a) …
>
> (b) each exercise of such right will be by way of a Conversion Notice by SHSH to the Company, provided that:
>
> > (i) …
> >
> > (ii) …
> >
> > (iii) …; and
> >
> > (iv) in the event [that] less than 25% of the SHSH Convertible Loan has been converted into Shares as at the Repayment Date (the difference between 25% of the SHSH Convertible Loan and the actual amount of [the] SHSH Convertible Loan converted into Shares [is] to be referred to as [the] 'Shortfall Conversion Amount'), a Conversion Notice is deemed to be served on the Repayment Date to convert the Shortfall Conversion Amount into Shares on the terms of this clause 5 …
>
> [emphasis in original]

10.26 Subsequent to the execution of the deed, SHSH was placed in liquidation. Its assets were distributed between its two shareholders, one Thomas Lim ("Lim") and Linguafranca. The latter then assigned its rights to its share of the SHSH convertible loan (amounting to some $473,238.40) to the appellant.

10.27 The issue before the court concerned the correct interpretation of cl 5.2 of the deed. As a preliminary point, both parties were agreed that cl 5.5(*b*)(iv) imposed an obligation on the appellant to apply at least 25% of the SHSH convertible loan ("the minimum conversion amount") towards the acquisition of the company shares. Assuming that a portion equal to or exceeding the minimum conversion amount had already been applied to acquire the company's shares, the question that then arose was whether the company was obliged, under cl 5.2, to repayment of 100% of the outstanding *balance*, or merely 75% of the same?

10.28 Arguing for the latter, the company submitted that cl 5.2 ought to be construed as having incorporated a 25% discount or "haircut" and this discount was justifiable as the consideration that SHSH had agreed to pay to the company in exchange for the latter's agreement to the conversion feature of the restructured loan. In response, the appellant pointed to the lack of commercial sense in such an arrangement. Having already given numerous other indulgences under the terms of the deed, there was no reasonable basis for assuming that SHSH would have agreed to a pay an additional price for the conversion feature.

10.29 A majority of the Court of Appeal (comprising Justices of Appeal V K Rajah and Andrew Phang) favoured the interpretation proffered by the appellant, *ie*, that the company was liable to repay the *full* balance outstanding. Taking a contextual approach to the construction of the deed, the majority judges emphasised (*Yamashita Tetsuo v See Hup Seng Ltd* [2008] SGCA 49 at [77] and [86]) that cl 5.2 should be construed in the context of cl 5 as a whole.

10.30 On the face of cl 5.2, although the words, "75% of the SSH convertible loan" suggested that the company would, in all circumstances, be liable to repay 75% of the *full amount of the original loan*, resulting in overpayment where more than the minimum conversion amount had already been converted into shares, the majority pointed out that such a construction was untenable. This was because cl 5.5(*a*) expressly stipulated that any part of the SHSH convertible loan that had been converted into shares would forthwith be "deemed fully and effectually repaid". Thus, a more sensible interpretation of cl 5.2 would be to confine its terms to one specific situation, *viz*, where exactly the minimum conversion amount has been converted. In other situations, the company's liability to repay would have to be determined by discerning the *schema* derived from all the provisions in cl 5.

10.31 Reading cl 5 as a whole, the majority then summed up its effects as follows (*Yamashita Tetsuo v See Hup Seng Ltd* [2008] SGCA 49 at [89]):

> (a) If exactly the … Minimum Conversion Amount has been converted into Shares …, the [Company] must repay in cash 75% of the [SHSH Convertible Loan] … (see cl 5.2).
>
> (b) If more than the Minimum Conversion Amount has been converted into Shares …, the respondent must repay in cash 75% of the [SHSH Convertible Loan] *less whatever part of that sum which has already been converted into Shares* (see cl 5.2 read with cl 5.5(a)) ...
>
> (c) If less than the Minimum Conversion Amount has been converted into Shares …, the difference between the Minimum Conversion Amount and the amount that has actually been converted into Shares will be deemed to have been converted into Shares, and (a) above will apply (see cl 5.2 read with cl 5.5(*b*)(iv)). In other words, the respondent will repay in cash exactly 75% of the [SHSH Convertible Loan].

10.32 Although both the majority and minority judges placed considerable weight on the textual analyses of cl 5 of the deed, intriguingly, the critical point of difference lay in the judges' respective assessment of the commercial context of the transactions. The majority emphasised (*Yamashita Tetsuo v See Hup Seng Ltd* [2008] SGCA 49 at [100]–[108]) the *lack of commercial sense* in the suggestion that SHSH had agreed to a 25% haircut as a price for the conversion feature, or as a

disincentive for non-conversion. In particular, the majority noted that although the company (through Meadow Springs) was in a stronger bargaining position *vis-à-vis* SHSH, the terms of the deed ought not to be, "construed in a manner so oppressive that, when viewed objectively, it would be difficult to conceive of any reasonable party in SHSH's position agreeing to those terms" (at [100]). Taking into account the delay in repayment of the loan, the concession represented by the repayment of minimum conversion amount in the form of shares rather than in cash, and the uncertain outlook for the company's business, it was commercially unrealistic that SHSH could have agreed to pay a large premium for the convertibility feature. Given that the company's interpretation was, from an objective point of view, commercially unreasonable, such an interpretation could only be upheld if it had been provided for in explicit and unambiguous terms.

10.33 In dissent, Chao Hick Tin JA adopted the company's interpretation of cl 5 and, more importantly, considered that such an interpretation was fully justifiable by the circumstances then prevailing. Given the company's financial troubles at that time, SHSH's loans were effectively bad debts. In light of that, Chao JA regarded it as "plain that the aim behind the arrangement set out in the deed was to ensure that, as far as possible, all the funds which SHSH had already put into the company, whether as capital or by way of loans, should remain in the company and be applied towards the rescue plan instead of being given back in cash to SHSH" (*Yamashita Tetsuo v See Hup Seng Ltd* [2008] SGCA 49 at [38]). The interpretation of cl 5.2 as imposing a 25% haircut on the outstanding and unconverted loan as a price for the conversion feature, or as an incentive to SHSH to convert the whole of the loan into shares was, therefore, fully consonant with this general aim. In reaching this view, Chao JA was obviously also influenced (at [21] and [37]) by the consideration that the parties involved were business entities which were fully appreciative of the consequences of their bargain. With that in mind, the appellant's argument would (as Chao JA's reasoning implicitly suggests) tread too close to inviting the court to rewrite the parties' bargain based on its own sense of fairness or reasonableness.

10.34 While it was clear from the facts in *Yamashita Tetsuo v See Hup Seng Ltd* [2008] SGCA 49 that the contract could not have been interpreted without recourse to the general commercial context, the divergent views of the majority and minority judges very neatly illustrate the resultant uncertainty that invariably confronts litigants in such cases. Admittedly, the commercial reasonableness of the transactions is, as the majority judges thought it to be, a relevant consideration for the inference of the parties' objective intention. On the other hand, it is not at all clear when such assessment might cross into the impermissible path of re-writing bargains.

10.35 For another case in which the contextual approach was applied, see *Uzbekistan Airways v Jetspeed Travel Pte Ltd* [2009] 1 SLR 1.

Parol evidence rule

10.36 The extent to which extrinsic evidence may be admitted to affect the interpretation of contractual terms was the subject of an impeccably scrupulous and penetrating analysis by the Court of Appeal in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR 1029.

10.37 The respondent in this case ("B-Gold") had contracted to carry out certain maintenance and repair works for Mediacorp Pte Ltd ("Mediacorp"). Under the contract, B-Gold was obliged, under cl 18 of the contract to "ensure that there [are] in force policies of insurance indemnifying MediaCorp, the Contractor and all subcontractors against damage to persons and property, for Workmen's Compensation and fire": *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR 1029 at [9]. For this purpose, B-Gold purchased a Contractors' All Risk Policy ("the policy") from the appellants ("Zurich Insurance") through the assistance of its usual agent, one Willy Lee, who was then in the employ of the American International Group. B-Gold's subcontractor negligently caused a fire at the premises where repairs were to be effected, causing extensive damage to Mediacorp's property. Mediacorp successfully brought a suit against B-Gold claiming compensation for the damage sustained. Thereafter, B-Gold commenced the present third-party action against Zurich Insurance, seeking an indemnity under the policy against all sums which it was liable to pay to Mediacorp. The strength of B-Gold's claim turned, naturally, on the correct meaning and effect to be ascribed to the terms of the policy.

10.38 Although the interpretative issues concerned various terms of the policy, a substantial portion of the Court of Appeal's reasoning was directed at the High Court's treatment of special exclusion 4(b) to Section II of the policy ("special exclusion 4(b)"), which excluded liability incurred in respect of (*Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR 1029 at [20]):

> *loss of or damage to property belonging to or held in care, custody or control of the Contractor(s), the Principal(s)* [including Mediacorp] or any other firm connected with the project which or part of which is insured under Section I, or an employee or workman of one of the aforesaid … [emphasis added]

10.39 In the District Court, the district judge took the straightforward view that since the damaged property belonged to Mediacorp, B-Gold's

claim fell squarely within the ambit of the exclusion. This holding was, however, reversed on appeal to the High Court. In that decision (*B-Gold Interior Design & Construction Pte Ltd v Zurich Insurance (Singapore) Pte Ltd* [2007] 4 SLR 82), Justice Andrew Ang accepted (at [47]) that a literal construction of special exclusion 4(*b*) would render it applicable to B-Gold's claim but concluded, after due consideration of the policy's genesis, that the exclusion was unjust and inoperable.

10.40 Andrew Ang J reasoned that since B-Gold had purchased the policy for the specific purpose of complying with cl 18 of the contract with Mediacorp, such purpose having been made known to the insurer, it would be "contrary to all sense of justice and fair play" (*B-Gold Interior Design & Construction Pte Ltd v Zurich Insurance (Singapore) Pte Ltd* [2007] 4 SLR 82 at [56]) to give effect to a standard printed exclusion clause which has the effect of denying the very cover that B-Gold had required. In Ang J's view (*B-Gold Interior Design & Construction Pte Ltd v Zurich Insurance (Singapore) Pte Ltd* [2007] 4 SLR 82 at [59]), the operation of such a clause would lead to "absurdity" and the court was in such circumstance obliged to intervene to deny its efficacy. The Court of Appeal disagreed. In its view, the judge's interpretation was flawed because it was essentially influenced by the improper use of extrinsic evidence. Recognising that there is a wider public interest to be served in clarifying an area of law that is often perceived as "obfuscated, obscure and opaque" (*Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR 1029 at [3]), the Court of Appeal set out on a meticulous and exhaustive review of the law relating to the parol evidence rule.

10.41 Delivering the judgment of the Court of Appeal, Justice of Appeal V K Rajah restated the common understanding of the parol evidence rule in these terms (*Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR 1029 at [40]):

> Where a contract has been determined by the court to contain all the terms of the parties' agreement, no extrinsic evidence is admissible to vary the terms of that document.

10.42 Despite its plainly intelligible terms, the application of the rule in the context of contractual construction is problematic. Particular tension has arisen, as V K Rajah JA explained (*Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR 1029 at [46] and [62]), because of the growing acceptance of the legitimacy of referencing extrinsic evidence to aid in the proper *interpretation* of contractual documents. Conceptually, of course, a marked distinction could be drawn between "contradicting, varying, adding to, or subtracting from" (at [44]) the contract – the very mischief at which the parol evidence rule is aimed – and that of interpretation, the process of ascribing one of several possible meanings to a term.

10.43 Where extrinsic evidence is admitted to clarify the meaning of a term, it would not ordinarily offend the parol evidence rule. In so far as the meaning ascribed is one that the text of the term could properly bear, the term is merely explained, not varied. To a large extent, this distinction has been preserved by the traditional (and more restrictive) approach to the interpretation of documents. Under this approach, the parties' intention is objectively discerned from the *natural and ordinary* meaning of the language employed by the parties. If the words used bear a clear meaning, there is no question of employing extrinsic evidence to prove that the parties had intended a different meaning. Resort to extrinsic materials will *only* be permitted where some doubt or uncertainty resides in the text of the agreement. In other words, "ambiguity, absurdity or the existence of an alternative technical meaning is ostensibly a *prerequisite* for the court's journey outside the contract towards its external context" [emphasis in original]: *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR 1029 at [52].

10.44 But this approach is, as V K Rajah JA observed (at [52]) unsatisfactory because, while it permits recourse to extrinsic evidence to resolve *latent* ambiguity, it may be impossible to detect such ambiguity without first having had access to the extrinsic materials. The learned judge thus concluded that "in denying the role of extrinsic evidence in the interpretation of contracts, proponents of the traditional approach are only creating frustration, conflict and inconsistency" (at [52]). No doubt it is for reasons such as these that the common law has more recently shifted away from the traditional approach towards a "contextual" or "purposive" approach to contractual interpretation. But this development introduces new difficulties that require redress, not least of which is the risk of indiscriminate application, leading to the obliteration of the line between the *interpretation* and *variation* of a contractual term.

10.45 In English law, the shift towards a "contextual approach" to contractual interpretation could be traced back to Lord Wilberforce's speech in *Prenn v Simmonds* [1971] 1 WLR 1381 and reached its high watermark in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 ("*Investors Compensation Scheme*"). Essentially, this approach emphasises the importance of ascertaining the meaning of a contractual document against its background or factual matrix. As Lord Hoffmann explained in *Investors Compensation Scheme*, at 913:

> … the meaning of the document is what the parties using those words *against the relevant background* would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary

> life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax … [emphasis added]

10.46 In V K Rajah JA's view (*Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR 1029 at [62]), this new approach departs from the traditional approach in two ways. First, it has enlarged the scope of extrinsic materials that could be used for purposes of contractual interpretation. Second, and far more importantly, the new approach has abandoned the requirement for ambiguity as a prerequisite for the admissibility of extrinsic evidence. This means that extrinsic evidence may be admitted even where the text of a contract bears a clear and fixed meaning. In an extreme case, the court may even (at [62]):

> conclude that the 'wrong words or syntax' … have been used, *ie* the court may substitute what it deems to be the correct language or syntax for that used in the contract.

10.47 Plainly, such a development has the effect of threatening the very rationale that underpins the parol evidence rule. But as we shall see (at para 10.48 below), the Court of Appeal, while fully appreciative of this tension, is ultimately satisfied that the context approach is the sensible way forward.

10.48 For the position in Singapore, the Court of Appeal first turned to consider the scope and effect of ss 93–102 of the Evidence Act (Cap 97, 1997 Rev Ed). Of these provisions, s 94 and its proviso (*f*) were most germane to the issues before the court. In particular, the parol evidence rule is embodied by s 94, which essentially ensures that "where the sole evidence of a contract consists of 'the document itself' (*per* s 93), that contract is not varied, contradicted, added to or subtracted from unless the circumstances described in one or more of the six accompanying provisos (*ie*, provisos (*a*)–(*f*) to s 94) are satisfied": *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR 1029 at [71]. This primary prohibition in s 94 is, however, subject to proviso (*f*), which permits the proof of any fact "which shows in what manner the language of a document is related to existing facts". Properly understood, proviso (*f*) is intended to encapsulate *a rule of interpretation*, and is not therefore (unlike provisos (*a*)–(*e*) to s 94) a true exception to s 94. In effect, the statutory framework does expressly permit, through proviso (*f*), the admission of extrinsic evidence to aid in the proper construction of contractual terms. But this logically leads to a more difficult question, *ie*, does proviso (*f*) import the traditional or the contextual approach? Put differently, is the proviso only applicable in instances that involve the resolution of "ambiguity"?

10.49 Upon a careful review of the relevant case law, the Court of Appeal answered the last mentioned question in the negative: *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR 1029 at [114] and [121]. Notwithstanding the more restrictive view evinced in earlier cases, *eg*, *Citicorp Investment Bank (Singapore) Ltd v Wee Ah Kee* [1997] 2 SLR 759 and *North Eastern Railway Co v Lord Hastings* [1900] AC 260, the discernible trend in a series of more recent cases (*Standard Chartered Bank v Neocorp International Ltd* [2005] 2 SLR 345, *China Insurance Co (Singapore) Pte Ltd v Liberty Insurance Pte Ltd* [2005] 2 SLR 509, *Singapore Telecommunications Ltd v Starhub Cable Vision Ltd* [2006] 2 SLR 195 and *Sandar Aung v Parkway Hospitals Singapore Pte Ltd* [2007] 2 SLR 891) is to endorse the broader contextual approach, *ie*, to allow the admission of extrinsic evidence in aid of contractual construction even if there is no ambiguity on the face of the contract. This shift towards the contextual approach is, in the view of the court, one that "accords with common sense and logic" (*Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR 1029 at [133]). From this, it must follow that "proviso (*f*) to s 94 should be given a permissive interpretation which does not make ambiguity a prerequisite for the admissibility of extrinsic evidence in aid of contractual interpretation": *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR 1029 at [114].

10.50 But this does not mean that the notion of ambiguity is altogether irrelevant. On the contrary, "ambiguity still plays an important role, in that the court can only place on the relevant contractual word, phrase or term an interpretation which is different from that to be ascribed by its plain language if a consideration of the context of the contract leads to the conclusion that the word, phrase or term in question may take on two or more possible meanings, *ie*, if there is *latent* ambiguity" [emphasis added]: *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR 1029 at [108]. In affirming the contextual approach, the Court of Appeal was at all material times cognisant of the risk of abuse.

10.51 Foremost amongst its concerns is the risk of unbridled application that would erode the quality of *certainty* that is the essential hallmark of any mature system of law (see in this connection, V K Rajah JA's observations in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR 1029 at [4], [58], [111] and [129]). Addressing this concern, Rajah JA reiterated (at [122]) that "the courts must remain ever vigilant to ensure that, in interpreting the contract, extrinsic evidence is only employed to illuminate the contractual language and not as a pretext to contradict or vary it." More specifically, Rajah JA laid down the *threshold* condition

requiring the court to be satisfied that a particular context is "clear and obvious" (at [129]) before it could adopt an interpretation that deviates from that suggested by the plain language of the contract. And here, indeed, lay the weakness of the High Court's reasoning in the present case.

10.52 Reviewing the evidence, the Court of Appeal found that the circumstances in which the policy was obtained was neither clear nor obvious (*Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR 1029 at [135]) because the precise communications that took place between Lee (B-Gold's agent) and Zurich Insurance's representative were obscure. In these circumstances, it was impermissible for the judge to allow the genesis of the policy to affect the interpretation of its terms. By altogether *ignoring* the effect of the exclusion clause, the High Court judge was not merely interpreting the clause but had "strayed far into the realm of *varying* a contract in contravention of s 94" [emphasis in original]: *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR 1029 at [134].

10.53 Finally, V K Rajah JA usefully summarised the principles governing the admissibility of extrinsic evidence to aid in the construction of contractual documents. Because of their importance, this summary is reproduced (*sans* references) below:

> (a) A court should take into account the essence and attributes of the document being examined. The court's treatment of extrinsic evidence at various stages of the analytical process may differ depending on the nature of the document. In general, the court ought to be more reluctant to allow extrinsic evidence to affect standard form contracts and commercial documents.
>
> (b) If the court is satisfied that the parties intended to embody their entire agreement in a written contract, no extrinsic evidence is admissible to contradict, vary, add to, or subtract from its terms (see ss 93–94 of the Evidence Act). In determining whether the parties so intended, our courts may look at extrinsic evidence and apply the normal objective test, subject to a rebuttable presumption that a contract which is complete on its face was intended to contain all the terms of the parties' agreement. In other words, where a contract is complete on its face, the language of the contract constitutes prima facie proof of the parties' intentions.
>
> (c) Extrinsic evidence is admissible under proviso (f) to s 94 to aid in the interpretation of the written words. Our courts now adopt, via this proviso, the modern contextual approach to

interpretation, in line with the developments in England in this area of the law to date. Crucially, ambiguity is not a prerequisite for the admissibility of extrinsic evidence under proviso (f) to s 94.

(d) The extrinsic evidence in question is admissible so long as it is relevant, reasonably available to all the contracting parties and relates to a clear or obvious context. However, the principle of objectively ascertaining contractual intention(s) remains paramount. Thus, the extrinsic evidence must always go towards proof of what the parties, from an objective viewpoint, ultimately agreed upon. Further, where extrinsic evidence in the form of prior negotiations and subsequent conduct is concerned, we find the views expressed in McMeel's article and Nicholls' article persuasive. For this reason, there should be no absolute or rigid prohibition against evidence of previous negotiations or subsequent conduct, although, in the normal case, such evidence is likely to be inadmissible for non-compliance with the requirements [as regards relevance, reasonable availability and a clear and obvious context]. (We should add that the relevance of subsequent conduct remains a controversial and evolving topic that will require more extensive scrutiny by this court at a more appropriate juncture.) Declarations of subjective intent remain inadmissible except for the purpose of giving meaning to terms which have been determined to be latently ambiguous.

(e) In some cases, the extrinsic evidence in question leads to possible alternative interpretations of the written words (*ie*, the court determines that latent ambiguity exists). A court may give effect to these alternative interpretations, always bearing in mind s 94 of the Evidence Act. In arriving at the ultimate interpretation of the words to be construed, the court may take into account subjective declarations of intent. Furthermore, the normal canons of interpretation apply in conjunction with the relevant provisions of the Evidence Act, *ie*, ss 95–100.

(f) A court should always be careful to ensure that extrinsic evidence is used to explain and illuminate the written words, and not to contradict or vary them. Where the court concludes that the parties have used the wrong words, rectification may be a more appropriate remedy.

10.54 It was, however, reiterated in *Ground & Sharp Protection Engineering Pte Ltd v Midview Realty Pte Ltd* [2008] SGHC 160 at [22] that, "[t]he holding in *Zurich Insurance* that ambiguity is not a

prerequisite for the admissibility of extrinsic evidence does not change the fundamental rule that a contract is to be interpreted objectively."

10.55 In that case, a plaintiff had negotiated with the defendant for the option to purchase certain units of a factory ("the units") but the option was only set out in a non-binding letter of intent that was made "subject to contract". Subsequently, the parties entered into binding offer letters and formal tenancy agreements in respect of the units but neither set of document incorporated the option to purchase. In these circumstances, Justice Judith Prakash held that the absence of a term providing for the option in the offer letters and tenancy agreement was conclusive in excluding the option to purchase. The plaintiff was thus unsuccessful in its attempt to enforce a term by reference to extrinsic evidence (*ie*, the letter of intent).

10.56 In *Wong Lai Keen v Allgreen Properties Ltd* [2009] 1 SLR 148, the High Court reiterated the general principle that the court will not lightly imply a term into a contract, but will only do so if such implication is necessary to give business efficacy to an agreement. This case was concerned with the collective sale of Regent Garden Condominium ("the property"). Briefly stated, a majority of subsidiary proprietors making up over 80% of the share value of the property agreed to sell it to Allgreen Properties Ltd ("Allgreen"). The minority subsidiary proprietors of the remaining six units initially opposed the sale and lodged their objections with the Strata Titles Board ("STB"). Subsequently, however, Allgreen successfully persuaded the minority proprietors to withdraw their objections and to consent to the sale by promising them an additional payment over and above the amount due to them under the collective agreement. In the meantime, the majority owners had discovered that they had overestimated the development charge payable on the property, the implication of which was that they could have sold it for a higher price. The majority then sought to terminate or rescind the collective sale on various grounds. One of the arguments raised by the majority was that there should be implied in the collective sale agreement a term that prohibits Allgreen from making additional payments to the proprietors on a selective basis. This argument was rejected by the High Court. Justice Lee Seiu Kin held that there was no basis for implying such a term since the collective sale agreement was perfectly capable of being performed without such a term being implied. (See also *Lim Quee Choo v Tan Jin Sin* [2008] SGHC 133, where the High Court also declined to imply a term into a contract that was neither necessary nor reasonable).

Conditions subsequent

10.57 In *Ong Chay Tong & Sons (Pte) Ltd v Ong Hoo Eng* [2009] 1 SLR 305, the appellant had conveyed a property to the respondent

subject to the latter's undertaking to dispose of the same to only his lineal male descendants. It was also stipulated that the appellant would, upon the breach of this undertaking, be entitled to repossess the property at the price of $100,000.

10.58 In considering whether this undertaking amounted to a condition subsequent to the original conveyance, the Court of Appeal observed (*Ong Chay Tong & Sons (Pte) Ltd v Ong Hoo Eng* [2009] 1 SLR 305 at [44]) that "the classic hallmark of a condition subsequent is that a breach of it would accord the grantee the right to bring the original contract to an end or to re-enter or forfeit the property." In the court's view, the undertaking was in the nature of a contractual restraint, and not a condition subsequent. This is because the provision of the appellant's right to repossess did not involve the cessation or rescission of the original grant. Thus, the original conveyance would not be affected by the breach of the undertaking but the appellant would be entitled to damages or (where the allegedly infringing disposition of the property was not yet complete) to seek an injunction against its alienation.

Indemnity clauses

10.59 In *CST Cleaning & Trading Pte Ltd v National Parks Board* [2009] 1 SLR 55, the High Court had the occasion to revisit the principles governing the interpretation of indemnity clauses in relation to liability for negligence. The appellant was a contractor ("the contractor") engaged by the respondent, National Parks Board ("the board"), to provide cleaning services at Pasir Ris Park. On 5 December 1999, a young boy, one Liew, cycling on a footpath at the park had collided with a lorry driven by one Ang, an employee of the contractor's subcontractor ("the subcontractor").

10.60 In a suit commenced by Liew in the Magistrates Court, the magistrate found the board and the subcontractor to be *jointly* liable for Liew's injuries, and apportioned liability at 50% each. The board paid the entire damages due to Liew pursuant to the magistrate's judgment and then commenced the present action to seek an indemnification from the contractor under cl 22(a) of its contract with the contractor:

> The Contractor shall be liable for and shall indemnify the Board in respect of any liability, loss, claim or proceedings whatsoever arising under any statute or common law in respect of personal injury to or death of any person whomsoever arising out of or in the course of or by reason of the execution of the Works *provided that the same is due to any negligence, omission or default of the Contractor, his servants or agents or any subcontractor, his servants or agents.* [emphasis in original]

10.61 The dispute between the parties turned essentially on the interpretation of the proviso to this clause. The contractor contended that cl 22(a) was intended to indemnify the board only in respect of any *vicarious* liability for the contractor's or his subcontractors' negligence. it therefore had no application to the present case, where the board was itself negligent. The board, on the other hand, argued that its claim fell squarely within the text of the proviso to cl 22(a) because its liability was caused by the negligence of the contractor's subcontractor.

10.62 In its analysis, the High Court identified two principles relevant to the interpretation of indemnity clauses. The first, which it termed "the 'inherently improbable' principle of construction", states that "parties to a contract are not to be taken to have agreed that a party shall be relieved of the consequences of its negligence without the use of clear words showing that that was the intention of the contact" (*per* Hobhouse J in *E E Caledonia Ltd v Orbit Valve Co Europe* [1994] 1 WLR 221 at 227). The second is the more familiar *contra proferentum* rule.

10.63 Applying the "inherently improbable" principle, the essential question is whether the board had, through cl 22(a), succeeded in relieving itself from the consequences of its own negligence in clear terms. Chan Sek Keong CJ did not think the clause had achieved this purpose. In his view, cl 22(a) was drafted only to meet the specific situations where either the board or the contractor was wholly liable but not a case such as the present, where the parties were concurrently liable. That being the case, the issue could not be resolved "by reference to the technical issue of causation nor by trying to ferret the express intention of the parties since they had not … addressed their minds to a case of concurrent causes": *CST Cleaning & Trading Pte Ltd v National Parks Board* [2009] 1 SLR 55 at [34]. In the face of such lacuna, the court would have to resort to other principles of construction to aid in its interpretation of the term.

10.64 In this connection, Chan Sek Keong CJ did not (*CST Cleaning & Trading Pte Ltd v National Parks Board* [2009] 1 SLR 55 at [37]) regard the *contra proferentum* rule helpful because the interpretation of cl 22(a) against the board would require the court to altogether ignore the proviso to cl 22(a), and this the court could not do. More specifically, Chan CJ rejected (at [29]) the argument that the proviso was intended only to reinforce the "inherently improbable" principle of construction by confining the contractor's liability to its own or its agent's negligence. So understood, the proviso would be superfluous because the same result would have been achieved (without the proviso and) by simply relying on the "inherently improbable" principle. Instead, the court should approach the matter as "the commercial parties to the agreement would probably have approached it … to give

effect to the indemnity *only to the extent that the Board itself is not at fault* in causing injury to any person lawfully in the Park" [emphasis in original]: *CST Cleaning & Trading Pte Ltd v National Parks Board* [2009] 1 SLR 55 at [37].

10.65 Such an approach, in Chan Sek Keong CJ's view, would resolve the tension between the "inherently improbable" principle (which would not relieve the board of liability for its own negligence) and the proviso (which sought to impose indemnification liability on the contractor). Consequently, the contractor was ordered to indemnify the board to the extent of the subcontractor's contributory negligence, *ie*, 50% of the board's loss.

Vitiating factors

Duress

10.66 In *Holcim (Singapore) Pte Ltd v Kwan Yong Construction Pte Ltd* [2008] SGHC 231, the defendant unsuccessfully argued for the vitiation of a varied contract on the ground of economic duress. This case concerned a contract entered into in August 2006, under which the plaintiff agreed to supply the defendant with ready-mix concrete. The defendant's intention was to use the concrete in the rebuilding of a primary school under a contract awarded by the Ministry of Education ("MOE"). In January 2007, the Indonesian authorities unexpectedly imposed a ban on the export of sand to Singapore. This resulted, naturally, in the sharp increase in the prices of sand and aggregate (materials used in the manufacture of concrete). Accordingly, the plaintiff informed the defendant that it would not be able to continue to supply concrete except at the relevant increased prices. A number of deliveries were, in fact, accepted by the defendant on these new terms. Subsequently, however, the defendant refused to pay for various deliveries, alleging, amongst others, that it had agreed to the higher prices under economic duress.

10.67 Whilst recognising (*Holcim (Singapore) Pte Ltd v Kwan Yong Construction Pte Ltd* [2008] SGHC 231 at [69]) that commercial pressure could constitute duress that could render a contract voidable, Justice Lai Siu Chiu held that the defendant had not proven that it was acting under such pressure. Applying the *indicia* of illegitimate pressure famously laid down by Lord Scarman in *Pao On v Lau Yiu Long* [1979] 3 WLR 435 at 451, Lai J found that not only had Kwan Yang not protested against the price adjustments at the material times, it had in fact, by the placement of new orders, assented to the same. Until the institution of the present action by the plaintiff, the defendant had taken no legal steps to assert its claims. Further, it had also succeeded in

obtaining extensions of time from the project's consultants and had not (at the time of the trial) been penalised by MOE in liquidated damages. It also did not help that the defendant was in the position to help the plaintiff in procuring the raw materials required for the manufacture of concrete but made no effort to do so. In these circumstances, the defence of economic duress appeared manifestly feeble.

Mistake

10.68 Another ground on which the majority proprietors sought to rescind the collective sale agreement in *Wong Lai Keen v Allgreen Properties Ltd* [2009] 1 SLR 148 (the facts of which are set out in para 10.56 under "Implied terms") was that of common mistake. At the time of the agreement, the parties had proceeded on the basis that the estimated development charge would be in the region of $7.6m. As it turned out, however, the actual development charge was only $950,894. The majority proprietors thus claimed that the agreement had been vitiated by the parties' common mistake as to the quantum of the development charge.

10.69 Rejecting this argument, Lee Seiu Kin J held (at [40]–[41]) that no mistake could have arisen in this case because the parties were at all material times aware that the estimated development charge was merely an *estimate*. A contract would not be avoided for mistake if, on its true construction, the mistake relates to a risk which one of the parties had agreed to bear. Having deliberately decided not to make specific enquiries to ascertain the actual amount of the development charge, the majority owners had clearly assumed the risk that the actual development charge would be lower than the estimate.

10.70 The discussion on common mistake is also noteworthy by reason of Lee Seiu Kin J's reference (at [39]) to *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2003] QB 679 ("*The Great Peace*"). It will be recalled that in *The Great Peace*, the English Court of Appeal had decided that the jurisdiction to set aside a contract on the ground of common mistake resided only in common law but not equity. This resulted, somewhat controversially, in the overrule of *Solle v Butcher* [1950] 1 KB 671. In Singapore, however, a different position appeared to have been adopted by the Court of Appeal in *Chwee Kin Keong v Digilandmall* [2005] 1 SLR 502, where equity's more flexible jurisdiction was expressly preserved. Although the issue in *Chwee Kin Keong* related to unilateral rather than common mistakes, nevertheless, it is clear that the court's reasons for not abandoning the equitable jurisdiction are applicable to both contexts. That being the case, it is uncertain whether or to what extent this aspect of the reasoning in *The Great Peace* is applicable in Singapore.

Illegality

10.71 In interlocutory proceedings for summary judgment dismissing the plaintiff's claim pursuant to O 14 r 12 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) and/or striking out of the claim pursuant to O 18 r 19 of the Rules of Court, Andrew Ang J made some interesting observations as to the effect of bribery on the validity of a contract. In *Sin Yong Contractor Pte Ltd v United Engineers (Singapore) Pte Ltd* [2008] SGHC 43, the plaintiff company sought to recover sums unpaid under 53 invoices for installation of sprinkler systems for the defendant company. The defendant company resisted payment on the ground that the contract was tainted by illegality and was unenforceable. Prior to its corporatisation in 1999, the business of the plaintiff had been run as a sole proprietorship, the sole proprietor being one Tan King Hiang, who became a shareholder and director of the plaintiff from 1999. From 1991 until 2003, Tan paid numerous bribes to one Lee Lip Hiong, the defendant's engineering manager at the time, having the duty to negotiate, award, enter into and administer contracts with contractors and subcontractors such as the plaintiff.

10.72 In reversing the decision of the registrar and dismissing both applications, Andrew Ang J rejected the proposition that the mere fact of bribery constituted fraud as would render the installation contracts to which the unpaid invoices pertained unenforceable. The learned judge also rejected the proposition that performance of the installation contracts was tainted by illegal performance and was, therefore, unenforceable.

Assignment of choses in action

10.73 Surprising as it may seem, until the Court of Appeal handed down its judgment in *Tsu Soo Sin v Oei Tjiong Bin* [2009] 1 SLR 529, the question as to whether the efficacy of an equitable assignment of a legal chose in action depended upon notice of the assignment having been given to the equitable *assignee* remained the subject of much legal uncertainty. So far as Singapore law is concerned, these doubts have now been expelled.

10.74 In the clearest of pronouncements, V K Rajah JA, delivering the judgment of the court, held that such notice served only practical functions, important though they might be. The efficacy of an equitable assignment depended, however, on the actual intention of the assignor, as made manifest by an act of assignment of a clearly identified chose in action. Notice to the assignee is not required for the efficacy of the equitable assignment, although such assignment was subject to the

assignee's right to disclaim the benefit of the chose assigned upon learning of it: *Tsu Soo Sin v Oei Tjiong Bin* [2009] 1 SLR 529 at [57].

Discharge of contract

Frustration and force majeure

10.75 The connection between the doctrines of frustration and *force majeure* was conclusively set out by the Court of Appeal in *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* [2007] 4 SLR 413 ("*RDC*") discussed in (2007) 8 SAL Ann Rev 150 at 179–180, para 10.81). *Inter alia*, it was noted in *RDC* that where a contract was discharged by operation of a *force majeure* clause, it could not simultaneously be said to have been frustrated since the operation of the doctrine of *force majeure* would exclude the doctrine of frustration (at [60]). It appears that this important decision was not brought to the attention of the High Court in *Holcim (Singapore) Pte Ltd v Kwan Yong Construction Pte Ltd* [2008] SGHC 231 ("*Holcim*"; see para 10.66 above on "Duress"). Given the learned judge's finding in *Holcim* that the subsequent agreement to vary the price payable for concrete was supported by valid consideration on application of the rule in *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1 (in that the defendant had avoided having to pay liquidated damages for delay on its part as a result of having the benefit of the continued supply of concrete, pursuant to the variation agreement: *Holcim*, at [81]) and that such variation agreement was not vitiated by duress (as discussed above at para 10.67), the judge's comments on the issues of frustration and *force majeure* ought to be taken to be *obiter dicta*.

10.76 On the question of frustration, the learned judge applied the test set out in *Glahe International Expo AG v ACS Computer Pte Ltd* [1999] 2 SLR 620. Even so, she held that on the facts before her, the imposition of the ban on sand exports by the Indonesian Government did, nevertheless, amount to a frustrating event. The learned judge said (*Holcim (Singapore) Pte Ltd v Kwan Yong Construction Pte Ltd* [2008] SGHC 231 at [77]):

> The premise for the performance of the contract evidenced in the Quotation was that the plaintiff would be able to obtain sand at the prices they had been paying ($11 – $12 per ton) to produce concrete. It also envisaged that the plaintiff would have a ready supply of sand at all times. The situation changed completely after the sand ban, that premise no longer held. Sand was no longer easily available or available at all, even if the plaintiff was willing to pay any price. … The plaintiff could no longer perform the contract because of the non-availability of sand, an event outside its control and which caused it to

close down two plants. The contract evidenced in the Quotation was accordingly frustrated.

10.77 Creating some slight difficulty, however, the learned judge proceeded to take the position that the contract between the parties contained a *force majeure* clause discharging the plaintiff from its obligation to supply concrete, and that "the sand ban would qualify as a *force majeure*" (*Holcim (Singapore) Pte Ltd v Kwan Yong Construction Pte Ltd* [2008] SGHC 231 at [84]). Regrettably, despite the conclusive statement of the law set out by the Court of Appeal in *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* [2007] 4 SLR 413 as to the relationship between these two doctrines, the court did not explicitly make it clear that its views on *force majeure* (*Holcim (Singapore) Pte Ltd v Kwan Yong Construction Pte Ltd* [2008] SGHC 231 at [84]) were to be taken in the alternative to its views on frustration (at [77]). Given the weight of the authority of *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* [2007] 4 SLR 413, *Holcim* ought not to be taken as standing for any position contrary to that taken by the Court of Appeal in *RDC*.

Remedies

Remoteness and proof of damage

10.78 The law of remoteness of damage in contract was extensively discussed by the Court of Appeal in *Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd* [2008] 2 SLR 623. The appellant, Robertson Quay Investment Pte Ltd ("Robertson Quay"), engaged the respondent, Steen Consultants Pte Ltd ("Steen Consultants"), to provide civil and structural engineering services in the construction of a hotel that Robertson Quay owned and was developing ("Gallery Hotel"). In particular, Steen Consultants were to design, plan and supervise the structural works for the hotel.

10.79 Due to a mistake, the wrong set of structural drawings was submitted to the building authorities and was subsequently used in the construction of the hotel. As a result, the hotel was structurally deficient and additional remedial and strengthening works were required, delaying its completion by 101 days. Robertson Quay sought damages against Steen Consultants for loss and damage suffered and expenses incurred as a result of the delay. Liability was admitted, and at first instance, the assistant registrar assessed Steen Consultants' total liability to be $699,429.41, inclusive of $279,363.82 for interest on loans from Robertson Quay's shareholders and other related parties (the "Shareholder Loans"), and $215,859.84 for interest on a term loan and an overdraft facility that Robertson Quay incurred during the delay ("the Loans"). Interest was also ordered on the total damages awarded at

6% *per annum* from the date of the service of the writ to judgment. The assistant registrar did not, however, award Robertson Quay damages for loss of rental income that might have been earned during the period of delay.

10.80 On appeal to the High Court, that part of the assistant registrar's award in relation to the interest on the Shareholder Loans and the Loans was set aside. Interest on the damages was also ordered to run from the date of service of the statement of claim instead of the date of service of the writ. The other parts of the assistant registrar's assessment, including her dismissal of Robertson Quay's claim for loss of rental income, were upheld. Limiting their appeal to the issue of damages for the interest on the Shareholder Loans and the Loans, Robertson Quay then lodged a further appeal.

10.81 Before the Court of Appeal, the appellant took the position that it had suffered actual loss in the form of additional interest expenditure that it would not have incurred had there been no delay, and that this loss was not too remote as to be irrecoverable on the principles set out in *Hadley v Baxendale* (1854) 9 Exch 341; 165 ER 145. This, the Court of Appeal pointed out, entailed consideration of two issues. First, whether Robertson Quay had proved that it had incurred such additional interest as a result of the delay in completion of the hotel; and second, whether such additional interest was recoverable as damages in law: *Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd* [2008] SGCA 8; [2008] 2 SLR 623 at [24]. The former, it should be noted, pertains to the issue of causation of loss, whereas the second, the issue of its remoteness.

10.82 The Court of Appeal pointed out that until causation of loss had been established, there was simply no need to discuss issues such as remoteness of loss or mitigation: *Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd* [2008] 2 SLR 623 at [27]. Even so, there was no need to prove with complete certainty the exact amount of damage suffered: at [28]. However, a flexible approach was to be applied, depending on the circumstances of the case and the nature of the damage claimed. Devlin J's observations in *Biggin & Co Ld v Permanite, Ld* [1951] 1 KB 422 at 438 were cited with approval (*Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd* [2008] 2 SLR 623 at [30]):

> [Where] precise evidence is obtainable, the court naturally expects to have it. Where it is not, the court must do the best it can.

10.83 Thus, although a plaintiff could not make a claim for damages without providing sufficient evidence of the loss suffered, the court ought to permit recovery so long as the plaintiff had attempted to do its level best to prove its loss and provided it had cogent evidence of such

loss: *Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd* [2008] 2 SLR 623 at [31].

10.84 The appellant's case floundered on this point. Although it was able to show the sums of actual interest it had incurred and paid during the period of delay, the Court of Appeal noted that this evidence merely demonstrated the quantum of the alleged damage. It did not demonstrate that such damage was *in fact* suffered by the appellant *as a result of the delay caused by the respondent.* Indeed, even taking into consideration the accounting practice of interest capitalisation, the Court of Appeal noted that interest would still have been payable so long as the loans remained unpaid: *Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd* [2008] 2 SLR 623 at [33].

10.85 To recover the additional interest paid, more was required of the appellant. First, although the facility agreement for the bank loan made it plain that the bank loan had been taken out for the purpose of financing the project, the agreements for the Shareholder Loans had not been produced before the court and there was no evidence that these loans or part thereof had been used to finance the project. Consequently, the court could not see how the appellant's claim for interest incurred on the Shareholder Loans during the period of delay could succeed: *Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd* [2008] 2 SLR 623 at [37]. Furthermore, although the bank loans were taken out to finance the project, part of these had been utilised to pay the interest incurred on the Shareholder Loans at [38].

10.86 Second, the respondent's responsibility for the delay in the project did *not* necessarily or automatically lead to their being responsible for the additional interest incurred as a result of the delay. Such a conclusion could only be reached if it was proved to the court's satisfaction that there was a factual link between the delay and the additional interest in question, and the mere payment of the interest by the appellant was insufficient to fix liability on the respondent, had the project been completed on time. For the Court of Appeal, given the facts of the case, the appellant ought to have gone further to prove that full or partial repayment of the loans would have been effected using the income generated from the operations of the hotel, had the project been completed on time. Mere assertion that such income would have been used to repay the loans was not enough. Rather, evidence that there was in existence an actual system of repaying the loans using operating income ought to have been produced in court: *Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd* [2008] 2 SLR 623 at [39]. Alternatively, the appellant might have been able to recover for additional interest paid if it could demonstrate that interest rates on the loans had increased and/or it had had to borrow further sums, or had had to extend the period of the loans: at [40].

10.87 Third, even if the appellant managed to demonstrate its intention to repay the loans, the Court of Appeal remained sceptical of its quantification of its loss. A claim for all of the additional interest incurred during the period of delay was only possible if the loans had been paid in full. But given the very substantial sums borrowed, the court found it highly unrealistic that the hotel would have, upon completion, instantaneously generated the necessary sums required to effect full repayment and the interest incurred to date: (*Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd* [2008] 2 SLR 623 at [43].

10.88 Although the appeal was readily disposed of on the point of insufficient proof of causation and quantification of loss, the Court of Appeal also made a number of useful observations on the remoteness of loss. It accepted that, on balance, the remoteness rule set out in *Hadley v Baxendale* (1854) 9 Exch 341; 165 ER 145 retained both theoretical coherence and practical functionality (*Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd* [2008] 2 SLR 623 at [53]), and that the rule in *Hadley*, as restated by Asquith LJ in *Victoria Laundry (Windsor) Ld v Newman Industries Ld* [1949] 2 KB 528, represented the law in Singapore on remoteness of contract: *Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd* [2008] 2 SLR 623 at [55]. Though recognising that the rule was not perfect, the Court of Appeal helpfully clarified a number of points.

10.89 First, that the criterion of "reasonable contemplation" applied to both "normal" loss as well as "unusual" loss under each of the limbs of the *Hadley* rule (*Hadley v Baxendale* (1854) 9 Exch 341; 165 ER 145). The difference lay in the horizon of contemplation. For the first limb, the horizon of contemplation was confined to loss which arose naturally in the usual course of things and was, therefore, presumed to have been within the contemplation of the parties. For the second limb, the horizon of contemplation was *extended* to loss that did not occur in the usual course of things: *Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd* [2008] 2 SLR 623 at [59].

10.90 The Court of Appeal also usefully highlighted that the criterion of "reasonable contemplation" of loss as used in connection with the remoteness rule in contract was not to be conflated with the criterion of "reasonably foreseeable" loss as commonly used in connection with remoteness of damages in tort. The difference between the two criteria of remoteness arose because the law of contract was about *agreement*: *Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd* [2008] 2 SLR 623 at [77]. Thus, it was held (at [79]) that, in its formulation of:

> … rules and principles that would apply universally to all contracting parties in situations where the contracting parties have not expressly provided, in advance, for what is to happen in the event of a breach of their respective contracts … the courts will bear in mind the fact that

> the contracting parties did have the opportunity to communicate with each other in advance. The courts must, however, also be careful to ensure that the rules and principles formulated do not result in a rewriting of the contract in question …

10.91 With this in mind, the Court of Appeal was of the view that third-party financing of the costs of construction in large commercial construction projects was inevitable in the present day and age and accordingly, "… the parties to such a project, as reasonable people, must be imputed with the knowledge that a delay in completion would certainly give rise to additional financing costs." Indeed, the court could not see why additional interest incurred in large commercial construction projects due to late completion should not, in principle, be recoverable under the first limb of the rule in *Hadley v Baxendale* (1854) 9 Exch 341; 165 ER 145: *Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd* [2008] 2 SLR 623 at [91]. Thus, but for the appellant's failure to provide satisfactory proof of its loss in the form of additional interest payments made as a result of the delay in completion, such loss would have been recoverable under the first limb of the rule in *Hadley v Baxendale* (1854) 9 Exch 341; 165 ER 145 as not being too remote: *Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd* [2008] 2 SLR 623 at [94].

Assessment of damages for loss of amenity

10.92 In *Sonny Yap Boon Keng v Pacific Prince International Pte Ltd* [2009] 1 SLR 385, the High Court was provided with an opportunity to revisit the *dicta* of Andrew Phang Boon Leong J (as he then was) in *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric* [2007] 1 SLR 853 at 903–904 on the limits of relying on market rental value of a substitute property as a means to measure loss of use of property.

10.93 The plaintiff, Mr Sonny Yap, had engaged the first defendant ("Pacific Prince") to design and build a house on land owned by the plaintiff and his wife. Completion of the house was delayed by three months beyond the expressly stipulated date of completion. The plaintiff also alleged that the bedrooms constructed by the first defendant were not in compliance with the contract specifications and were too small. There were also other various breaches, but the parts of the judgment of greatest interest relate to these two matters.

10.94 First, in relation to the assessment of damages for the plaintiff for the late completion, Judith Prakash J observed that it would not be correct to measure the loss caused *to the plaintiff* by the delay in completion by reference to the cost of renting similar premises in the vicinity since: (a) the plaintiff had not suffered any such loss – he had not rented any other accommodation in light of the delay, but had

merely continued to stay on in the flat he and his family had been residing in; and (b) the plaintiff had intended to live in the house to be constructed by the first defendant as his residential home.

10.95 Taken together, these two reasons set out the basic principle that one may not recover for loss that one does not suffer. Given the former, it was plain that the plaintiff had not endured any loss by reference to the cost of renting alternative accommodation. Given the latter, it was also impossible for the plaintiff to assert that it had suffered any expectation loss by reference to the income he would have enjoyed by renting the property out. Had the house been constructed with a view to renting it out to generate income, on the expectation model of recovery, the plaintiff would have been entitled to assert that its inability to generate such income for the period occasioned by the first defendant's delay in completing construction amounted to a loss caused by the first defendant's breach of contract. But this was not the case. Rather, the plaintiff's loss in the circumstances pertained to the loss of income that might have been earned through renting out his existing flat, had the property been completed in accordance with the contract: *Sonny Yap Boon Keng v Pacific Prince International Pte Ltd* [2009] 1 SLR 385 at [120]. However, as there was no evidence of this, Prakash J awarded the plaintiff nominal damages of $1,000 under this head.

10.96 Second, Prakash J was concerned with the problem of the shortfall in the floor area of the bedrooms. In relation to this, the plaintiff had claimed for the cost of reconstructing the affected rooms. Noting the obvious parallel with the decision of the House of Lords in *Ruxley Electronics and Construction v Forsyth* [1995] 3 WLR 118, Prakash J held that, in the case before her, it was necessary to look at the entire contractual objective and not just the objective of the individual specifications in the contract, and that the entire objective was to construct a house that was suitable for the occupation of the plaintiff's family (*Sonny Yap Boon Keng v Pacific Prince International Pte Ltd* [2009] 1 SLR 385 at [127]). In the judgment of the court, this objective had been met, even though the four bedrooms as constructed by the first defendant were measurably smaller in dimension than that desired by the plaintiff. Taking into consideration the original cost of building (being $736,400) and comparing that against the cost of reconstruction works (being $141,080) which would require extensive demolition rendering the house to be uninhabitable for the period of reconstruction, Prakash J accepted the first defendant's submission that recovery of such cost of reconstruction would be unreasonable since his loss only pertained to the lack of space in the bedrooms. Though smaller than desired, leading to a loss of amenity to the plaintiff, they were still usable as bedrooms.

10.97 The question, then, was whether only nominal damages, too, ought to be awarded for the plaintiff's loss of amenity. Prakash J followed the position taken by Lord Bridge of Harwich and Lord Mustill in *Ruxley Electronics and Construction v Forsyth* [1995] 3 WLR 118, and held that the court was entitled to make an award to compensate the plaintiff for the loss of amenity arising from the shortfall in the floor area of the bedrooms, even though there was no evidence that such shortfall had had any adverse effect on the market value of the property, nor had there been any skimping or diminution in the value of the work done by the first defendant: *Sonny Yap Boon Keng v Pacific Prince International Pte Ltd* [2008] SGHC 161 at [129]. Taking into account the differing degrees to which the sizes of the bedrooms had fallen short, Prakash J assessed the plaintiff's loss of amenity to amount to $50,000, that being the sum "sufficient to compensate the plaintiff for the inconvenience to be experienced from the shortfall over the years": *Sonny Yap Boon Keng v Pacific Prince International Pte Ltd* [2009] 1 SLR 385 at [128].

Quantum meruit

10.98 Joining a line of Singapore cases ranging from *Rabiah Bee bte Mohamed Ibrahim v Salem Ibrahim* [2007] 2 SLR 655 to *Lee Siong Kee v Beng Tiong Trading, Import and Export (1988) Pte Ltd* [2000] 4 SLR 559, Woo Bih Li J in *Yaku Shin (JB) Sdn Bhd v Panasonic AVC Networks Singapore Pte Ltd* [2008] 4 SLR 193 had occasion to repeat the point that there are two forms of *quantum meruit*: one, arising out of contractual agreement ("contractual *quantum meruit*"), and a second, arising out of unjust enrichment ("restitutionary unjust enrichment"), clarifying that though a contractual relationship was necessary for the former, the latter restitutionary unjust enrichment could be found in the absence of any contract: *Yaku Shin (JB) Sdn Bhd v Panasonic AVC Networks Singapore Pte Ltd* [2008] 4 SLR 193 at [79]–[81]. But, the presence of contractual liability could preclude the possibility of unjust enrichment, as was the case on the facts before him.

10.99 Yaku Shin (JB) Sdn Bhd ("YKJB") brought proceedings against Panasonic AVC Networks ("Panasonic") on the basis of restitutionary *quantum meruit* for goods supplied to Panasonic. These goods had been ordered by Panasonic via an online procurement system, the orders being placed with Yaku Shin (M) Sdn Bhd ("YKM"), a company in common ownership with YKJB. Although the orders were indisputably placed with YKM, fabrication and delivery of the goods was effected by YKJB. Consequently, it was not possible for YKJB to succeed in its claim against Panasonic for restitutionary *quantum meruit* since Panasonic remained contractually liable to make payment to YKM, the entity with whom Panasonic's orders had been placed and with whom it was in contractual relations with. Accordingly, at no point would Panasonic

have been unjustly enriched by its receipt of the goods fabricated by YKJB: *Yaku Shin (JB) Sdn Bhd v Panasonic AVC Networks Singapore Pte Ltd* [2008] 4 SLR 193 at [82].

Assessment of damages for fraudulent misrepresentation

10.100 The long-running litigation over the ill-fated involvement of Wishing Star Ltd in the installation of the glass façade of the Biopolis developed by the Jurong Town Corporation has, it seems, finally come to an end. Having been found liable for fraudulent misrepresentation, the question of assessment of damages for that tort came for consideration before the Court of Appeal in *Wishing Star Ltd v Jurong Town Corp* [2008] 2 SLR 909. Though this case might be more appropriately dealt with in the section on tort, it is useful to mention this case within the present contractual context, if only to highlight the importance of keeping the very different bases of an award in contract for breach, as compared with an award in tort, distinct from each other.

10.101 The salient facts were that the appellant, Wishing Star Ltd ("WSL"), had successfully tendered to design, supply, deliver and install curtain walling and cladding systems for the Biopolis project developed by the respondent, Jurong Town Corp ("JTC"). There was one bid, just marginally higher than WSL's, but JTC had disregarded that bid as they had had poor experiences with that contractor in previous projects. The next highest bid to WSL's bid of $54m was for $63,458,706. It transpired that WSL was not able to perform, as represented, and JTC undertook another tender exercise, eventually appointing a new contractor, Bovis Lend Lease ("BLL") to complete the façade works pursuant to a new contract (the "BLL contract"), BLL having submitted the lowest bid in this exercise of $61.81m.

10.102 Various heads of damage were claimed by JTC from WSL on account of their fraudulent misrepresentation, but only the following were allowed by the judge in the court below:

(a) $7.81m, being the difference between the value of WSL's bid and the value of BLL's bid;

(b) $18,223.97, being expenses incurred by JTC as a result of having to visit China to inspect WSL's facilities;

(c) $313,600, being expenses incurred by JTC as a result of having to attend to WSL during the time when it was seeking to perform its obligations under their contract with JTC; and

(d) $8,000, being the costs of engaging a surveyor for inspecting WSL's facilities in China.

> Given that the victim of a fraudulent misrepresentation may recover all losses directly caused by the misrepresentation, the Court of Appeal agreed that, other than the first head of loss, *ie*, the $7.81m claimed as the difference between WSL's bid and BLL's bid, all the other heads of loss were rightly awarded and upheld the decision below.

10.103 The difficulty with the claim for the $7.81m was, unfortunately, that it had not been demonstrated how this loss could be said to be *directly caused* by WSL's misrepresentation. It had put in the lowest tender, and the next bid that might have been seriously considered by JTC, was for a sum in excess of $64m. On these premises, the Court of Appeal noted as follows (*Wishing Star Ltd v Jurong Town Corp* [2008] 2 SLR 909 at [56]):

> What this scenario meant was that if WSL had never tendered for the contract for the façade works in the original tender exercise, JTC would have been left with Liang Huat's bid as, in effect, the lowest bid that was available for acceptance … And, taking into account that the Project had to be completed on an urgent basis, it is reasonable to infer that JTC would have accepted Liang Huat's bid instead of calling for new bids …

10.104 Given the above, it was clear to the Court of Appeal that:

> (a) JTC could not have accepted any bid below that of Liang Huat's which was in excess of $64m; and
>
> (b) the lowest bids leading to the appointment of BLL was that submitted by BLL (being in excess of $63m).

10.105 As Lord Hoffmann had observed, *obiter*, in *South Australia Asset Management Corp v York Montague* [1997] AC 191 at 216, "[t]he defendant is clearly not liable for losses which the plaintiff would have suffered even if he had not entered into the transaction." It was, therefore, not possible for JTC to maintain the argument that the difference between the value of the contracts entered by WSL and BLL with JTC, respectively, was loss that flowed directly from the transaction entered into as a result of WSL's fraudulent misrepresentation. Accordingly, the $7.81m claimed under this head was disallowed.

10.106 The result may seem surprising, given the plain finding of WSL's deceit and the extensive liability one typically associates with liability under the tort of deceit which is the basis of recovery in a case of fraudulent misrepresentation. But this case reinforces the point that damages for tort are to place the victim of the tort in the position as if the tort had not occurred. And, had the tort not occurred, it was likely that JTC would have gone on to appoint another contractor who would, most likely, have charged JTC more than the $54m proposed by WSL.

Therefore, it was not possible to draw any connection between the $54m proposed by WSL in the original tender, and the price fixed in the BLL contract arising out of the subsequent tender exercises. There was, it seemed, a confusion between the contract and tort measures of damages, and the two, the court emphasised, ought not to be conflated: *Wishing Star Ltd v Jurong Town Corp* [2008] 2 SLR 909 at [43].

Damages on the "broad ground"

10.107 The Court of Appeal has in *Family Food Court v Seah Boon Lock* [2008] 4 SLR 272 provided further guidance on the resolution of the problem of the infamous "black hole" encountered in cases where a contract entails performance for the benefit of a non-party. Usefully, it also considered the interaction between this quintessentially contract problem with the doctrine of undisclosed principals.

10.108 This was an appeal from the decision of Andrew Ang J in *Seah Boon Lock v Family Food Court* [2007] 3 SLR 362. In this case, the first plaintiff had been licensed by the defendant to operate a food stall on the defendant's premises. The first plaintiff sought to recover substantial damages when that licence was wrongfully terminated. The complication arose because he appeared to have been acting as agent of an undisclosed principal. Following the judgment handed down by the Court of Appeal, the following points now seem clear:

(a) The "narrow ground" is only applicable in the context of a breach of contract where the third party to the contract has no contractual remedy to recover substantial damages against the contractual promisor (*Family Food Court v Seah Boon Lock* [2008] 4 SLR 272 at [47]), where it is in the contemplation of the contracting parties that the proprietary interest in the contractual subject matter may be transferred from one owner to another after the contract had been entered into but before the occurrence of any breach of contract: at [36], [40] and [58].

(b) The "narrow ground" is not rendered inapplicable by the availability to the third party of an alternative cause of action against the contractual promisor in tort: *Family Food Court v Seah Boon Lock* [2008] 4 SLR 272 at [47].

(c) Like the narrow ground, the broad ground applies only in the context of a breach of contract, though on the broad ground, the plaintiff would be recovering substantial damages for its own loss and not on behalf of the third party: *Family Food Court v Seah Boon Lock* [2008] 4 SLR 272 at [52].

(d) The broad ground was, however, constrained by an objective test of reasonableness as to the performance interest claimed so as to curb what would otherwise be a windfall

accruing to the plaintiff and to limit recovery only to instances where the performance interest claimed was genuine (at [53]).

(e) Over and above the objective test of reasonableness applicable to the broad ground, and the element of contemplation or foreseeability required in the narrow ground, both the broad and narrow grounds continued to be subject to the traditional legal mechanisms for controlling recovery for breach of contract, to wit, the mechanisms pertaining to causation of loss, remoteness of damage, mitigation of loss and the requirement of certainty of loss; but the broad and narrow grounds did *not* correlate, respectively, to the first or second limbs of the rule in *Hadley* (at [55]).

(f) The broad and narrow grounds were, however, conceptually inconsistent with each other and could not be applied simultaneously (at [56]).

(g) Given the need for contemplation of transfer, the narrow ground is not applicable in a case where the third party is an undisclosed principal. It would not be possible to argue that the loss of the plaintiff/promisee was to be seen as the loss of the third party/principal since the third party/principal was undisclosed and the defendant/promisor would not have known of him: *Family Food Court v Seah Boon Lock* [2008] 4 SLR 272 at [58].