10. CONTRACT LAW

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Formation of contract

Sanctity of contracts

10.1 The case of *Tee Soon Kay v AG* [2007] 3 SLR 133 presented the Court of Appeal with an opportunity to restate the fundamental importance of upholding the sanctity of contracts. In this case, the appellants were a group of public officers who had opted to irrevocably convert from the pension scheme to the Central Provident Fund ("CPF") scheme in 1973. More than 30 years later, the appellants commenced the present proceedings and contended, unsuccessfully, that they were entitled to return to the pension scheme on the ground, *inter alia*, that the purported condition of irrevocability was *ultra vires* and unconstitutional. Once the arguments on unconstitutionality fell apart, the appellants' application was, in substance, a request that the court sanction its breach of contract. Such a request, if permitted, would "dismantle the very foundation and structure of the law of contract itself" (at [109]). Andrew Phang Boon Leong JA thus observed:

> The law of contract is, simply put, premised on parties fulfilling promises made to each other pursuant to a legal agreement entered into between them. What, therefore, the appellants are attempting to do is to ignore the very foundation of what a legal contract is about in the first instance. If parties were allowed to walk away from contracts simply because they felt that the contract entered into was no longer

> to their advantage, chaos would ensue. Indeed, this would be an understatement. The very concept of an ordered society depends on parties observing the law in general and the promises validly made under law to each other in particular. This is not only obvious and axiomatic; it is utterly essential to a proper functioning of society itself.

Certainty and completeness

10.2 The well-established principle that an agreement lacking in essential terms cannot constitute a binding contract was applied in *Colliers International (Singapore) Pte Ltd v Senkee Logistics Pte Ltd* [2007] 2 SLR 230. In that case, an estate agent's claim against the vendor for commission purportedly due in respect of a sale of the vendor's property failed because no agreement was in fact reached on the quantum of the commission. This does not suggest, of course, that a contract would invariably fail if the parties have yet to agree to a price, or that a genuine bargain could be struck down on the ground that it lacks some subsidiary or inessential term. In the present case, however, the term disputed was by no means minor or subsidiary in nature. On the contrary, the amount of commission went to the heart of the parties' agreement. The agent's claim that a binding contract had resulted *via* conduct also failed because the relevant agreement could not be inferred from the mere fact that the vendor had completed the sale with the purchaser. The agent appreciated that there was a real risk that it would not be remunerated when it proceeded to facilitate the transaction without first securing a firm commitment on its commission, and such a risk had indeed materialised. In any event, even if there had been a binding contract, the claim for commission would still have failed because the agent was *a* factor, but not the effective cause of the sale.

10.3 In *T2 Networks Pte Ltd v Nasioncom Sdn Bhd* [2008] 2 SLR 1 (see also para 10.4 below on "Consideration") Judith Prakash J rejected an argument that the parties were bound by a settlement agreement on the ground, *inter alia*, that the agreement lacked certainty. Although it was clear that the parties had in fact agreed to certain payment obligations, they had not in fact agreed to a payment schedule. On the evidence available, it was not possible to imply that payment would be made within a reasonable time as it was clear that one of the parties would not have agreed to such a term.

Consideration

10.4 The alleged settlement agreement in *T2 Networks Pte Ltd v Nasioncom Sdn Bhd* [2008] 2 SLR 1 (see para 10.3 above on "Certainty and completeness") was also found to be invalid for lack of consideration. In that case, the plaintiff, a company providing

telecommunications and internet services, had entered into a number of agreements to provide its services to the defendant, a company incorporated in Malaysia. The plaintiff claimed against the defendant for payments due and owing on these agreements. In defence, the defendant argued that the plaintiff was precluded from making these claims by the terms of a settlement agreement binding the parties. Judith Prakash J held that the promises comprised in this agreement were invalid for lack of consideration. First, the agreement provided for the transfer of 51% of the shares in the plaintiff to the defendant's nominees but no consideration was stated for this transfer. Secondly, the defendant undertook to "settle the outstanding debts to [the plaintiff]" but this promise was not in and of itself sufficient consideration since the defendant was already legally bound to pay those sums. Although the promise to pay an existing debt could constitute consideration if it were made as a compromise of a disputed claim, this was not the case because no material dispute existed between the parties at the relevant time. Finally, the defendant's undertaking to make payments for sums owing by the plaintiff to third party creditors was also found to be invalid as there was no evidence that the defendant had agreed to or assumed the plaintiff's legal obligations to the third parties.

Estoppel

10.5 In (2006) 7 SAL Ann Rev 171 at 173–174, we noted at paras 10.7–10.8 that in the case of *Abdul Jalil bin Ahmad bin Talib v A Formation Construction Pte Ltd* [2006] 4 SLR 778, Judith Prakash J had endorsed the view that it was unnecessary for a party relying on the doctrine of promissory estoppel to establish that he had suffered detriment. As this holding was not challenged by counsel on appeal, the Court of Appeal did not see fit to comment on the same in *Abdul Jalil bin Ahmad bin Talib v A Formation Construction Pte Ltd* [2007] 3 SLR 592.

10.6 In *Tee Soon Tay v AG* [2007] 3 SLR 133 (see para 10.1 above on "Sanctity of contracts"), Andrew Phang JA helpfully discussed the scope and rationale of the doctrine of promissory estoppel. The learned judge explained (at [114]) that "the doctrine was developed in order to avoid the injustice that would otherwise result when a contracting party pleaded an absence of consideration" and is therefore underpinned by the notion of unconscionability. The learned judge further noted that uncertainty still surrounds the question whether this doctrine could be invoked as a cause of action, although such a development had in fact taken place in Australia, and there was indication that the traditional position could be reviewed in the future.

10.7 The question whether an estoppel by convention applied to prevent a party from denying that an assumed state of affairs existed

arose in *Travista Development Pte Ltd v Tan Kim Swee Augustine* [2007] 3 SLR 628 (see paras 10.15–10.17 below on "Construction of terms"). Here, the defendants had on 12 December 2006 contracted to sell their property to the plaintiff. As the plaintiff was a foreign-incorporated company, the sale was conditional upon the plaintiff obtaining a Qualifying Certificate ("QC") from the Singapore Land Authority ("SLA") and cl 9(b) of the agreement provided, *inter alia*, that the plaintiff was to use "best endeavours" to obtain the approval and to do so "without delay". Clause 3.2 of the agreement further provided that the completion of the sale was to take place within six weeks from the date of receipt of the QC or within three months from the date of the agreement, whichever was the later. The SLA approved the plaintiff's application for the QC on 29 December 2006 but the QC would only be issued upon the plaintiff furnishing a banker's or insurer's guarantee to guarantee the plaintiff's compliance with the terms of the QC. Having been informed of the approval, the defendants assumed that the plaintiff would swiftly comply with the said condition and procure the issue of the QC. On that basis, both parties' lawyers made preparations for the transaction to be completed on 12 March 2007, that date being the "later" date determined in accordance with cl 3.2.

10.8 Completion did not, however, take place on 12 March 2007 as the plaintiff had not obtained the guarantee in time and the defendants terminated the agreement on that ground. Thereafter, the plaintiff commenced proceedings seeking a declaration that it was entitled to complete the transaction six weeks after the issue of the QC. In the High Court, Judith Prakash J found that the defendants were entitled to terminate the agreement as the plaintiff had not employed best endeavours to obtain the QC in time. Prakash J further held, *obiter*, that the parties' conduct gave rise to an estoppel which prevented the plaintiff from denying that 12 March 2007 was the expected completion date. Having permitted transfer forms dated 12 March 2007 to be sent to the defendants, the plaintiff was aware of the defendants' expectation to complete the transaction on that date but took no step to inform the defendants that the QC would not be issued in time. On these facts, it was unconscionable to allow the plaintiff to deny that 12 March 2007 was the expected completion date.

10.9 The Court of Appeal affirmed the High Court's finding on the issue of breach but disagreed with its conclusion on the issue of estoppel (see *Travista Development Pte Ltd v Tan Kim Swee Augustine* [2007] SGCA 57). The evidence did not establish that the parties had acted on a shared assumption. At its highest, the respondent-vendor had assumed that the appellant-purchaser would use its best endeavours to obtain the QC but that was not a sufficient basis for assuming that the completion date would *definitely* be 12 March 2007. Even if the purchaser had used

its best endeavours, there was no certainty that the QC would be obtained in time to complete the transaction on 12 March 2007.

Formalities

10.10 In *Seah Boon Lock v Family Food Court* [2007] 3 SLR 362, the defendant attempted to resist a claim on the ground that an agreement for the lease of certain hawker stall premises was unenforceable under s 6(*d*) of the Civil Law Act (Cap 43, 1999 Rev Ed) because it was not signed. Rejecting this argument, Andrew Ang J held s 6(*d*) is satisfied if the document in question set out all the material terms of the agreement (even if it was not prepared in the form of a memorandum), and further that the requirement for signature might be satisfied if the agreement is evidenced by two documents, only one of which is signed. On the facts, the signature requirement was met because the unsigned agreement was followed by a signed letter from the defendant confirming the lease. In addition, since the first plaintiff had already performed those contractual obligations which were due, the defendant would be estopped from invoking the statutory provision to deny its contractual obligations.

10.11 A similar issue arose in *Reindeer Developments Inc v Mindpower Innovations Pte Ltd* [2007] SGHC 170. Here, the plaintiff vendor orally agreed to grant an option to the defendant purchaser. The purchaser signed the option agreement and paid the deposit by way of a cheque, which was subsequently presented for payment and cleared. The vendor did not, however, sign the option agreement upon receipt of the same and reneged on the deal on learning that the property market was on the rise. Lai Siu Chiu J held for the purchaser, rejecting the vendor's argument that the option agreement was unenforceable for non-compliance with s 6(*d*) of the Civil Law Act (Cap 43, 1999 Rev Ed). Lai J applied the settled proposition that s 6(*d*) does not require that the contract itself be in writing, and that provision is complied with if the "requisite three Ps" are present. As the purchaser's representative had identified the property on the reverse of the cheque, the price of the property was known, and as the identities of the parties were also reflected on the cheque itself, all the material terms of the option had been reflected in writing, and hence, the requirement of s 6(*d*) complied with.

The terms of the contract

Construction of terms

10.12 The importance of the factual matrix to the construction of contracts was emphasised by the Court of Appeal in *Sandar Aung v*

Parkway Hospitals Singapore Pte Ltd [2007] 2 SLR 891 (see also (2006) 7 SAL Ann Rev 171 at 175, para 10.10). The appellant had executed an agreement which obliged her to be liable for "all charges, expenses and liabilities incurred by and on behalf of the patient", being her mother and who had been admitted to the plaintiff's hospital for an angioplasty procedure. The appellant had also signed a document which estimated the hospital charges at approximately $15,000. As a result of unexpected post-surgery complications, the final bill rendered far exceeded the initial estimate. The appellant argued that on a proper construction of the agreement, the scope and ambit of her undertaking was limited to those charges incurred by the patient in connection with the angioplasty, and she was thus not liable for the invoiced sum. At trial, the court had taken the view that the words "all charges, expenses and liabilities" have to be given their plain meaning and could not be limited to the estimated charges (see (2006) 7 SAL Ann Rev 171 at 175, para 10.10). The Court of Appeal disagreed with this reading of the phrase. Andrew Phang JA, delivering the judgment of the court, stated (at [19]):

> The focus … ought not to be on the word 'all' but, rather, on the *type* of charges, expenses and liabilities that the parties intended to be covered under the contract … It would then follow that the appellant would be liable for *all* of the charges *that fell within the ambit and scope of the contract*. [emphasis in original]

10.13 As for what the ambit and scope of the contract is, this depends on a proper construction of the contract itself. In this regard, the court noted that, as no contract exists in a vacuum, its language has to be construed in the context in which the contract is made, *ie*, the factual matrix. In response to the respondent's argument that such an approach in the present case would offend the "four corners" rule of construction as the terms of the contract were clear, the court observed (at [29]) as follows:

> [E]ven if the plain language of the contract appears otherwise clear, the construction consequently placed on such language should not be inconsistent with the context in which the contract was entered into if this context is clear or even obvious, since the context and circumstances in which the contract was made would reflect the intention of the parties when they entered into the contract and utilised the (contractual) language they did. It might well be the case that if a particular construction placed on the language in a given contract is inconsistent with what is the obvious context in which the contract was made, then *that* construction might *not* be as clear as was initially thought and might, on the contrary, be evidence of an ambiguity. [emphasis in original]

10.14 In the circumstances, the court concluded that regard must be had to the context and terms of the estimate, which clearly showed that

the scope of the appellant's liability was confined to the angioplasty procedure.

10.15 It is an established principle of documentary interpretation that clauses in a written agreement cannot be read in isolation but must be read in the context of the entire document. Additionally, in the construction of a contract, every part should, where possible, be given effect and no part should be considered redundant or surplus. These principles were applied by the Court of Appeal in *Travista Development Pte Ltd v Tan Kim Swee Augustine* [2007] SGCA 57 (for facts, see para 10.7 above on "Estoppel") in determining the completion date for the purposes of an agreement for the sale and purchase of property. The completion date defined by cl 3.2 of the agreement depended on the later of two possible dates, specifically six weeks from the date of receipt of the QC or within three months from the date of the agreement. However, how quickly the QC might be received was itself dependent on the plaintiff's efforts and the agreement obliged the plaintiff to exert its "best endeavours" to obtain the QC without delay. It was contended by the defendants that if the plaintiff had used its best endeavours, it would have obtained the QC in time to complete the sale and purchase by 12 March 2007 (which date was three months from the date of the agreement). The plaintiff, however, contended that it was entitled to complete the sale and purchase within six weeks from the date of its receipt of the QC.

10.16 The Court of Appeal took the view that if the plaintiff's contention was right, this would render the obligation to use its best endeavours to obtain the QC "without delay" nugatory, a conclusion that could only be reached by ignoring the established principles of documentary interpretation. Thus, on an objective evaluation, the clause imposing the "best endeavours" obligation on the plaintiff had to be read together with cl 3.2 to determine the "later" date as contemplated by the parties. The court stated (at [23]):

> [T]he 'best endeavours' provision … was intended to fix the earliest date by which the [plaintiff] had to complete the purchase; if that date occurred earlier than the 'later' date as computed under cl 3.2 (*ie*, 12 March 2007), then the 'later' date would be the Completion Date. Accordingly, unless the [plaintiff] was able to show that it had failed to obtain the QC by the 'later' date of 12 March 2007 despite having used its best endeavours to do so, it would be in breach of cl 3.2.

10.17 It was, thus, necessary to determine whether the plaintiff had discharged its obligation to use its best endeavours to obtain the QC. The court stated the legal obligation imposed by a best endeavours clause as follows (at [22]):

> The test to determine whether a party has exercised its best endeavours is an objective one. But, it is also a composite test in that the covenantor may also take into account its own interests. While the covenantor has a duty to use its best endeavours to perform its contractual undertaking within the agreed time, the duty is discharged upon the covenantor 'doing everything reasonable in good faith with a view to obtaining the required result within the time allowed'.

10.18 It will be recalled that the QC would only be issued upon the plaintiff furnishing a banker's or insurer's guarantee to guarantee the plaintiff's compliance with the terms of the QC. The plaintiff, however, failed to obtain a banker's guarantee in time. The court found that the reason for the delay was that the plaintiff had coupled its application for the guarantee with a request to the banks to finance the purchase and redevelopment of the property. As the plaintiff failed to adduce evidence to show that the banks would not have agreed to provide the guarantee separately from overall financing for the purchase and redevelopment, the court concluded that the plaintiff had, in not applying for the guarantee separately, failed to use its best endeavours to obtain the QC.

10.19 The aforementioned principles of contract interpretation were also applied by the High Court in *MacarthurCook Property Investment Pte Ltd v Khai Wah Development Pte Ltd* [2007] SGHC 93, wherein MacarthurCook Property Investment Pte Ltd ("MPI") and MacarthurCook Ltd ("ML") jointly applied for a declaration that an option agreement for the sale and leaseback of certain leasehold property still subsisted and remained valid and binding. The respondent ("KWD") was the owner of the leasehold interest in certain property, the reversionary interest in which was owned by the Jurong Town Corporation. ML was an Australian company which was looking to establish a real estate investment trust ("REIT") in Singapore, and MPI was its subsidiary and the trustee of the REIT. KWD granted MPI a call option which would require the former to enter into a sale and purchase agreement in respect of the property. The option stipulated a period ending 31 January 2007 (the "satisfaction period") by which certain conditions had to be satisfied. These conditions included the obtaining of the approval of JTC for the disposal of KWD's leasehold interest in the property, which cl 2 of the option obliged KWD to "use its best endeavours to procure … by the end of the Satisfaction Period". The procurement of certain other approvals from JTC fell within the province of MPI, which was also similarly obliged to exercise best endeavours to secure the same. Clause 2 further provided that should JTC refuse to give the necessary approvals or subject such approvals to conditions that were considered unsatisfactory to the parties, either party would be entitled to terminate the option at the end of the satisfaction period. Lastly, cl 4.2 of the option provided for the option to terminate immediately upon the expiry of the satisfaction period if "the

Conditions are not either satisfied or waived by the end of the Satisfaction Period".

10.20 KWD duly applied to JTC seeking its approval to the transaction, which approval was not granted until 2 February 2007. In addition, the approval was conditional upon the REIT being listed. Thereupon, KWD wrote to MPI, adopting the position that as the conditions had not been satisfied by the end of the satisfaction period, the option was automatically terminated. The applicants argued, *inter alia*, that KWD's literal reading of cl 4.2 was commercially absurd as it would allow KWD to withdraw from the transaction without incurring any liability by simply refusing to satisfy any of the conditions. Judith Prakash J disagreed with the applicants' submission. Her Honour accepted that the rationale behind cl 4.2 was to "set down a date by which the parties would have a significant degree of certainty about whether the contingent requirements had been satisfied before they proceeded to expend resources to facilitate further progress of the sale and leaseback transaction" (at [32]). In any case, the option imposed a parallel obligation on KWD to use its best endeavours to procure the requisite approval. Accordingly, if KWD had refused to do so, it would be in breach of its contractual obligation and be liable in damages. KWD was, therefore, entitled to rely on cl 4.2 to terminate the option. Prakash J stated (at [39]) as follows:

> The Option would not survive the Satisfaction Period because satisfaction of the Conditions before the Satisfaction Period was the condition precedent to the exercise of the … Option but the party in default would not escape without liability. …Thus, notwithstanding that cl 4.2 would bring the Option to an automatic end if the Conditions were not satisfied by the end of the Satisfaction Period, if the non-satisfaction of the Conditions was in fact due to the respondent's failure to exercise its best endeavours to procure the satisfaction of Condition 1, then the respondent would be liable in damages to the applicants. It could not, therefore, take the easy way out of the transaction by simply sitting back after executing the Option and waiting for the expiry of the Satisfaction Period.

10.21 The question that had then to be considered was whether KWD had fulfilled its obligation to use best endeavours towards the satisfaction of the conditions within the stipulated period. The applicants argued that KWD had failed in its obligation and thus could not rely on its own default to insist on its strict legal rights. Prakash J found (at [72]) that KWD had "in fact acted from the beginning as a prudent man who was concerned to bring matters to a favourable conclusion". However, the question was whether, in failing to "chase" JTC for its reply before 31 January 2007, it was in breach of its obligation. Her Honour considered this a "delicate question" as a man who was anxious to bring about a certain state of affairs that depended on the approval of a third party would often be a nuisance if he

continually pestered the third party for a positive response. On balance, however, her Honour took the view that KDW ought to have at least informed JTC of the vital importance of providing an answer before 31 January 2007. In failing to do so, KDW was in breach of its obligation to exercise best endeavours.

10.22 However, Prakash J accepted KWD's argument that as the applicants were *themselves* obliged to procure certain approvals from JTC within the satisfaction period and had similarly not pressed JTC for a response within that time, they were not without fault. Thus, the applicants could not, in the circumstances, take advantage of the principle "no man may take advantage of his own wrong". In Prakash J's words (at [75]):

> [The applicants'] failure operates … to negate the consequences of the respondent's similar failure. There are two ways of looking at this. The first is that each party was … in breach of its best endeavours obligation and therefore neither party could seek to rely on the wrong of the other so as to prevent the other from relying on the operation of cl 4.2. The second is that, neither party thought that the requirement of best endeavours obliged it to send JTC a reminder or inform JTC that 31 January 2007 was a vital date before which the answer to the applications should be provided. In either case, the result is that [KDW] remained entitled to rely on cl 4.2 notwithstanding its failure to chivvy JTC.

10.23 The option was, therefore, held to have been terminated automatically by the end of the satisfaction period as the conditions had not been satisfied by then.

10.24 In *NTUC Co-operative Insurance Commonwealth Enterprise Ltd v Chiang Soong Chee* [2007] SGHC 222, the High Court had to construe a disability benefit clause in a life insurance policy. The clause provided as follows:

> The disability referred to herein must be total and permanent and such that there is neither then nor at any time thereafter any work, occupation or profession that the Life Assured can ever sufficiently do or follow to earn or obtain any wages, compensation or profit.

10.25 The clause also provided that certain conditions, including, *inter alia*, the total and irrecoverable loss of the sight of both eyes or the loss by severance of both hands, would be considered total and permanent disability. There were two questions of interpretation the court had to address. First, whether the clause imposed, for the purposes of making payment, two requirements, *ie*, that the disability must be total and permanent *and* that this disability precluded the assured from gainful employment. Woo Bih Li J was of the view that the phrase "and such that" should be interpreted such that "total and permanent" meant

the inability of the assured from being engaged in gainful employment. In any case, the *contra proferentem* rule applies where there is ambiguity and this would require the provision to be read against the insurer who drafted the terms, reinforcing the argument for one requirement.

10.26 The second question was whether it would be sufficient for the assured to establish that he could no longer substantially carry out his *usual* occupation (the broad interpretation), without having to establish that he was unable to carry out *any* work (the strict interpretation). In Woo J's view, the literal meaning of the clause pointed clearly in favour of the strict interpretation. However, aware that the adoption of the strict interpretation could result in extreme and unfair consequences for the assured, his Honour took pains to review and distinguish cases that have decided in favour of the broad interpretation. In this connection, Woo J took account of the type of policy under consideration, the amount of premiums paid and whether the language used was clear. His Honour also took into consideration the possibility of insurance companies increasing the premiums charged for policies such as the one under present consideration should a broad interpretation be adopted. Woo J was of the view that whilst the strict interpretation would mean that claims could succeed only in the most extreme cases, *eg*, where the insured was in a vegetative state, the position was mitigated somewhat by the second part of the clause, which allowed for payment whenever there was, for example, a loss of sight of both eyes, regardless whether the assured was employable or not. On balance, thus, Woo J concluded that the strict interpretation was applicable.

10.27 The general principles by which contractual documents are to be construed were set out by Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at 912. These principles were applied by the Court of Appeal in *Lal Hiranand v Kamla Lal Hiranand* [2007] 2 SLR 165 in the construction of a deed of settlement made between husband and wife to settle their disputes over the wills and estate of the husband's father, MHR. By the deed, the husband undertook to "implement and faithfully carry out all the wishes of [MHR] as manifested and executed by [MHR] in the 1988 Will both in substance and according to the spirit of the 1988 Will notwithstanding that the 1988 Will may in any way be defective or unenforceable in law".

10.28 The 1988 will was found to be forged, and the question was whether the husband's undertaking was premised on the will being genuine. Kan Ting Chiu J, delivering the judgment of the court, held that the court's role in the construction exercise was to ascertain the intention of the contracting parties by a consideration of the terms of the contract as a whole within the factual matrix of the transaction in question. His Honour concluded (at [27]) that:

> The statement of the parties' intention to resolve all the outstanding disputes between them should be taken as the reason for, and not as the form or substance of the [husband's] undertakings. The [husband's] obligations were limited to and governed by the terms of the undertakings. The undertaking to implement and carry out MHR's wishes as manifested and executed by MHR in the will was conditional on there being a will, executed by MHR, in which he manifested his wishes.

10.29 The court also affirmed the principle that uncertain terms in a contract cannot be given effect to where the court was unable to clarify the uncertainties sufficiently so that there was certainty and content to the obligations undertaken. The deed had imposed certain obligations on the husband with respect to the "Hiranand family companies", a term which was not defined in the deed, nor was there a list of such companies appended to the deed. Kan J held that, although the court may ascribe a meaning to a term that was on its face uncertain, this could not be done in the present case. The term "Hiranand family companies" was a collective term for companies to be agreed on between the parties, and as there had been no agreement, the clauses in the deed containing the term were too uncertain and could not be cured by the court. Accordingly, no order for performance of the obligations contained in those clauses could be made.

Implied terms

10.30 The implied terms as to satisfactory quality and fitness for purpose under the Sale of Goods Act (Cap 393, 1999 Rev Ed) ("SOGA") were considered by the Court of Appeal in *National Foods Ltd v Pars Ram Brothers (Pte) Ltd* [2007] 2 SLR 1048. The respondent, PRB, had entered into various contracts for the sale of dried ginger slices to the appellant, NFL. The ginger slices supplied were heavily contaminated with mould, had high ash and moisture content and were dusty. NFL argued that the implied conditions as to quality and fitness for purpose had been breached. The Court of Appeal made some useful observations of the relationship between ss 14(2) and 14(3) of the SOGA. These observations may be summarised as the following propositions:

> (a) The function of s 14(2) is to establish a general standard by which goods supplied under a contract of sale are required to reach, whereas the function of s 14(3) is to impose, in transactions where the buyer, to the seller's knowledge, require the goods to possess some special quality for some special purpose, a particular and higher standard tailored to the particular circumstances of the case.
>
> (b) In assessing the standard of "satisfactory quality", the inquiry is an objective one undertaken from the view of a

reasonable person placed in the position of the buyer and armed with his knowledge of the transaction and its background. For the purposes of this inquiry, s 14(2B) provide a list of non-exhaustive factors which the court should only take into account in appropriate cases. The factor of "freedom from minor defects" in s 14(2B)(*c*) is targeted at mass-produced manufactured consumer goods, and not at agricultural and natural products such as fruits and vegetables where freedom from minor defects might be impossible to achieve.

(c) The words "particular purpose" in s 14(3) are not used in contradistinction to a "general purpose" and do not mean that only a "special purpose" would be sufficient. Instead, they are used in the sense of being a "specified" or "stated" purpose. If no purpose is indicated, it would be assumed that goods are ordered for their normal purpose.

(d) Once it has been shown that the particular purpose for which the goods are required was made known to the seller, the onus is on the seller to prove that the buyer did not rely, or that it was unreasonable for the buyer to rely, on the seller's skill and judgment. The fact that both the buyer and seller are members of the same commodity market does not of itself show that the buyer did not rely on the seller, although it would tend to militate against the inference of such reliance.

10.31 The court concluded that NFL had supplied ginger slices that were of unsatisfactory quality and were not fit for the particular purpose for which PRB required them.

Exception clauses

10.32 In *B-Gold Interior Design & Construction Pte Ltd v Zurich Insurance (Singapore) Pte Ltd* [2007] 4 SLR 82, the High Court construed an exception clause in an insurance policy. The appellant was appointed by MediaCorp in respect of certain renovation works to be carried out at the latter's premises. The contract required the appellant to take out a contractor's all-risk policy of insurance, which the appellant did with the respondent. A fire broke out in a room in MediaCorp's television building where repair works were being carried out. This resulted in damage to MediaCorp's property for which the appellant was found liable. The appellant claimed against the respondent under the insurance policy. The policy contained an exclusion clause which was found by the District Judge, and accepted by Andrew Ang J, to have been intended to exclude any indemnity in respect of loss of or damage to property owned or possessed by, *inter alia*, MediaCorp. However, Ang J found on uncontroverted evidence that the respondent knew full well the coverage required was for the

purposes of the appellant's contract with MediaCorp. As such, it would be "contrary to all sense of justice and fair play" if the exclusion was to operate to deny the very cover which the appellant required. In holding that the exclusion clause was, on the facts of the present case, inoperable, his Honour observed (at [57]–[60]) as follows:

> Commercial morality must perforce temper the unrelenting quest for profit; the more so with respect to insurers whose *raison d'être* is their provision of indemnity against the vicissitudes of life or the vagaries of fortune and where (in the absence of agreement or legislation to the contrary) utmost good faith underlies the relationship between the parties … Where the effect of any such exclusion is to take away the very essence of the cover thus leading to an absurdity, the courts will intervene to deny the exclusion clause its efficacy. Equally, where the insured has relied upon the insurer to provide cover for a specific purpose made known to the insurer prior to the issue of the policy without the latter's demurrer and yet a standard printed exclusion clause takes away precisely such cover, the court will be failing in its duty if it does not intervene in such a situation even if, sans such reliance, the exclusion clause might not quite aptly be described as giving rise to an absurdity.

10.33 In *PT Soonlee Metalindo Perkasa v Synergy Shipping Pte Ltd (Freighter Services Pte Ltd, third party)* [2007] 4 SLR 51, the High Court construed, in the context of a contract for the carriage of goods by sea, a clause which limited the liability of the defendant to "£100 British Sterling per package. To obtain higher limits of liability shipper must declare a greater value and pay additional freight to be agreed". The plaintiff owned 300 bundles of deformed steel bars that the defendant had contracted to carry by sea from Singapore to Batam. During the voyage, the bars fell overboard. The defendant contended that its liability was limited by the limitation clause, which on the facts was found to have been incorporated into the contract of carriage.

10.34 Judith Prakash J accepted that limitation clauses had to be read *contra proferentem*. However, her Honour was of the view that the clause under present consideration was plain and unambiguous. As limitation clauses were not, as a general rule subject to the same exacting standards that were applied to exclusion and indemnity clauses, the wording of the present clause was wide enough to encompass liability of any sort whatsoever and howsoever arising as long as it was in relation to the carriage of goods. Prakash J was, however, of the view that the language of the clause would not be wide enough to cover the defendant's liability in respect of loss or damage that was deliberately caused. Her Honour was of the view that, if any reduction of one's responsibility for deliberately inflicted injury was to be permitted, if at all, "very clear words" would be necessary.

Vitiating factors

Misrepresentation

10.35 It is trite that any claim in misrepresentation is dependent on the establishment, at the outset, of a false statement of *fact*. In *Tipper Corp Pte Ltd v JTC Corp* [2007] SGHC 67, the plaintiff required a place from which to construct barges. The defendant offered to grant a licence to the plaintiff for the use of certain waterfront land for this purpose. The plaintiff alleged that, whilst it was contemplating whether to accept the defendant's offer, an employee of the defendant orally represented to the plaintiff that all vessels in the waterfront in the vicinity of the licensed land would be removed within three months. Soon after the licence was granted, most of the vessels left the waterfront, except for a derelict vessel that remained moored there for many months thereafter. The plaintiff claimed that the oral representation amounted to negligent misrepresentation. Tan Lee Meng J dismissed the claim as the alleged representation was a statement of intention and not a statement of existing or past fact. Whilst recognising that a statement of an intention not honestly held could amount to a misrepresentation of fact in relation to the representor's state of mind, his Honour observed that the plaintiff had neither asserted that the defendant did not honestly have the intention represented, nor adduced any evidence as to the issue. The claim, thus, failed at the outset.

10.36 By s 3 of the Misrepresentation Act (Cap 390, 1994 Rev Ed), the validity of a term in a contract that attempts to *exclude or restrict* liability or available remedies for misrepresentation is dependent on it satisfying the requirement of reasonableness under the Unfair Contract Terms Act (Cap 396, 1994 Rev Ed). That is, the term "shall have been a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made". The question whether a particular clause falls within s 3 can be difficult to answer. A non-reliance clause (typically one which stipulates that a party has not relied on any representations of the other party to enter into the contract), for example, attempts to prevent a representee from establishing the element of reliance, and, if effective, could prevent a successful claim for misrepresentation. It is, however, not clear if, as a matter of *jurisdiction*, such a clause is subject to s 3. The question is whether the courts ought to look only at the *literal* wording of the particular clause (see, *eg*, *Watford Electronics Ltd v Sanderson CFL Ltd* [2001] EWCA Civ 317), or whether it should consider the substance and effect of the clause (see, *eg*, *Witter Ltd v TPB Industries* [1996] 2 All ER 573). The Court of Appeal appears to have *assumed* in *Orient Centre Investments v Societe Generale* [2007] 3 SLR 566 that such non-

reliance clauses are always effective to exclude claims for misrepresentations.

10.37 The appellants, Orient, had an investment account with the respondent, SG, which the former alleged it had been induced to open by certain representations of Goh, a client relationship manager in the employ of SG. Orient allegedly suffered substantial losses in relation to investments in certain structured products undertaken through the investment account. The various agreements relating to the opening of the account as well as the different investments contained, *inter alia*, non-reliance clauses pursuant to which Orient had represented that it had, in entering into these transactions, relied on its own judgment and not on any representations of SG or its employees, whether written or oral, other than those representations specifically provided for in the agreements.

10.38 Counsel for Orient had argued that the non-reliance clauses had the effect of raising an evidential estoppel which could prevent a claimant from proving that he had relied on pre-contractual representations. However, in order to rely on the defence of estoppel, it had to be pleaded, which SG had failed to do. Counsel referred the court to the observations of Chadwick LJ in *EA Grimstead & Son Ltd v Francis Patrick McGarrigan* (27 October 1999) (CA) (unreported) that non-reliance clauses can give rise to an evidential estoppel provided the following elements set out in *Lowe v Lombank Ltd* [1960] 1 WLR 196 at 205 were pleaded and proven:

> (a) that the representation of non-reliance was clear and unequivocal;
>
> (b) that the representor (*ie*, the party making the representation of non-reliance) had intended that the other party should act on the representation of non-reliance; and
>
> (c) that the other party had believed that the representation of non-reliance was true and had been induced by that belief to act on it.

10.39 The court held that counsel's pleading point was unmeritorious as it was "sufficient for pleading purposes that the clauses are pleaded for their legal effect without having to put a label on the defence" (at [45]), and this SG had done. The court then concluded that, in the face of Orient's own representations and warranties as contained in these clauses, "it was not possible for [Orient] to argue that [it] had relied on any alleged representation on the part of Goh" (at [50]). With respect, the matter involved more than just a matter of specifically pleading the term "estoppel" – it was necessary, in order for the estoppel to succeed, that the three elements in *Lowe v Lombank* be established. In this connection, Chadwick LJ had observed in *Watford Electronics Ltd v*

Sanderson CFL Ltd [2001] EWCA Civ 317 at [40] that the need to prove these elements of the estoppel may provide the representor with "insuperable difficulties; not least because it may be impossible for a party who has made representations which he intended should be relied upon to satisfy the court that he entered into the contract in the belief that a statement by the other party that he had not relied upon those representations was true".

10.40 This is, of course, a *different* question from whether s 3 of the Misrepresentation Act applied. The Court of Appeal in the present case was of the view that even if Goh had made the alleged (mis)representations, this would be of no avail to Orient as it had, through those "clear and specific" terms in the agreements, represented and warranted that it did not rely on any representation given by any of SG's employees. This conclusion appears to suggest that the non-reliance clauses were *not* subject to the reasonableness test under s 3. In the present case, as the parties are arguably experienced parties of equal bargaining power, the conclusion is probably correct. However, as a general proposition, it goes, with respect, too far as it would mean that there would be no need to subject such clauses to judicial scrutiny even when used against consumers or as between parties of unequal bargaining powers.

Undue influence

10.41 In *Susilawati v American Express Bank Ltd* [2008] 1 SLR 237, the plaintiff, a private banking customer of the defendant bank, had executed a document under which she had granted a charge in favour of the bank over all monies in her account with the bank in order to secure liabilities of her son-in-law (Tommy) to the bank. As a result of Tommy's default in discharging his liabilities, the bank effected a deduction from the plaintiff's account pursuant to the terms of the charge. The plaintiff sued for a return of the money deducted, alleging, *inter alia*, that her signature to the charge had been procured by Tommy's undue influence on her, and as the bank had been "infected" by this alleged undue influence by its actual or constructive knowledge of Tommy's wrongdoing, the charge was, accordingly, unenforceable. Applying the principles laid down in the House of Lords decision of *Royal Bank of Scotland v Etridge* [2002] 2 AC 773, Lai Siu Chiu J stated (at [27]) as follows:

> [T]he plaintiff must first establish that the Charge was executed as a result of Tommy's undue influence; second, that the defendant was put on inquiry as to the manner in which the Charge had been procured; and finally, that the defendant had failed to take reasonable steps to ensure that the Charge had not been procured by undue influence.

10.42 As the relationship between a son-in-law and his mother-in-law did not fall within the class of relationships with respect to which the law adopts a "sternly protective attitude" (*per* Lord Nicholls in *Royal Bank of Scotland v Etridge* [2002] 2 AC 773 at [18]), the plaintiff had to establish, in order for a presumption of undue influence to arise, first, that she reposed trust and confidence in Tommy or that Tommy had acquired ascendancy over her, and second, that the transaction was not readily explicable by the relationship of the parties. On the first pre-requisite, the court found on the evidence that, contrary to the plaintiff's claims of "naïve dependence" on Tommy, she was in fact the dominant person in the relationship. As for the second requirement, Lai J opined (at [35]) that:

> [T]he court should take a more holistic view of the circumstances as opposed to a blinkered and artificial preoccupation with financial considerations. In order to determine whether a transaction is explicable in terms other than undue influence, it becomes necessary to examine its context and to ascertain its true nature and objective.

10.43 In the circumstances, the court found that while the charge was, from an economic perspective, disadvantageous to the plaintiff who gained no overt benefit, it was, nevertheless, explicable in the context of the particular familial relations involved. Specifically, the plaintiff was close to Tommy's wife, who was her daughter, and an extension of financial assistance to Tommy was neither inexplicable nor unexpected. The plaintiff's claim on the ground of undue influence, therefore, failed *in limine*, and the court had no need to consider the doctrine of infection.

10.44 It may, however, be useful to consider the issues that may arise if the plaintiff had indeed been a victim of undue influence. In this regard, two observations may be made. The first relates to the creditor being "put on inquiry". The House of Lords in *Royal Bank of Scotland v Etridge* [2002] 2 AC 773, [87] was clear that this did not require the creditor to look into whether undue influence was present or not. The House clarified that the only practical position to adopt was to regard creditors to be "put on inquiry" whenever the relationship between the surety and the debtor was non-commercial. The relationship between the plaintiff and Tommy was probably, in the absence of further information, non-commercial.

10.45 Secondly, the obligation imposed on the creditor to take reasonable steps placed an obligation on the creditor to take such steps as are necessary to "satisfy itself that the [surety] has had brought home to her, in a meaningful way, the practical implications of the proposed transaction" (*per* Lord Nicholls in *Royal Bank of Scotland v Etridge* [2002] 2 AC 773 at [53] and [54]). In this regard, Lai J's statement (quoted above at para 10.41) that, in order to succeed against the

defendant bank, the plaintiff had also to establish that "the defendant had failed to take reasonable steps to ensure that the Charge had *not been procured by undue influence*" [emphasis added] may, with respect, be misleading. Indeed, as Lord Nicholls pointed out, it would be "plainly neither desirable nor practicable that banks should be required to attempt to discover for themselves" whether undue influence was present or not ([2002] 2 AC 773 at [53]). With respect, if creditors are not expected to *discover* the presence of undue influence, it might appear, logically at least, that they would not be expected to *prevent* the occurrence of such wrongdoing.

10.46 Interestingly, a similar contention appeared to have been made in *Malayan Banking Bhd v Sivakolunthu Thirunavukarasu* [2008] 1 SLR 149, albeit in a different context. The case involved a dishonest solicitor, Sivakolunthu, who, through a series of forged transactions, procured the transfer by the defendants of their interests in certain property to her and the second defendant, to be held as to 75% by her and as to 25% by the latter. These interests were then mortgaged to the plaintiff bank to secure a loan to Sivakolunthu alone. The plaintiff was represented in the mortgage transaction by Ho of the firm of Rodyk & Davidson, while the solicitor who appeared "on the record" as having acted for the defendants, one Dass, was the husband of Sivakolunthu and also from the same law firm as Sivakolunthu. The phrase "on the record" was used by the judge as Dass did not in fact act in these transactions nor was he party to the fraud. As the property came under the Land Titles Act (Cap 157, 2004 Rev Ed) ("LTA"), the documents for these transactions were registered in the Registry of Land Titles which conferred an indefeasible title unless defeated by the fraud of the registered proprietor or his agent, in this case the plaintiff or Ho (see s 46(2) LTA; see also *United Overseas Bank Ltd v Bebe bte Mohammad* [2006] 4 SLR 884).

10.47 The defendants sought to establish that the plaintiff and its agent, Ho, had been "so wilfully blind or voluntarily ignorant" in the matter as to be akin to being fraudulent. In this, it was contended, *inter alia*, that the plaintiff's agent, Ho, had knowledge of the undue influence Sivakolunthu had over the second defendant, and in failing to act on this, he was "wilfully blind".

10.48 It is automatically presumed that, in a transaction between a solicitor and his client, a relationship of influence, unless rebutted, exists. The defendants treated Sivakolunthu as a solicitor who was purchasing an interest in the property from her clients as she had in fact acted for them in effecting a settlement agreement between them (see *The Law Society of Singapore v Sivakolunthu Thirunavukarasu* [2005] SGDSC 13). However, in the present case, she did not appear, on the record, as acting for the defendants. Kan Ting Chiu J was, however, of

the view that where two members of a law firm are spouses, a rebuttable presumption of undue influence arose whenever one of them acted in a sale and purchase transaction for the vendor and the other was the purchaser. His Honour observed (at [37] and [38]) that:

> In this case, what could the plaintiff or Mr Ho have done? There was no legal basis to prevent M Dass & Co from acting for the defendants. However, I believe that, on a commercial basis, a lender bank uncomfortable with such a situation can impose a condition in the loan offer that the borrowers be represented by solicitors with no interest, direct or indirect, in the transaction other than as solicitors. It can be argued that a prudent solicitor in Mr Ho's position would be cautious about M Dass & Co acting for the second defendant, who was offering his interest in the property to secure a loan to Mr Dass's wife, and that *a prudent solicitor should have taken action to eliminate the risk of undue influence*. [emphasis in original]

10.49 Nevertheless, his Honour concluded, undoubtedly correctly, that Ho was neither wilfully nor voluntarily ignorant.

Illegality

The ex turpi causa *defence*

10.50 A useful decision illustrating the application of the *ex turpi causa* defence was handed down by Belinda Ang Eau Sen J in the case of *Koon Seng Construction Pte Ltd v Chenab Contractor Pte Ltd* [2008] 1 SLR 375. The defendant company, Chenab Contractor Pte Ltd ("Chenab"), wished to secure a contract to supply workers and drivers to be deployed by the PSA Distripark and Container Logistics Department. The tender for this "PSA Contract", was, however, limited to companies having a paid up capital of at least $1.5m. To satisfy this requirement, the second defendant, Raj Dev s/o Ram Singh ("Raj"), hatched a scheme with one Goh Koon Suan ("GKS"), the managing director of the plaintiff company, for Koon Seng Construction to be allotted $700,000 Chenab ordinary shares of $1 each and registered in its name, so as to raise Chenab's paid up capital to the $1.5m level required to tender for the PSA Contract; nevertheless, no fresh capital was injected by GKS into Chenab for these shares. Chenab succeeded in the tender and the PSA Contract was awarded to it.

10.51 Purportedly in accordance with the terms of the oral allotment agreement entered into between the parties, a call was made for the shares allotted to Koon Seng Construction. When the call was not met, Chenab resolved to forfeit these shares. This led to the present application whereby Koon Seng Construction sought an order declaring the forfeiture of the shares to be invalid, on the basis that the allotment agreement provided, instead, that the consideration for the allotment of

the shares lay in Koon Seng Construction making loans to Chenab or continuing to provide other forms of financial assistance by way of guarantees and indemnities to third parties. Chenab counterclaimed for the sum of $700,000.

10.52 Rejecting much of the evidence tendered by both sides, Ang J found that the allotment agreement was a sham: there was no such agreement. Rather, the allotment and registration of the Chenab shares in the name of Koon Seng Construction was a paper exercise to create the appearance that the shares had been paid in cash when they had not. Despite appearances, the parties never had any intention that Koon Seng Construction might have to expend money of its own to meet some deferred payment arrangement. Accordingly, Ang J dismissed both the application to invalidate the forfeiture, and Chenab's counterclaim for payment of the $700,000.

10.53 Of particular interest in the present context is Ang J's alternate ground for her decision. Ang J cited, with approval, Beldam LJ's observation in *Clunis v Camden and Islington Health Authority* [1998] 2 WLR 902 at 908 that, "[the court does] not consider that the public policy that the court will not lend its aid to a litigant who relies on his own criminal or immoral act is confined to particular causes of action". Further, Ang J endorsed the four instances identified by the House of Lords in *North-Western Salt Co v Electrolytic Alkali Co Ltd* [1914] AC 451 where the court may apply the *ex turpi* principle of its own motion, namely:

> (a) Where a contract is *ex facie* illegal, the court will not enforce it, whether the illegality is pleaded or not.
>
> (b) Where the contract is not *ex facie* illegal, evidence of extraneous circumstances tending to show that it has an illegal object should not be admitted unless the circumstances relied on are pleaded.
>
> (c) Where facts not pleaded have been revealed in evidence (because, perhaps no objection was raised or because they were adduced for some other purpose) and which taken by themselves show an illegal objective, the court should not act on them unless it is satisfied that the whole of the relevant circumstances are before it.
>
> (d) Where the court is satisfied that all the relevant facts are before it and it can see clearly from them that the contract had an illegal object, it may not enforce the contract, whether the facts were pleaded or not.

10.54 Ang J then concluded (at [37]), after traversing recent English Court of Appeal authority on the extent of reliance on illegal or immoral activity as to trigger the *ex turpi* defence, that:

> … the *ex turpi* maxim requires a 'reliance test' to be satisfied. The claim must be 'founded on' or 'arise from' an illegal act of the claimant … or the illegal act must necessarily be pleaded or relied upon to sustain the claim … or to put forward the case … or the facts which give rise to the claim are 'inextricably linked with' the illegality. The contrast is with a claim to which illegality is only 'collateral' or 'insignificant' … or 'incidental'. It is also acceptable that only part of a claim or loss is [*sic*] defeated by the maxim …

10.55 Falling in line with the Court of Appeal's statements in *Siow Soon Kim v Lim Eng Beng* [2004] SGCA 4, whenever the question of illegality arises, it is relevant to consider the parties' intentions.

10.56 Applying the rationale set out by Morris LJ in *Brown Jenkinson & Co Ltd v Percy Dalton (London) Ltd* [1957] 2 QB 621, Ang J observed (at [70]) that "an agreement made with the object (direct or indirect) of deceiving a third party is illegal". In the present case, all the elements of the tort of deceit against a third party were present: the capital assets of Chenab were stated as being fully paid-up (when they were not); the allotment to Koon Seng Construction was a sham erected in order to deceive the PSA. For the learned judge, "[t]he two parties were, therefore, *in pari delicto* and neither could establish a cause of action against the other without relying on its own wrongdoing" (at [72]).

10.57 In contrast with the English case of *Tinsley v Milligan* [1994] 1 AC 340, the claim of Koon Seng Construction for reinstatement of its status as shareholder was not premised on any right of ownership of the Chenab shares apart from the allotment agreement. As the whole scheme was a "paper exercise", Ang J found there to be no intention to pass property in the shares (at [76]). In summary (at [80]), Koon Seng Construction's claim to be reinstated as a shareholder arose out of the unlawful conduct of the defendants in creating the sham appearance of Chenab being a company with a paid up capital of $1.5m to deceive the PSA. This was done with the connivance and participation of Koon Seng Construction. So both the relief sought by Koon Seng Construction, and the counterclaim sought by Chenab were substantially (and not collaterally or insignificantly) based on their unlawful conduct. Both claim and counterclaim, therefore, had to be dismissed.

Moneylending transactions

10.58 The vexed issue as to what amounts to an illegal moneylending transaction as to be rendered void under the Moneylenders Act (Cap 188, 1985 Rev Ed) ("MLA") fell for consideration by the Court of

Appeal in *Donald McArthy Trading Pte Ltd v Pankaj s/o Dhirajlal* [2007] 2 SLR 321, being an appeal from the decision of Kan Ting Chiu J in *Pankaj s/o Dhirajlal v Donald McArthy Trading Pte Ltd* [2006] 4 SLR 79 (discussed in (2006) 7 SAL Ann Rev 171 at paras 10.69–10.71).

10.59 In this case, the respondent agreed to allow the first appellant to use his facilities with various banks for the issue of letters of credit ("L/C facilities") to enable the first appellant to finance goods purchased by it. The first appellant became indebted to the respondent pursuant to this arrangement, and when the debts were not repaid, the respondent brought proceedings to recover the sums owed. Upholding Kan J's decision (who had found in favour of the respondent), the Court of Appeal clarified that, "[t]he provisions of the MLA are not intended to apply to transactions made at arm's length between commercial entities"; and that the courts should not adopt an over-extensive application of the MLA even if its provisions could be construed literally to cover most commercial situations (at [9], quoting with approval the analysis of V K Rajah J (as he then was) in *City Hardware Pte Ltd v Kenrich Electronics Pte Ltd* [2005] 1 SLR 733).

10.60 From that perspective, it was obvious that the respondent was not a moneylender within the terms of the MLA since the agreement between the first appellant and the respondent involved no loan of money, but was, on its face, a "loan or rental of credit facilities, specifically L/C facilities, which the respondent had obtained from his bankers" (at [13]). But was it in substance (though not in form) a moneylending transaction? For the reasons set out at [15]–[24], the Court of Appeal thought not. In concluding that the respondent had not loaned money to the first appellant in the first place, the Court of Appeal recognised that this form of mutually beneficial financial arrangement had (at [25]):

> … become a common an established practice among small business entities in Singapore … [and there was, therefore] no reason why the MLA should proscribe such 'win-win' solutions in the business sector when both parties are able to negotiate the terms of the transaction at arm's length. Not only are these transactions not loans in nature or in form, they are also a convenient way to expand credit facilities in the market.

Restraint of trade

10.61 An unusual situation involving the validity of a restraint of trade clause arose in the case of *Man Financial (S) Pte Ltd v Wong Bark Chuan David* [2008] 1 SLR 663. In this case, a "termination agreement" was entered into between the appellant company and the respondent (who had been its managing director and chief executive officer), after he had been instructed to resign and had been placed on garden leave

while serving out his notice period. The termination agreement was only executed after much negotiation between the parties, and provided, *inter alia*, that the respondent was prohibited, for a specified period, from soliciting the employment of certain persons in the employ of the appellant while himself in the employ of another ("cl C.1"); or participating in or rendering advice to a competitor "… anywhere in the world" ("cl C.3"). In consideration, the respondent would be paid a fee at a specified due date. Ultimately, however, the appellant refused to make payment, alleging that the respondent had acted in breach of these restraints on his freedom of action, leading to the present suit by the respondent for the sum owed to be paid.

10.62 In the court below (reported as *Wong Bark Chuan David v Man Financial (S) Pte Ltd* [2007] 2 SLR 22), the trial judge found that the respondent was only in breach of cl C.3 but not cl C.1 as he was not in the employ of any competitor to the appellant at the time of the alleged solicitation. But this was immaterial, as the learned judge further ruled that both clauses were unreasonable restraints of trade and were thus invalid. Accordingly, after severing the two offending clauses from the agreement, he held that the consideration due under the termination agreement remained payable and found in favour of the respondent.

10.63 The Court of Appeal agreed with the factual findings in the court below as to the breach of cl C.3, and as to its invalidity as being an unreasonable restraint of trade. This was so, since the appellant had failed to demonstrate the underlying legitimate proprietary interest which that clause might have been intended to protect, and further, its ambit was simply far too wide (at [15]). This was the case, even if one were to take the view that the termination agreement amounted to a settlement agreement, as "the doctrine of restraint of trade does apply to settlement agreements in general" (at [150]), unless the settlement agreement itself related to the settlement of a prior dispute over a restraint of trade covenant in an existing contract, *and* where the settlement agreement was not itself tainted by any vitiating factors (at [65]).

10.64 However, the Court of Appeal was of the view that cl C.1 had in fact been breached by the respondent (at [18]). Nor was it invalid as being an illegal restraint of trade. Recognising that, in general, the two legitimate proprietary interests in the context of non-solicitation clauses like cl C.1 (being the interest to protect trade secrets and trade connections) were *not* directly in issue, the Court of Appeal noted that *other* legitimate proprietary interests might also exist. After reviewing English, Australian and various academic authorities, the Court of Appeal accepted that the interest of an employer in maintaining a stable, trained work force in a highly competitive environment *could* be a legitimate proprietary interest as would legitimise a non-solicitation

clause that would otherwise have been an unreasonable restraint of trade (at [94]–[105]), even in the absence of any protectable confidence (although this would affect the determination of the reasonableness of the non-solicitation clause in question – at [121]). In particular (at [110]):

> In our view, the *scope (or, more accurately, the categories)* of employees *covered* under a non-solicitation clause goes to the *reasonableness* of the clause concerned, which, in turn, depends on the *precise factual matrix* concerned. No blanket rule ought to be laid down, although we would agree that it would generally be more difficult to justify a non-solicitation clause which covers the solicitation of just 'any' employee. … [W]e would think that if the non-solicitation clause concerned covers employees whose work entails very minimal (or even no) expertise and does not form an integral part of the employer's operations, it would (absent extraordinary circumstances) be extremely difficult for the employer to justify the reasonableness of that particular clause … [emphasis in original]

10.65 The key factor was the clause's reasonableness in reference to the interests of the parties concerned and the interests of the public, such interests invariably having at least some connection and overlap (as Lord MacNaghten had pointed out in *Thorsten Nordenfelt v The Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894] AC 535, cited with approval at [145]).

10.66 The Court of Appeal clarified, however, that the inclusion of clauses recording the parties' prior agreement as to the reasonableness of the anti-solicitation clauses and other restraints of trade were wholly irrelevant to the inquiry as to whether such restraints of trade might be illegal and void (at [146]–[149]). Clause C.1 was, therefore, held to be valid, and had been breached by the respondent. Discussion of the consequences of this breach may be found at paras 10.76–10.77 below.

Discharge of the contract

Discharge by breach of a term

10.67 The Court of Appeal took full advantage of the opportunity presented by the dispute in *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* [2007] 4 SLR 413 ("*RDC Concrete*") to exhaustively set out how the question as to discharge in response to a breach of contract ought to be addressed. This was an appeal and cross-appeal from the decision of Lai Siu Chiu J (reported as *Sato Kogyo (S) Pte Ltd v RDC Concrete Pte Ltd* [2006] SGHC 213; and discussed in (2006) 7 SAL Ann Rev 171 at 195–197, paras 10.72–10.79). In summary, the plaintiff ("Sato Kogyo") had contracted to purchase concrete from the defendant ("RDC"). The contract provided for the plaintiff to purchase around 70,000m^3 of

concrete at contractually stipulated prices between 1 September 2003 to 30 June 2006. On 5 April 2005, alleging non-payment of sums due, the defendant suspended supply of concrete. On 30 May 2005, the plaintiff terminated the contract because the defendant's concrete had failed quality control requirements stipulated in the contract and also because of delay in its supply.

10.68 Agreeing with the finding in the court below that the supply contract did not disentitle the defendant from supplying concrete to third parties and did not require the defendant to "prioritise" requests for supply under the contract by the plaintiff ahead of orders from third parties (at [25]–[32]), the Court of Appeal, nevertheless, came to very different conclusions on two issues. First, it held that on a proper construction of the contract, the plaintiff was entitled to recover "direct costs" arising from the defendant's default in supply without first having to bring the contract to an end (at [39]–[41]); and second, such "direct costs" encompassed the price differentials paid by the plaintiff to third party concrete suppliers to make up shortfalls in supply by the defendant since such additional sums paid flowed directly and naturally from the defendant's inability to supply concrete (at [42]–[45]).

10.69 What is of more general interest, however, is the Court of Appeal's summation of the approach to be taken in analysing the availability of the right to terminate a contract for breach. Delivering the grounds of decision of the Court of Appeal, Andrew Phang JA identified four distinct situations which could give rise to such a right (at [90]–[101]):

> (a) where the contract clearly and unambiguously provides for an event, the occurrence of which entitles the innocent party to elect to terminate the contract ("Situation 1");
>
> (b) where there is no such provision, but where one contracting party renounces the contract, by words or conduct, so as to convey to the other contracting party that it will not perform its contractual obligations at all ("Situation 2");
>
> (c) where there is no contractual provision for termination, but where the term which is breached may be identified as a condition, in particular, focussing on the question as to whether the intention of the parties to the contract was to designate the term breached as one that was so important that any breach, regardless of the consequences of the breach ("Situation 3(A)"); and
>
> (d) where there is no contractual provision for termination, in determining whether termination was available, the court would consider whether the nature and consequences of the

> breach are such as to deprive the innocent party of substantially the whole of the benefit of the contract ("Situation 3(B)").

10.70 The Court of Appeal highlighted the potential tension between Situation 3(A) and Situation 3(B), and clarified that the two were not necessarily incompatible (at [102]), although it recognised that in certain cases, application of either approach would result in opposing conclusions. Reasoning, however, that since, "[i]n determining whether an innocent party is entitled to terminate a contract upon breach, the *foremost* consideration is (and must be) *to give effect to the intentions of the contracting parties* … the condition-warranty approach [*ie* Situation 3(A)] must *take precedence* over the *Hongkong Fir* approach [*ie* Situation 3(B)] because … it is premised on the intentions of the contracting parties themselves" [emphasis in original] (at [106]). Plainly, therefore, where the term breached is a condition, there is no need to consider application of the *Hongkong Fir* (*Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26) approach.

10.71 In a significant step, however, the Court of Appeal went further to address what should happen if the term breached was found to be a warranty. As the Court of Appeal said (at [107]):

> If … the term breached is a *warranty*, we are of the view that the innocent party is not thereby prevented from terminating the contract (as it would have been entitled so to do if the condition-warranty approach operated *alone*). Considerations of *fairness* demand, in our view, that the *consequences* of the breach should *also* be examined by the court, *even if* the term breached is only a warranty (as opposed to a condition). … [I]n a situation where the term breached would otherwise constitute a *warranty* … the court would, as a question of *fairness*, go *further* and examine the *consequences* of the breach as well. In the result, if the consequences of the breach are such as to deprive the innocent party of *substantially the whole of the benefit* that it was intended that the innocent party should obtain from the contract, then the innocent party *would* be entitled to terminate the contract, *notwithstanding* that it only constitutes a *warranty*. If, however, the consequences of the breach are only *very trivial*, then the innocent party would *not* be entitled to terminate the contract. [emphasis in original]

10.72 Given the very last sentence in the above extract, without careful reading, one might then be concerned as to the residual utility of the concept of a warranty. This is addressed by the Court of Appeal (at [108]):

> It is true that the approach adopted in the preceding paragraph would, *in effect*, result in the concept of the *warranty*, as we know it, being effectively effaced since there would virtually *never* be a situation in which there would be a term, the breach of which would *always* result in *only trivial circumstances*. In other words, if a term was not a

> condition under the condition-warranty approach, it would necessarily become an *intermediate* term, subject to the *Hongkong Fir* approach … [emphasis in original]

10.73 These comments echo the observations of Upjohn LJ in *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26 itself, in particular, at 64:

> In my judgment the remedies open to the innocent party for breach of a stipulation which is not a condition strictly so called, depend entirely upon the nature of the breach and its foreseeable consequences. Breaches of stipulation fall, naturally, into two classes. First there is the case where the owner by his conduct indicates that he considers himself no longer bound to perform his part of the contract; in that case, of course, the charterer may accept the repudiation and treat the contract as at an end. The second class of case is, of course, the more usual one and that is where, due to misfortune such as the perils of the sea, engine failures, incompetence of the crew and so on, the owner is unable to perform a particular stipulation precisely in accordance with the terms of the contract try he never so hard to remedy it. In that case the question to be answered is, does the breach of the stipulation go so much to the root of the contract that it makes further commercial performance of the contract impossible, or in other words is the whole contract frustrated? If yea, the innocent party may treat the contract as at an end. If nay, his claim sounds in damages only.

10.74 But it is important to note, first, that these observations do not relate to cases where the term in question is treated *in law* as a warranty by dint of case authority or statutory provision. Second, these observations were made in the context where the parties had *not* made it abundantly clear that the term in question was *not* to entail any right of discharge on breach. It is respectfully suggested that these two matters were not fully considered by the court, and therefore, some care should be taken not to read this aspect of the decision too broadly.

10.75 As to the latter point, the passage in *RDC Concrete* at [108] of the court's grounds of decision is carefully silent on what is to happen where the contracting parties have explicitly provided that breach of the term in question is *not* to entitle the innocent party any right of election to discharge the contract. But by parity of reasoning, if one disregards the *consequences* of a breach where the parties have intended the term in question to operate as a condition, it is unclear why one should not similarly disregard such consequences where the parties have intended the term to operate as a mere warranty (and, *mutatis mutandis*, where case authority or statute may have designated the term in question as a warranty). Arguably, notwithstanding the express language used in the decision, it is implicit in both passages set out above that before one moves on to apply the *Hongkong Fir* approach to the term in question, that term must also have been found *not* to have been intended by the

parties (or, for that matter, decreed as a matter of case law or statutory authority) to be a term for which discharge of the contract was envisaged. But, the question remains open for future clarification, given that this part of the decision is plainly *obiter dicta*, albeit *dicta* of great persuasive weight.

10.76 Given the centrality of the need to ascertain party intentions as to the status of the terms in a contract, some additional clarification as to how this is done was provided by the Court of Appeal in *Man Financial (S) Pte Ltd v Wong Bark Chuan David* [2007] SGCA 53. Having addressed its mind on the issue as to illegality (discussed above at paras 10.61–10.66), the Court of Appeal reiterated the points it had made in *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* [2007] 4 SLR 413 before outlining the *factors* which were relevant in ascertaining whether a given term was a condition (at [162]–[173]). Even so, it recognised that where none of those considerations specified were strictly applicable (as was the case on the facts before it), it remained open to the court to ascertain the intention of the contracting parties with regard to the term in question by construing the contract in light of the surrounding circumstances as a whole (at [179]).

10.77 Ultimately, the Court of Appeal held that that clause was intended by the parties to be a condition, being an integral part of an important cluster of clauses, compliance with which was a precondition to receipt of the consideration set out in the contract (at [188]). It followed, therefore, that breach of that clause entitled the appellant to discharge the contract.

Discharge by frustration

10.78 Usefully emphasising the exceptional nature of discharge by frustration, the Court of Appeal held in *Lee Chee Wei v Tan Hor Peow Victor* [2007] 3 SLR 537 ("*Lee Chee Wei*") that the failure to have the shares in question listed was not a frustrating event so as to discharge the contract. Thus, V K Rajah J, in delivering the judgment of the court, held (at [48]):

> To establish that a frustrating event has occurred is always an uphill task, and rightly so, in order that legitimate commercial expectations may be preserved and protected. Parties to a contract can always guard against vagaries or unforeseen contingencies through express stipulation and should they voluntarily choose to accept and undertake an absolute and unconditional obligation, they forfeit the right to complain if events do not unfold as planned. Imprudent commercial bargains cannot be aborted or modified merely because of an adverse change of circumstances.

10.79 What is most significant, however, lies in the preceding paragraph of the judgment. The court emphasised (at [47]) that:

> The effect of a possible failure to obtain listing by the completion date *would surely have been duly considered by the parties*. Having held executive positions and directorships in various companies, the defendants were more than adequately experienced and savvy and it would be ludicrous for them to insist that they had never properly contemplated the risk or the possibility of a failure to list [the company in question]. [emphasis added]

10.80 This short passage is significant because it demonstrates that in ascertaining whether the purported frustrating event is, indeed, such, one does *not* take an *objective* view of the parties' reasonable expectations as to the possible occurrence of such event. The test is *subjective*. That is, the court must endeavour to establish whether the parties to the contract *did* reasonably contemplate the risk or possibility that the purported frustrating event might occur. If such a finding is made (as was the case in *Lee Chee Wei*), that event cannot be said to be a frustrating event as to discharge the contract so as to excuse its non-performance. Read strictly, these two passages do not, it is admitted, lay the possibility of an objective test of reasonable contemplation to rest – but the extract of the judgment in para 10.79 above is certainly support for the proposition that it is the subjective test which has been applied by the courts.

Frustration and force majeure

10.81 Apart from dealing with the question of discharge by breach, the Court of Appeal in *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* [2007] 4 SLR 413 reiterated the significance of reasonable foreseeability within the context of frustration and *force majeure*. On the facts, as the defence of *force majeure* had not been specifically pleaded by the defendant to excuse their non-performance of their obligations to supply concrete to the plaintiff (on account of shortages in raw materials and plant breakdowns), it was not strictly necessary for the court to address these issues. However, given the dearth of local case law on point, the Court of Appeal saw fit to set out a number of general principles:

> (a) First, it emphasised that the principal purpose of a *force majeure* clause was to contractually allocate the risks in the performance of a contract between the contracting parties with regard to the occurrence of certain contractually specified events. Therefore, the first task before the court in such a situation would be to construe the *force majeure* clause (at [53]–[54]).

(b) Second, building on the reasoning adopted by a differently constituted Court of Appeal in *Glahe International Expo AG v ACS Computer Pte Ltd* [1999] 2 SLR 620, the court observed that whereas a *force majeure* clause was an agreement as to how outstanding obligations were to be resolved upon the onset of a *foreseeable* event, the doctrine of frustration concerned how contractual obligations were to be treated from the onset of an *unforeseeable* event (at [56]).

(c) Third, notwithstanding that difference, the principles relating to the doctrine of frustration were still relevant to the construction and interpretation of *force majeure* clauses in that, "by their *very nature and function, force majeure* clauses would – in the ordinary course of events – be triggered only where there was a radical external event that supervened and that was not due to the fault of either of the contracting parties" (at [57]). Further, although the court accepted that there could be *force majeure* clauses, the terms of which might fall short of such criteria, it was of the view that, "this would not be common, especially if one accepts the basic premise that the doctrine of frustration centres (in large part at least) on the absence of reasonable control on the part of the contracting parties" (at [57]). This is notable, for it indicates that there may well be a judicial predisposition to refuse to treat a clause excusing non-performance for reasons which were neither a radical supervening event nor independent of fault of the contracting parties as a *force majeure* clause.

(d) Fourth, given that the effect of a *force majeure* clause would be to exclude the operation of the doctrine of frustration in relation to the nature of the relief to be given to the non-performing party, it behoved the parties to make clear and unambiguous provision as to when such clause would be triggered; and that the court would construe such clauses strictly (at [60]–[63]).

(e) Fifth, a party relying on a *force majeure* clause would also have to demonstrate that it had taken "all reasonable steps to avoid its operation, or mitigate its results" (at [64]).

(f) Last, if pleaded, the burden lay on the party seeking to rely on a *force majeure* clause to prove that it fell squarely within the ambit of that clause (at [65]).

Remedies

Remoteness of consequential losses arising from settlement of downstream claims in back-to-back sales contracts

10.82 In *Britestone Pte Ltd v Smith & Associates Far East, Ltd* [2007] 4 SLR 855, the Court of Appeal addressed the issue as to when a court should uphold a settlement against a third party to that settlement process. As V K Rajah JA observed (at [3]):

> Must the courts choose only between two stark choices, *ie*, *the principle* that a party must prove its losses by establishing through direct evidence what its precise losses are on the one hand and *the pragmatism* that encourages the courts to support the sensible extra-judicial resolution of disputes on the other? Is it not open to the courts to approach the resolution of such a conundrum with *principled pragmatism*? [emphasis in original]

10.83 The respondent purchased capacitors from the appellant and resold them to a third party who, in turn, installed the capacitors onto printed circuit boards for a fourth party. However, the capacitors were counterfeit. The fourth party obtained indemnification by the third party for its expenses in purging these counterfeit capacitors from the printed circuit boards supplied. The third party then sought compensation from the respondent – and after negotiations, the sum of US$300,000 was paid to the third party in full and final settlement of all claims by the third party against the respondent. During the negotiations, the respondent sought to involve the appellant, seeking a contribution from it towards the settlement amount. These approaches were ignored. Ultimately, the respondent claimed the settlement sum of US$300,000 it had paid to the third party, as well as US$2,184 as loss of profits.

10.84 On 20 March 2006, both parties entered into a consent judgment by which the appellant admitted liability for the damage caused. This left only the issue of quantum of damages for the court's assessment. At first instance, the assistant registrar allowed the respondent's claim in full (*Smith & Associates Far East, Ltd v Britestone Pte Ltd* [2006] SGHC 186). On appeal, though no longer disputing its liability for the respondent's loss of profit, the appellant disputed its liability for the US$300,000 settlement sum. On appeal to Tan Lee Meng J (reported as *Smith & Associates Far East Ltd v Britestone Pte Ltd* [2007] 1 SLR 958; [2006] SGHC 238), Tan J upheld the assessment of the assistant registrar. Still dissatisfied, a final appeal to the Court of Appeal was brought, first, on the basis that the losses claimed were too remote as the appellant had had no notice of the use to which the capacitors were to be put; and second, whether the settlement sum was a

reasonable one as to be capable of being taken to reflect the respondent's actual loss.

10.85 On this, the Court of Appeal noted (at [12]) that the assistant registrar had found it to be surely within the appellant's contemplation that the capacitors might be sold from customer to customer, and ultimately be used in relation to a printed circuit board, as had Tan J. At [14], V K Rajah JA cited Tan J's judgment in the court below with approval:

> In the present case, the capacitors sold by Britestone to Smith became an 'integral' part of the printed circuit boards … The fact that it was [the third party] and not [the respondent] who fixed the capacitors onto the printed circuit boards should not matter in the circumstances of the case, *and especially so since the testimony of [the respondent's representative] that the capacitors sold by [the appellant] to [the respondent] had no use other than to be installed onto printed circuit boards was not contradicted by [the appellant]*. [emphasis in original]

10.86 The appellant's objection based on remoteness of loss, therefore, fared no better before the Court of Appeal. As V K Rajah JA elaborated (at [18]):

> Bearing in mind the fact that the capacitors could only be used on printed circuit boards, it must surely have been within the appellant's reasonable contemplation that the capacitors would be used in such a manner by the respondent.

10.87 As to the second issue, the Court of Appeal took the view that the position in England and Australia was consistent, that as a first step, the court should consider the reasonableness of settlements in determining whether such settlements could be treated as evidencing the actual loss suffered (at [30]). It clarified, however, that there was no evidential presumption that business settlements were made reasonably (at [31]).

10.88 Once the issue of liability was resolved and no longer in issue, what factors might the court take into consideration as establishing the "reasonableness" of downstream settlements? To this end, the Court of Appeal set out a conceptual framework of the various factors, albeit in broad, non-exhaustive terms. In summary (at [54]):

> When a downstream claimant seeks to subsequently rely on an earlier settlement as reflecting the actual loss which he now claims against an upstream defendant, the courts should usually consider the following matters in determining whether he has acted as a responsible and reasonable businessman in arriving at the settlement:
>
> (a) the duration or period of negotiations as well as their general content;

(b) whether there are any customs of trade or previous business dealings between the parties and/or whether there are any legitimate business considerations or contractual requirements (*eg*, dispute resolution clauses, etc) enjoining a settlement ;

(c) whether the negotiations were conducted *bona fide*;

(d) the assessment which could properly be made at the time of settlement of the prospects of success or failure of the claim based on materials then available;

(e) the availability of and/or reliance on legal advice, expert advice or independent survey reports taking into account considerations of cost and time;

(f) whether the actual settlement itself was arrived at arm's length;

(g) whether there was an opportunity accorded to the third party/ultimate payee to be involved in the negotiations;

(h) whether there was a positive reception of complaints by the third party/ultimate payee;

(i) whether the settlement amount has been paid, and, if so, how and when;

(j) the bargaining strengths of the parties involved in the settlement, taking into account (among other things) alternative means by which the dispute could have been concluded;

(k) whether, in the round, the settlement figure was objectively assessed and properly calibrated against the context of the entire factual matrix; and

(l) the practical consequences of the decision on reasonableness.

10.89 These factors were to be assessed in a holistic fashion, being neither exhaustive nor anything other than a rough-and-ready practical guide to give effect to the broad policy to encourage settlements without insisting on technical and arid assessment of each item of evidence (at [55]).

10.90 On the matter before it, the burden lay on the respondent, *prima facie*, to establish on a balance of probabilities that its settlement with the third party was reasonable. This it had done (details of which are set out at [62]). The burden, thus, moved to the appellant to show that the settlement was not reasonable (at [61]); and on careful consideration of the evidence, the Court of Appeal found that there was absolutely no basis for the appellant to argue that the settlement was not a genuine arm's length settlement and was unreasonable (at [65]).

Damages on the "broad ground"

10.91 Following the Court of Appeal's decision in *Chia Kok Leong v Prosperland Pte Ltd* [2005] 2 SLR 484 (upholding the decision of Prakash J in *Prosperland Pte Ltd v Chia Kok Leong* [2004] 4 SLR 129), it seems well accepted that where a defendant has contracted with a plaintiff to perform certain contractual works on a subject property as to which the plaintiff has no proprietary interest, there is no basis to assert that such plaintiff is not a proper party to bring an action on that contract should the defendant be in breach thereof. The specific issue which was dealt with by the High Court and the Court of Appeal in this connection was whether the plaintiff in such a case was entitled to recover substantial damages even though the plaintiff had no proprietary interest in the subject property, and therefore could be said to have suffered "no loss". The *ratio* in both, was that the plaintiff *could* do so, on the basis of the so-called "narrow ground" or "Albazero exception" enabling the plaintiff to recover substantial damages, even while accepting that such recovery was *not* in respect of any loss suffered *by* the plaintiff, but was rather in compensation for losses suffered by a third party to the contract, namely, the present owner of the subject property.

10.92 As an alternative basis in response to the preliminary issue which had been posed before them, both the High Court and the Court of Appeal adverted to the possibility of using the "broad ground" to justify the award of substantial damages to the plaintiff in such a case. In *obiter dicta*, Andrew Ang J has provided some further clarification as to what might be recovered under the broad ground.

10.93 In *Seah Boon Lock v Family Food Court* [2007] 3 SLR 362 (see also para 10.10 above on "Formalities"), Ang J was posed with the question as to whether the first plaintiff, acting as agent of an undisclosed principal (said to be the first plaintiff's wife and who had been joined as the second plaintiff in the action) who had entered into a licence with the defendant to operate a food stall, was entitled to recover substantial damages when that licence was wrongfully terminated. Having found that the termination of the lease by the defendant was wrongful, the question arose as to the appropriate remedy in damages.

10.94 Complications arose because Ang J found that the second plaintiff was *not* the undisclosed principal to whom the first plaintiff was agent. As matters before the court stood, the precise identity of the first plaintiff's principal was unknown. This, the court recognised, could create an anomalous situation whereby the first plaintiff might, as a party to the contract with the defendant (albeit as an agent of an undisclosed *and* unidentified principal), be unable to claim against the defendant even if the defendant was clearly in breach of the contract.

Nevertheless, Ang J concluded that the non-joinder of the first plaintiff's undisclosed principal was immaterial.

10.95 The primary basis for this was Ang J's holding, after reviewing the authorities (at [61]–[75]), that it was, "an established proposition that the agent has a right to sue the third party [to the agency relationship] because he does so as a party to the contract [between himself and the third party]" (at [75]).

10.96 Next, the learned judge found that the *principal's* loss was *not* idiosyncratic – rather, it was an objectively assessable loss which was within the contemplation of the contracting parties (at [97]–[99]) for it was clear to the defendant from the outset that it was dealing with a family business unit (of which the first plaintiff was a part) and that losses arising from breach of the contract would be suffered by that unit. So it was disingenuous for the defendant to claim that it did not contemplate that the losses arising from breach of the agreement would fall on, "some permutation of Seah [the first plaintiff], Wee [the second plaintiff], or the companies they controlled" (at [99]).

10.97 But even though the plaintiffs' case had not pleaded for damages on the basis of the broad ground, strictly speaking, there was no call for the court to examine the point. But for completeness' sake, in *obiter dicta*, Ang J sought to examine the applicability of the "broad ground" discussed in *Chia Kok Leong v Prosperland Pte Ltd* [2005] 2 SLR 484 had it been pleaded. A few points were made.

10.98 First, Ang J clarified (at [106]–[107]) that the broad ground was available to a plaintiff even where this might expose the defendant to liability for substantial loss to both the plaintiff *as well as* the third party who had suffered the "actual" loss, noting that such restriction was nowhere to be found in the Court of Appeal's analysis in *Chia Kok Leong v Prosperland Pte Ltd* [2005] 2 SLR 484 ("*Chia Kok Leong*"). Second, it had to be kept in mind that the formulation of the broad ground encapsulated *only* the plaintiff's performance interest in the contract (at [109]). The learned judge quoted with approval *Chia Kok Leong* where the Court of Appeal said (*Chia Kok Leong* at [53]) "*the basis on which a plaintiff is entitled to claim for substantial damages under the broad ground is that he did not receive what he had bargained and paid for*". [emphasis in original] That is to say, "[t]he *only* loss which can be claimed by the party not receiving the bargain he contracted for is the performance loss and nothing else" [emphasis in original] (*Seah Boon Lock* at [110]). To substantiate his loss on the broad ground, had it been pleaded, the first plaintiff would have had to adduce evidence of the difference in the cost between obtaining shop premises of similar size and traffic as opposed to the one which ought to have been provided by the defendant, and *not* the first plaintiff's loss of profits from operating

the food stall (at [108]). Such "loss of profits" could not be considered as a loss under the broad ground, "for the simple reason that the contracting party [the first plaintiff] was never in any position to make any profits in the first place. If he had been, then he could have claimed substantial damages without resorting to the 'broad ground' at all" (at [112]).

Damages for loss of a chance

10.99 In the case of *Asia Hotel Investments Ltd v Starwood Asia Pacific Management Pte Ltd* [2005] 1 SLR 661, a majority in the Court of Appeal held that the appellant, Asia Hotel Investments ("Asia Hotels"), was entitled to bring a claim against the respondent, Starwood Asia Pacific Management ("Starwood"), for having caused it to suffer the loss of a *chance* to acquire a majority stake in a company (the "Lai Sun stake") which owned a hotel property situated in central Bangkok, the Grand Pacific Hotel ("GPH"). The facts underlying the dispute and a discussion of the Court of Appeal's decision may be found in (2004) 5 SAL Ann Rev 198 at paras 9.109–9.127. In *Asia Hotel Investments Ltd v Starwood Asia Pacific Management Pte Ltd* [2007] SGHC 50, it fell to Lai Siu Chiu J to conduct the assessment of damages for this loss.

10.100 To begin with, certain passages in the learned judge's grounds of decision may require a modicum of circumspection. Lai J summarised the holding of the majority in the Court of Appeal as follows:

> 19 The plaintiff appealed against Tan J's decision (in Civil Appeal No 143 of 2003). By a majority decision (Yong Pung How CJ dissenting), the Court of Appeal allowed the plaintiff's appeal (see report at [2005] 1 SLR 661) and held:
>
> (a) Tan J had erred in treating the plaintiff's lack of progress in its negotiations with Lai Sun and with financial institutions as important in determining whether the loss by the plaintiff of the chance to acquire the Lai Sun stake was caused by the breach. The plaintiff knew that to successfully wrap up the deal to purchase the Lai Sun stake, the most critical factor was an international hotel operator with a five-star brand. Having locked the defendants in for a year up to 4 December 2002 through the [non-compete agreement], the plaintiff knew that it had up to that same day to sew things up. Hence, the plaintiff was not as anxious as it should have been when Lai Sun refused to extend the first MOU and when it knew that the Narulas would be a competitor.
>
> (b) The objective facts showed that the Narulas needed the defendants as the operator of GPH. The defendants' acts helped the Narulas to acquire the Lai Sun stake. The evidential burden of disproving that shifted to the defendants to show that the Narulas could have proceeded with the acquisition without the

help of the defendants and the defendants did not discharge this evidential burden.

(c) Once causation had been established for loss of a chance, all that was needed to be shown was that the chance which was lost was real and substantial. What would constitute a real or substantial chance need not be proved on a balance of probabilities.

10.101 With respect, para (c) may be an over-simplification of the majority's reasoning. As was teased out in the discussion of the reasoning of the majority in the Court of Appeal's decision in (2004) 5 SAL Ann Rev 201:

> 9.118 In the opinion of Chao Hick Tin JA (delivering the judgment of the majority in the Court of Appeal), this case fell within the … category [of] cases where the plaintiff's loss would depend on the hypothetical action of a third party, either independently or in addition to the plaintiff's own action. In so far as proof of the third part's actions was concerned, it was enough for the plaintiff to prove that there was a 'substantial chance rather than a speculative one' … It was not necessary for the plaintiff to prove, on a balance of probabilities, that the third party would have acted in such a manner as to confer the plaintiff the benefit in question … It was also not necessary for such a plaintiff to show on a balance of probabilities that the chance would have come to fruition.

10.102 The majority's reasoning in the Court of Appeal does not, therefore, go so far as to accept proof of what might constitute a real or substantial chance (of success in acquiring the Lai Sun stake) on a standard of proof less than the usual standard of a balance of probabilities. Quite otherwise: the party claiming such loss must still prove, *on a balance of probabilities*, that he had a real or substantial chance of acquiring the Lai Sun stake. In establishing such proof, in so far as that chance would depend on the actions of a third party, there was no need to prove (on a balance of probabilities) that the third party *would* have acted in such a manner as to ensure a successful acquisition. So long as there was a real and substantial chance that it might do so, that would be enough.

10.103 In so far as the assessment of the damage caused to Asia Hotels as a result of Starwood's actions resulting in Asia Hotels losing the *chance* of a successful acquisition of the Lai Sun stake was concerned, Lai J identified (at [32]) three components that Asia Hotels would have had to achieve in order to acquire the Lai Sun stake: (a) obtain sufficient financing for the acquisition ("the financing element"); (b) obtain shareholder consent for the sale of the Lai Sun stake ("the shareholder element"); and (c) obtain the defendants' approval to conclude the hotel management agreement ("the management element").

10.104 The learned judge then proceeded to observe as follows:

> 33 The crux boils down to the interaction between the three elements above. What weight should be ascribed to each of those three elements? It is only after the issue of the relative weight of the three elements is determined, that one is better able to determine the extent of the chance. Without determining the proportion to be ascribed to each of these three elements, there is a risk of placing undue emphasis on one of the elements, at the expense of the others. It also bears remembering that assessment of damages is an art, never an exact science.
>
> 34 Having evaluated the evidence, I am of the view that an appropriate apportionment of weight between the three elements would be:
>
> (a) financing element – 40%;
>
> (b) shareholder element – 30%; and
>
> (c) management element – 30%.
>
> …
>
> 36 Ultimately, the extent of the chance which I will eventually determine will be the sum total of the product between the weights attached to each of the three elements (eg, 40% for the financing element) and my assessment of the likelihood of the plaintiff's securing that particular element. …

10.105 The assessment of damages is, as the learned judge observed, "an art, never an exact science" (at [33]). The learned judge assessed the likelihood of successfully resolving each of financing, shareholder and management elements to be 10%, 60% and 40% (at [99], [115], [148], respectively). But rather than proceed to the assessment of the damage done to Asia Hotels on the basis of these percentages alone, the learned judge proceeded to apply a discount to these percentages by reference to the "weightage" as to their significance to the successful completion of the outcome. Thus, the learned judge found as follows:

	Likelihood of securing	Weightage	Percentage of chance
Financing element	10%	40%	4% (10% x 40%)
Shareholder element	60%	30%	18% (60% x 30%)
Management element	40%	30%	12% (40% x 30%)

10.106 The details of the complex financial calculations as to the plaintiff's investment gains had it been able to successfully carry out its

scheme of acquisition are far beyond the remit of this summary. But the learned judge ultimately found that the net present value of the hotel, had it been acquired, was THB325,997,077 (or about US$8.15m). As the learned judge noted (at [476]), this was "only half of the equation in assessing the plaintiff's damages" since the court still had to "attribute the loss of chance to the figure of THB325,997,077 to take into account the fact that the plaintiff's loss, at the end of the day, is merely a loss of chance and not the actual loss of profits." Adopting the analysis as the percentage of chances above, the learned judge awarded the sum of THB110,839,006 to the plaintiff with interest from the date of the writ, being the product of the value of the investment and the value of the *chance* to successfully make that investment. (At [39]–[42], Lai J clearly explained the basis of the court's power to award damages in foreign currencies, and the reasons for doing so in the present case.)

10.107 A slight difficulty arises out of the learned judge's assessment of the value of the chance that had been lost by Asia Hotels. The value of the chance was, in Lai J's judgment, the *sum* of the chance of the *discounted* financing, shareholder and management elements falling in place (*ie*, the 4%, 18% and 12% figures set out in the fourth column in the table above). Accordingly, the learned judge assessed the value of the chance lost by Asia Hotels to be 34% (being the *sum* of 4%, 18% and 12%).

10.108 Two points may be made here. The first is mathematical. Say outcome X occurs only when events P, Q and R all occur. A simple example would be a bet to pay $1,000 to anyone who throws three coins simultaneously and manages to get all of them to show "heads". Here, there is a 50% chance of each coin turning out to be "heads". However, the probability that one might get all three coins to show "heads" simultaneously is not the *sum* of the probabilities of each coin coming up "heads" (*ie*, 50% + 50% + 50% = 150%, or ½ + ½ + ½ = 1½). That is obviously untenable since it would give us a figure in excess of absolute certainty. Rather, the probability that one might get three "heads" at the same time in a single throw is the *product* of the probability that each coin might turn up heads (*ie*, 50% x 50% x 50% = 12.5%, or ½ x ½ x ½ = $^1/_8$). That is, one has a one in eight chance of getting the $1,000.

10.109 The same is true for the derivation of the probabilities of occurrence of other kinds of events, such as the probability (or chance) that Asia Hotels might have successfully acquired the Lai Sun stake. Following the reasoning above, this should be derived as the *product* of the probabilities of a successful outcome in relation to the financing, shareholder and management elements.

10.110 The second point of note relates to Lai J's weighting of the financing, shareholder and management elements. As noted above, the

end-result of this weighting exercise was to discount the "likelihood of securing" success in each of the financing, shareholder and management elements. With respect, this may have been one refinement too many.

10.111 For the Lai Sun stake to be successfully acquired, *all three* elements as identified by the learned judge would have had to be successfully concluded. Failure in respect of any one of these three elements would have resulted in failure of the acquisition. Lai J was concerned (at [33]) that, "without determining the proportion to be ascribed to each of these three elements, there is a risk of placing undue emphasis on one of the elements, at the expense of the others." But it is unclear what Lai J sought to achieve by placing greater weight on the financing element.

10.112 As the learned judge said (at [35]):

> … the financing element stood out from the other two because it had a greater force in determining whether the plaintiff was going to clinch the Lai Sun stake. It was also the one element on which [Asia Hotels] had to do the most work in order to seal the deal with Lai Sun. To that end, I thought it was fair and reasonable to place on it a greater weight, albeit only slightly more, than the other two elements.

10.113 As to the latter, surely the difficulty of the task would go to the percentage likelihood of successfully negotiating the financing element, a matter already taken into account in the 10% probability figure arrived at later (at [99])?

10.114 As to the former, it is not precisely clear *how* it could be said that the financing element could have a "greater force" in determining Asia Hotels' success in clinching the Lai Sun stake since, as observed earlier, *all three elements* would have had to be successfully resolved in order for Asia Hotels to clinch the Lai Sun stake. Perhaps Lai J was obliquely suggesting that the three elements were *not* independent of each other, that success in obtaining financing would, perhaps, increase the probability of success in the shareholder and management elements. But if so, it is not immediately obvious that the application of weights to the seemingly independently derived probabilities of success in the financing, shareholder and management elements (namely the 10%, 60% and 40% figures, at [99], [115], [148], respectively) accurately reflects that relationship of *interdependence*. The precise rationale for weighting the importance of the financing, shareholder and management elements, and the application of the discount to the findings as to the probability of successful resolution of these three elements is, therefore, unclear.

10.115 Given that the financing, shareholder and management elements were equally important to the acquisition, and that a successful

acquisition could only be obtained if there was a successful result for each of these elements, on the assumption that each of the elements is *independent* of the outcome of the others, it would seem that the probability or chance of a successful outcome would simply be the *product* of the likelihoods of securing a successful outcome for each of these three elements. Other than the exceedingly oblique reference at [35], perhaps, to the interdependence of the chances of success in relation to the shareholder and management elements at [35], there is little else to suggest that the court thought them to be anything other than independent of each other.

Proof of damage

10.116 A dramatic example of the severe consequences of failing to tender evidence of damage arising out of a breach of contract arose in the case of *Abe Isaac (Pte) Ltd v Marieta Montalba Pacudan* [2007] SGHC 46. The dispute arose over the non-performance of various contractual obligations contained in a lease of commercial premises by the defendant-tenant upon the expiration of the lease, thereby causing, allegedly, loss to the plaintiff-landlord. Apart from other difficulties with the plaintiff's case, in relation to that part of its claim based on the non-return of various items specified in an inventory list annexed to the lease, Judicial Commissioner Sundaresh Menon noted, "[t]he burden of proof as to liability as well as quantum is on the plaintiff. The fact that the plaintiff failed to adduce any credible evidence as to the damage it sustained was fatal to its case" (at [50]).

10.117 In relation to the landlord's claim for the value of various items which were to have been returned on the expiration of the lease, the failure of the landlord to provide any credible evidence as to the damage sustained from such non-return (on the basis of the cost of replacing such missing items) compelled the submission of an alternate basis of assessment, being the depreciated cost of the said items. In her closing submissions, counsel suggested that an appropriate method for such depreciation might be gleaned from a taxation ruling issued by the Australian government. The learned Judicial Commissioner noted, however, that such damage was neither pleaded, nor led in evidence, nor argued. Nor was any explanation offered as to why the depreciation method used by the Australian Tax Authorities was relevant. But most of all, "in the absence of an acceptable starting point, it is irrelevant to speak of depreciation" (at [53]).

10.118 There being no evidence as to the quantum of loss on this head of claim, following the analysis set out by Thean J in *L & M Airconditioning & Refrigeration (Pte) Ltd v S A Shee & Co (Pte) Ltd* [1993] 3 SLR 482, since this was a case where the fact of loss had been shown but the necessary evidence as to its amount was not given,

nominal damages might be awarded (at [54]). Further, as had been the case in *Permasteelisa Pacific Holdings Ltd v Hyundai Engineering and Construction Co Ltd* [2005] 2 SLR 270, since there had been no bifurcation of the hearing between issues of liability and quantum, and the plaintiff-landlord had had the opportunity to adduce such evidence as he wished on quantum, there could be no further opportunity for further evidence on quantum upon the court's rejection of such evidence as had been led (at [55]). Given this state of affairs, the learned Judicial Commissioner ordered nominal damages of $200 in respect of the claim based on non-return of the items set out in the inventory list.

10.119 The plaintiff-landlord's claim as to damage suffered in light of the failure of the defendant-tenant to reinstate the premises fared no better. No expert surveyor had been invited to provide a report as to such costs, and the only evidence adduced (which was rejected by the court) was a rough estimate prepared by the contractor who had been asked by the plaintiff-landlord to provide a quotation of the necessary works for reinstatement. Accordingly, and for the same reasons as for the other head of claim, nominal damages of $200 were awarded in relation to the damage caused by the defendant-tenant's non-reinstatement of the premises.

Remedies in the alternative: specific performance and damages

10.120 Given the Court of Appeal's decision that the contract had been breached and not frustrated (discussed above at paras 10.78–10.80), the next issue in *Lee Chee Wei v Tan Hor Peow Victor* [2007] 3 SLR 537 was the appropriate remedy for the defendant's breach of contract. The difficulty arose because the trial had been conducted almost exclusively with an eye to having the contract specifically performed. Declining to interfere with the decision in the court below not to exercise its discretion to grant specific performance, the Court of Appeal stated that it was persuaded, based on the facts, that damages were sufficient to restore the plaintiff to the position he would have enjoyed had the contract been performed (at [56]).

10.121 The following passages in the Court of Appeal judgment do, with respect, have to be read with some care. At [57], the court noted that "[t]he next and perhaps most pertinent issue is the trial judge's refusal to grant the plaintiff damages in lieu of specific performance." Reading this in the context of the judgment as a whole, it is plain that the Court of Appeal did *not* have in mind the kind of damages it is empowered to award pursuant to s 18(2) read with para 14 of the First Schedule to the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed). That is to say, the Court of Appeal was *not* concerned with what in England would have been termed "damages pursuant to Lord Cairns' Act". Given its agreement with the court below that

damages were adequate so as to rule out exercise of the court's discretion to grant specific performance, the court was really concerned with the question as to whether damages, *in the alternative*, could be awarded, even though the plaintiff had left out the words "to be assessed" as part of his pleading.

10.122 On the point, the Court of Appeal took a robust approach. It concluded (at [61]–[62]) that the plaintiff's pleading for "damages in lieu of specific performance" was ample to give fair notice of the case which was to be met and to define the issues which the court would have to decide. Indeed, for the Court of Appeal, "the words 'to be assessed' are in effect superfluous given that any claim for damages must necessarily be assessed (unless otherwise agreed) whether it involves a simple uncontroversial line item or multiple items. It follows that a failure to apply for an amendment to include the words 'to be assessed' should not *per se* impair the discretion to order an assessment of damages" (at [62]). On the contrary (at [69]), adopting with approval the analysis taken by the New Zealand court in the case of *Souster v Epsom Plumbing Contractors Ltd* [1974] 2 NZLR 515 at 521:

> Where a party seeks a decree of specific performance, he is in fact approbating the contract and seeking damages as an alternative remedy. With perfect consistency such a plaintiff is entitled to maintain at the hearing of the action that the contract is on foot (and it does remain on foot until the moment when specific performance is refused and damages are awarded instead) … [I]f the damages are to be regarded as damages for the loss of a bargain brought to an end by the action of the court in refusing specific performance there is only one time at which they should be determined, and that is when the bargain for which they are intended as compensation is brought to an end. Until the contract is brought to an end by the action of the court, the contract remains on foot.

10.123 And, thus, "[h]aving 'brought the contract to an end' by refusing specific performance, it was perfectly legitimate for the trial judge to have ordered damages to be assessed in lieu of specific performance, despite the failure to adduce evidence on damages at the trial" (*Lee Chee Wei v Tan Hor Peow Victor* [2007] 3 SLR 537 at [70]). The plaintiff's failure to adduce evidence on damages at the trial because of his unwitting assumption that the issue of damages would be assessed at a separate assessment should his specific performance application be rejected did not cause the defendants any prejudice that could not be adequately compensated by costs. Therefore, the Court of Appeal reversed the decision of the court below and ordered that an assessment of damages in lieu of specific performance was appropriate in the circumstances (at [76]–[80]).

Refunds of advance payments and deposits

10.124 The final issue that remained to be considered in *Lee Chee Wei v Tan Hor Peow Victor* [2007] 3 SLR 537 was in respect of the defendant's counterclaim for a refund of the $750,000 that had been paid in advance for the shares. To this end, the Court of Appeal usefully summarised the law in relation to such refunds at [83]–[85], noting that the key issue was to determine the nature of the payment, whether the payment was construed as a deposit entitling forfeiture, or as an advance payment; and that that nature was to be determined by the intention of the parties as expressed in the contract between them (at [85]). Given the wording of the contract, stipulating payment of the purchase price by multiple instalments and the specific reference to the $750,000 paid as one such instalment, it was plain that the sum was an advance payment which would, *prima facie*, be immediately repayable. Nevertheless, given the pending assessment of damages, the Court of Appeal resolved that that assessment ought to include an account of what was due to the defendant after ascertainment of the damages payable to the plaintiff. Accordingly, the trial judge's order on the counter-claim was also varied.

Equitable relief against forfeiture of deposits

10.125 In *Metro Alliance Holdings & Equities Corp v WestLB AG* [2008] 1 SLR 139, the High Court provided further guidance as to when equitable relief against forfeiture of deposits might be granted. In this case, the plaintiff was granted an option to purchase certain assets to be acquired by the defendant. The option agreement required the plaintiff to deposit US$1,632,242 (the deposit) into a New York bank account within three days of the agreement, and to deposit additional sums from time to time as requested by the defendant. The option agreement also authorised the defendant to transfer these sums into its own account, and to use them to purchase the assets in question once they fell within certain price bands. Significantly, the option contract provided that the defendant was not obliged to purchase any such assets should the New York bank account not contain sufficient funds.

10.126 Although a total of US$1,635,509.73 was paid into the New York bank account, ultimately, the transaction failed when further funds (totalling some US$8,759,595) were not forwarded. Unsurprisingly, given the express terms of the contract, the court agreed with the defendant that it was a condition precedent that the defendant be placed in sufficient funds in order to pay the balance purchase price for the assets in question. There was, therefore, no obligation on the defendant to carry out its part of the bargain (*viz* purchase and re-transfer of the assets in question to the plaintiff). Rather, as contractually provided, they were entitled to forfeit the deposit.

10.127 The question then became whether the plaintiff was entitled to equitable relief against such forfeiture. After examining Singapore and English academic authority (at [19]–[22]), the learned judge concluded that there were no grounds to grant any such relief. The burden lay on the plaintiff to demonstrate that it would be unconscionable on the part of the defendant to forfeit the deposit (at [22]), yet on the facts, no proprietary or possessory right had been forfeited. There was merely an arm's length contract between two parties acting with the benefit of legal counsel. Further, the court was not satisfied that, "[e]ven if the court had power to grant relief against forfeiture in this case, it would be necessary to inquire into the necessity … of exercising such power, which altered [*sic*] the bargain between the parties" (at [24]). Accordingly, the court resolved not to grant relief against forfeiture.