10. CONTRACT LAW

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Formation of contract

Certainty and completeness

10.1 The issue of contract formation arose in the unusual context of civil procedure in *Wellmix Organics (International) Pte Ltd v Lau Yu Man* [2006] 2 SLR 117 (see also para 10.60 on "Mistake"). The plaintiff in this case unsuccessfully sought to enforce a consent unless order against the defendant. Andrew Phang Boon Leong J (as he then was) emphasised that, keeping in view its very drastic consequence of depriving a party of his cause of action, such an order will only be established where the terms of the agreement are clear and unambiguous. It was clear on the facts that the parties had not adequately expressed any intention to enter into such an agreement, and even if there was a possibility of an agreement, such agreement must fail because the parties were not in fact *ad idem*. Significantly, Phang J also laid stress on the critical importance of assessing the evidence objectively in ascertaining the parties' intention.

10.2 Although certainty and contractual intention are clearly distinct elements of contract formation, arguments in relation to both these elements are often raised in conjunction and do frequently overlap. This was observed by Andrew Ang J in *Chua Kim Leng (Cai Jinling) v Phillip Securities Pte Ltd*

[2006] SGHC 221, who found on the facts of that case that an oral agreement for the payment of commissions existed between the plaintiff and defendant. This conclusion is unsurprising given that the plaintiff had in fact fulfilled her promise under the agreement and the defendant had by its conduct accepted its obligation to remunerate the plaintiff for her services. The fact that the agreement did not spell out detailed provisions as to the host of contingencies that could have arisen did not render the agreement too vague and uncertain to enforce, nor was it realistic to insist that the requisite contractual intention was lacking in the face of such evidence.

10.3 In *CS Bored Pile System Pte Ltd v Evan Lim & Co Pte Ltd* [2006] 2 SLR 1, Choo Han Teck J was also satisfied that an oral agreement had been formed between the plaintiff subcontractor and the defendant main contractor. Choo J observed (at [6]) that "it is not unusual that in construction contracts some terms and conditions might have to be worked out subsequently to the formation of the contract, but as long as the nature and general structure of the agreement is clear, that agreement is enforceable in law".

10.4 The foregoing cases may be contrasted with *GYC Financial Planning v Prudential Assurance Company Singapore (Pte) Ltd* [2006] 2 SLR 865, where an alleged oral contract failed on both the grounds of uncertainty and lack of intention to create a binding contract. Here, the alleged agreement was for the provision of marketing of financial products over an extended period of time. As such activities are closely regulated by the Monetary Authority of Singapore, the absence of detailed provisions tailored to ensure strict compliance with the legal and regulatory restrictions militated against the finding of a binding agreement. See also *Otech Pakistan Pvt Ltd v Clough Engineering Ltd* [2006] 3 SLR 1, where an allegation that the parties' negotiations amounted to an oral variation of an antecedent contract failed.

Consideration

10.5 In *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric* [2007] 1 SLR 853, Andrew Phang Boon Leong J (as he then was) questioned (albeit in an *obiter* capacity) whether the doctrine of consideration still served any useful role in validating contracts. Citing the earlier and similar observations by V K Rajah JC (as he then was) in *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2004] 2 SLR 594 at [139], Phang J observed (at [29]) that although the case for dispensing with the requirement for consideration is strongest in purely commercial transactions, the same may be true even of non-commercial transactions principally because the usefulness of the doctrine

has been substantially blunted by the controversial English Court of Appeal decision in *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1. As Phang J explained at [30]:

> …the combined effect of *Williams v Roffey Bros & Nicholls (Contractors) Ltd* (to the effect that a factual, as opposed to a legal, benefit or detriment is sufficient consideration) and the well-established proposition that consideration must be sufficient but need not be adequate (see, for example, the Singapore Court of Appeal decision of *Wong Fook Heng v Amixco Asia Pte Ltd* [1992] 2 SLR 342 at 348, [23]) is that (as Rajah JC has pointed out in *Digilandmall* (see [28] above)) it will, absent exceptional circumstances, be all too easy to locate some element of consideration between contracting parties. This would render the requirement of consideration otiose or redundant, at least for the most part. On the other hand, there are other possible alternatives available that can perform the tasks that the doctrine of consideration is intended to effect. These include the requirement of writing, as well as the doctrines of promissory estoppel, economic duress and undue influence (for these two last-mentioned doctrines, in the context of the modification of existing legal obligations).

10.6 It is true indeed that commercial transactions are rarely defeated for lack of consideration. Thus, an attempt to invalidate an assignment of debt on the ground of lack of consideration failed in *Leun Wah Electric Co (Pte) Ltd v Sigma Cable Co (Pte) Ltd* [2006] 3 SLR 227. In this case, the plaintiff raised the somewhat surprising argument that as the assignment was made only as a partial payment for debts owed by the plaintiff to the defendant, it was insufficient consideration. Rejecting this argument, Choo Han Teck J found that the assignment, which was made in lieu of cash payment, was clearly good consideration for the defendant's agreement to discharge part of the debts owed to it by the plaintiff. Similarly, the argument that a compromise agreement was unsupported by consideration and hence unenforceable also failed in *Abdul Jalil bin Ahmad bin Talib v A Formation Construction Pte Ltd* [2006] 4 SLR 778. Judith Prakash J found that the defendant in this case had furnished consideration when, pursuant to the compromise agreement, it gave up its rights to dispute the plaintiff's claims. It was immaterial that the defendant's claim might have been weak, as long as the defendant believed in good faith that it had reasonable grounds for making the claim.

Estoppel

10.7 It was held in *Abdul Jalil bin Ahmad bin Talib v A Formation Construction Pte Ltd* [2006] 4 SLR 778 ("*Abdul Jalil*") (see also para 10.6 on "Consideration" above and para 10.40 on "Capacity" below) that the plaintiff

lessor was estopped from going back on its promise to waive the payment of certain rental arrears as the defendant had, in reliance on the promise, paid other moneys due in accordance with the plaintiff's requirements, and incurred further expense in completing the redevelopment works on the subject property. Significantly, Judith Prakash J adopted (at [44]), citing *Chitty on Contracts* (H G Beale gen ed) (Sweet & Maxwell, 29th Ed, 2004) at para 3-135), the English position that "detriment of any kind … is not an essential requirement [of promissory estoppel] and all that is necessary is that the promisee should have acted in reliance on the promise in such a way as to make it inequitable to allow the promisor to act inconsistently with it". These observations are of undoubted significance, particularly in view of the more equivocal position taken by the Singapore High Court in *Fu Loong Lithographer Pte Ltd v Mun Hean Realty Pte Ltd* [1989] SLR 300. In that case, Grimberg JC appeared, on the one hand, to have endorsed the requirement for detriment as a necessary element of the doctrine but adopted (at p 309), on the other hand, a broad definition of "detriment" as "the injustice to the promisee which would result if the promisor were allowed to recede from the promise" (citing *Spencer Bower and Turner on Estoppel by Representation* (3rd Ed)). Taken literally, this has the effect of equating "detriment" with "inequity" (another essential element of the doctrine), and does not confine the concept to the demonstration of some prejudice or disadvantage suffered in reliance on the promisor's representation. Notwithstanding this broad approach, however, Grimberg JC then proceeded to refer specifically to the prejudice suffered by the defendant to explain why the requirement for "detriment" had been satisfied. Thus, the decision in *Fu Loong Lithographer Pte Ltd v Mun Hean Realty Pte Ltd* is, at best, ambiguous on this issue of detriment.

10.8 In contrast, Prakash J in *Abdul Jalil* appears to have unequivocally excluded the requirement for prejudice as an essential element of the doctrine. That said, however, it should be noted that the element of prejudice was also established in *Abdul Jalil*, as the promisee in that case had incurred expense in reliance on the relevant representation.

10.9 The doctrine of estoppel by convention was applied by the High Court in *Candid Water Cooler Pte Ltd v United Overseas Bank Ltd* [2006] 3 SLR 216 with the result that contracting parties who had acted on the assumption that the condition precedent to the completion of the sale and purchase of a property had been fulfilled were bound by the completion date so determined even if it subsequently transpired that both parties were in fact unable, through no fault of either party, to complete the transaction on the date contemplated. See also *Spandeck Engineering Pte Ltd v Defence*

Science & Technology Agency [2007] 1 SLR 720, where the doctrine was similarly applied. For a decision in which an attempt to plead estoppel by convention failed, see *Chew Tong Seng v Chew Cheng Quee* [2006] SGHC 149.

The terms of the contract

Construction of terms

10.10 The objective approach to the construction of contractual documents was applied by the High Court in *Parkway Hospitals Singapore Pte Ltd v Sandar Aung* [2007] 1 SLR 227. The agreement in question was signed by the defendant and obliged her to be liable for "all charges, expenses and liabilities incurred by and on behalf" of her mother who had received treatment at the plaintiff's hospital. At the time the agreement was signed, the hospital had given the defendant an estimate of the hospital charges, which was approximately $15,000. The final bill rendered, however, exceeded $500,000. The defendant argued that on a proper construction of the agreement, the plaintiff could only recover an amount in the region of the estimate given. Judith Prakash J held that the words "all charges, expenses and liabilities" had to be given their plain meaning and could not be limited to the estimated charges. Although the agreement was drafted by the plaintiff, the *contra proferentem* rule did not apply as there was no ambiguity in the agreement.

10.11 The importance of a contextual approach to the construction of contracts was affirmed by the Court of Appeal in *Clarke Quay Pte Ltd v Tan Hun Ling* [2006] 3 SLR 626. In order to determine the nature of the contractual obligations undertaken by the respective parties to a contract, an objective consideration of the language, spirit and concomitant purpose of the relevant terms of the contract had to be undertaken. In this regard, the purely subjective perceptions of a party to the contract were not relevant.

10.12 A similar construction exercise was conducted in *Panwah Steel Pte Ltd v Koh Brothers Building & Civil Engineering Contractor (Pte) Ltd* [2006] 4 SLR 571. The Court of Appeal however adopted slightly different terminology, referring instead to a *purposive* construction of the contract, which required a consideration of the express and material terms of the contract, read in an integrated fashion in the context in which the contract was made.

10.13 The contract was for the supply of steel bars by P to KB, who were the main contractors for a water reclamation project in Changi. As a result of

its own supplier's cessation of the delivery of steel bars, P failed to supply the full contracted amount to KB. Although KB did not require the remaining quantity of bars for the Changi project, it nevertheless wanted P to deliver the balance as it wanted to replenish its own stocks. The issue before the court was whether the contract between the parties was "project-specific", such that the obligation to supply **steel** bars was dependant on the actual requirements of the project.

10.14 Andrew Phang Boon Leong JA held that on a purposive interpretation of all the relevant terms of the contract, the contract was clearly "project-specific". As such, P was not liable to KB for not supplying the balance number of steel bars.

10.15 The construction of an express warranty in a marine insurance policy was considered in *Royal & Sun Alliance Insurance (Singapore) Ltd v Metico Marine Pte Ltd* [2006] 3 SLR 333. In this regard, Judith Prakash J stated as follows (at [39]):

> As an express warranty in an insurance policy is a clause that must be complied with strictly by the insured in order that cover is maintained, it is, as well, a clause that has to be read equally strictly when its meaning is in issue. The insured should be able to take the words of the warranty at their face value and comply with the literal meaning of the warranty (unless of course this would lead to absurdity) without being at risk of finding that the insurance cover has been lifted by reason of breach of the warranty.

10.16 In *The Asia Star* [2006] 3 SLR 612, the agreement in question was a standard form charterparty which modified the shipowner's absolute obligation at common law to provide a sea- and cargo-worthy vessel. The modified obligation merely required the shipowner to exercise due diligence to make the vessel both sea- and cargo-worthy. A clause in the charterparty also gave the owner the right to cancel the charterparty without liability in the event the cargo holds were not fit to carry cargo. In response to the argument that, because of this particular clause, the vessel owner would not be liable even if the vessel was not cargo-worthy, Tan Lee Meng J held that such a construction would render the obligation to exercise due diligence without "room to operate" (at [46]). His Honour held that the charterparty had to be construed in a manner that would give effect to the intention of the parties. The necessary assumption must be that the parties did not intend to include meaningless terms in the contract. Further, the common law obligation was an important one, and any attempt to whittle it down contractually had therefore to be strictly construed (at [47]).

10.17 For an application of the general principles of contractual construction in an unusual fact situation, see *Lal Hiranand v Kamla Lal Hiranand* [2007] 2 SLR 165 (see also para 10.64 on "*Undue influence*".)

The parol evidence rule

10.18 In *Jet Holding Ltd v Cooper Cameron (Singapore) Pte Ltd* [2006] 3 SLR 769, Andrew Phang Boon Leong JA observed in passing that the parol evidence rule must be distinguished from ss 63–67 of the Evidence Act (Cap 97, 1997 Rev Ed) as the provisions served rather different purposes. While the parol evidence rule applied to restrict the liberty of the parties to have resort to evidence extraneous to the document, the core rationale for ss 63–67 was to ensure that the best evidence was before the court. Any overlap in the form of evidence that could fall within ss 93 and 94 would therefore be purely a factual coincidence.

10.19 The parol evidence rule was also applied in *Orient Centre Investments Ltd v Societe Generale* [2006] SGHC 164.

Implied terms

10.20 In the case of *Forefront Medical Technology (Pte) Ltd v Modern-Pak Pte Ltd* [2006] 1 SLR 927 ("*Forefront Medical Technology*"), the plaintiff entered into a contract with the defendant, for the defendant to supply clamshells into which the plaintiff's medical devices for surgical procedures were packed for supply to its customers. These clamshells were produced from material supplied by May Polyester Films Sdn Bhd ("May"). It transpired, however, that a significant number of the clamshells produced by the defendant were cracked, leading the plaintiff's customer to reject the equipment packed in the clamshells. The cracks arose because the raw material supplied by May was defective. The plaintiff thus brought an action against the defendant for loss and damages.

10.21 The case turned on two threshold questions: first, whether it was a term in the contract that the defendant procure the material for the production of the clamshells from May and no other source; and if so, whether it was an express or implied term of the contract that the defendant would have discharged its contractual obligations as to the suitability of the material for the production of clamshells by providing the relevant Certificates of Analysis ("COAs") from May. On the evidence before him, Andrew Phang Boon Leong J (as he then was) found in favour of the defendant as, in the learned judge's view, express terms had been stipulated as to both issues: see [62]–[63], and [69]–[75].

10.22 But it is the learned judge's analysis as to the inter-relationship between the business efficacy and the officious bystander tests of implied terms that is of greatest general interest. At [36] of the grounds of decision, the learned judge observed:

> An even cursory perusal of the above statement of principle by Scrutton LJ [in *Reigate v Union Manufacturing Company (Ramsbottom), Limited and Elton Copdyeing Company, Limited* [1918] 1 KB 592, at 605] will reveal the i*ntegration as well as complementarity* of the "business efficacy" and "officious bystander" tests. This is especially evident by the learned judge's use of the linking phrase "that is" in the above quotation. Indeed, the plain and natural meaning of this quotation is too clear to admit of any other reasonable construction or interpretation. And it is this: that the "officious bystander" test is the practical mode by which the "business efficacy" test is implemented. [emphasis in original]

10.23 Emphasising the point, at [40], the learned judge reiterated:

> Given the persuasive historical and judicial background as well as the general logic concerned, I would suggest that the approach from complementarity ought to prevail.

This followed several careful paragraphs of analysis, setting out various other judicial positions that had been taken, for example, where the two tests were treated as being interchangeable equivalents, or as alternative and wholly different tests (at [34] and [39]). Following the lead taken by Judith Prakash J in the case of *Telestop Pte Ltd v Telecom Equipment Pte Ltd* [2004] SGHC 267 ("*Telestop Pte Ltd*") (who, in turn, had cited with approval Phang J's earlier academic work, "Implied Terms, Business Efficacy and the Officious Bystander – A Modern History" [1998] JBL 1), Phang J's analysis of "complementarity" is, seemingly, not to be taken to be the same as either of these approaches.

10.24 In the two grounds of decision handed down separately by Phang and Prakash JJ, reference was made to Scrutton LJ's analysis in *Reigate v Union Manufacturing Co (Ramsbottom)* [1918] 1 KB 592, at 605, that:

> A term can only be implied if it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that it can confidently be said that if at the time the contract was being negotiated some one had said to the parties, "What shall happen in such case," they would both have replied, "Of course, so and so will happen; we did not trouble to say that; it is too clear." Unless the Court comes to some such conclusion as that, it ought not to imply a term which the parties themselves have not expressed.

10.25 Relying on this, both Prakash and Phang JJ concluded that the "officious bystander" test is *the* practical mode by which the theoretical guideline encompassed within the "business efficacy" test is satisfied, to paraphrase the wording used by the two learned judges in *Telestop Pte Ltd* at [68] and *Forefront Medical Technology* at [36], respectively.

10.26 However, it may be helpful to bear in mind Bowen LJ's observations in *The Moorcock* (1889) 14 PD 64 at 68:

> Now, an implied warranty, or, as it is called, a covenant in law, as distinguished from an express contract or express warranty, really is in all cases founded on the *presumed intention* of the parties, and upon reason. … I believe if one were to take all the cases, and there are many, of implied warranties or covenants in law, it will be found that in all of them the law is raising an implication from the presumed intention of the parties *with the object* of giving to the transaction such efficacy as both parties must have intended that at all events it should have. [emphasis added]

10.27 Interestingly, this seemingly inverts the proposition put forward by Prakash and Phang JJ. As Prof Treitel put it, "'business efficacy' … is merely a practical test for determining the intention of the parties: in most cases, it can be assumed that they would have agreed to a term which is necessary to make their agreement work". (G H Treitel, *The Law of Contract* (Thomson Sweet & Maxwell, 11th Ed, 2003) at pp 202–203). It therefore seems that the true relationship between the two tests for implied terms may still be ripe for further examination by the courts.

10.28 The second aspect for which *Forefront Medical Technology* may claim significance lies in its analysis of terms *implied in law* (at [42]–[45]). But as that discussion was clearly *obiter dicta*, those observations are better discussed together with the decision of the Court of Appeal in *Jet Holding Ltd v Cooper Cameron (Singapore) Pte Ltd* [2006] 3 SLR 769 ("*Jet Holding Ltd*") where the issue of terms implied in law formed part of its *ratio decidendi*.

10.29 The dispute in *Jet Holding Ltd* arose from the fracture of a slip joint on board an oil-rig owned by the first plaintiff, Jet Holding Limited ("JHL") and chartered to the second plaintiff, Jet Shipping Ltd ("JSL") on a bareboat charter, leading to the loss of the oil-rig's drilling unit. Prior to the loss, the oil-rig was equipped with two slip joints. Both were found by the manager of the oil-rig to be unfit for use. Cooper Cameron (Singapore) Pte Ltd ("Cameron"), the first defendant, was engaged to refurbish both slip joints, the other party to this contract being the then-owner of the oil-rig, JSL. Cameron sub-contracted the work to Van Der Horst Engineering Services

Pte Ltd ("VDH") and the second defendant, Stork Technology Services Asia Pte Ltd ("Stork"). Using selected parts from both joints, VDH re-assembled a single operational joint. The discarded unused parts were sent to Stork for fabrication into a second "Standby Slip Joint." At trial, it was established that it was this "Standby Slip Joint" which failed due to over-machining of the walls of a load-bearing component in the slip-joint, leading to its inability to support the weight of the drilling unit which had been attached to it. Both Cameron and Stork were found to be in breach of their tortious duties of care to the plaintiffs.

10.30 But the issue of greatest significance for the Court of Appeal was the issue of liability between Cameron and Stork. It transpired that Stork had over-machined the walls of the slip-joint because it had failed to conduct a dimensional inspection of the slip-joint as it was expressly obliged to do. The question then arose as to whether *Cameron's* failure to supply Stork with dimensional drawings of the slip joint might amount to a breach of its obligations to take reasonable care in the performance of the contract.

10.31 In this connection, the Court of Appeal recognised that there was no such express term in the contract between Cameron and Stork; nor had it been pleaded that such a term might have been implied *in fact*: at [89] (although it is plain that there is nothing, in principle, to prevent implication of such kinds of terms in fact; an example of this may be found in the District Court case of *Media Corp of Singapore Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2006] SGDC 132 at [45]). But Cameron's failure to supply these dimensional drawings could (and did) amount to a breach of a term implied *in law* to take *reasonable care*.

10.32 Citing the relevant passages of *Forefront Medical Technology* at [42]–[44] with approval, Andrew Phang Boon Leong JA recognised that although the category of implied terms at law would tend to generate uncertainty because of the breadth of the criteria to imply such terms being grounded on reasons of public policy, the reality of such a category of terms could not be denied: at [90]–[91]. That said, "general reasons of justice and fairness as well as of public policy justify the implication of a "term implied in *law*" in cases such as the present to the effect that each party (here, Cameron and Stork) would owe each other a duty to take reasonable care in the performance of the respective parts of the *contract* they had entered into": at [92]. Further, given the nature of this category of implied term, it did not matter that this issue had never been pleaded since such terms are, "recognised by the court *as a matter of law*" [emphasis in original]: at [93]. In consequence, both Cameron *and* Stork were in breach of certain of their obligations to each

other under the refurbishment contract. The implications of this are explored further below (see para 10.80 below on "Remedies").

10.33 Notwithstanding the expansive developments discussed above, it should be kept in mind that the ability of the courts to imply terms is capable of being checked or modified by statute. Thus, as was observed in the case of *Marina Offshore Pte Ltd v China Insurance Co (Singapore) Pte Ltd* [2006] 4 SLR 689, the normal contractual tests for implication of terms in fact do not apply to a contract of marine insurance because ss 33 to 41 of the Marine Insurance Act (Cap 387, 1994 Rev Ed) provide that, "implied promissory warranties are only those warranties implied by law through the various sections of the Act that impose them": at [25].

Exception clauses

10.34 The nature and function of exception and limitation clauses were considered in the High Court decision of *Emjay Enterprises Pte Ltd v Skylift Consolidator (Pte) Ltd* [2006] 2 SLR 268. The issue before the court was whether a contracting party could argue that an exception clause could nevertheless be introduced at the assessment of damages stage despite it not having been pleaded. The premise for the point was that an exception clause related not to liability but to quantum of damages, and was thus not required to be pleaded pursuant to O 18 r 13(4) of the Rules of Court (Cap 322, 2004 Rev Ed). The exception clause in question was in fact a limitation of liability clause. But Andrew Phang Boon Leong J (as he then was) observed that the primary nature of an exception clause, whether it sought to exclude liability altogether or whether it sought to limit liability, was to govern the obligations of the respective parties to the contract. As such, exception clauses deal with the issue of liability, even though this would necessarily have an impact on the question of quantum: at [19]–[21]. *A fortiori*, such defences ought to have been pleaded: at [31]. His Honour also contrasted exception clauses with liquidated damages clauses, observing that, as the latter clauses constitute an attempt at fixing the quantum of loss, they lie more appropriately in the sphere of assessment of damages: at [28]–[29].

10.35 Phang J also usefully reviewed the existing law on the construction of exception clauses, in particular, whether the doctrine of fundamental breach was a rule of construction or a rule of law. Referring to Lord Diplock's judgment in the House of Lords decision in *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, Phang J observed (at [14]):

> [A] fundamental breach of contract does *not necessarily and automatically* destroy the efficacy of an exception clause because, whilst the primary

> obligations come to an end, the secondary obligation (to pay damages) remains and an exception clause might cover this last-mentioned liability. Whether or not the exception clause in question does in fact cover such liability is not an automatic rule of law as such but, rather, a matter of *construction of the contract*. In other words, the court's task is to *construe* the exception clause concerned in the context of the contract as a whole in order to ascertain whether the contracting parties *intended* that the exception clause cover the events that have actually happened. If they did, then the exception clause would be given effect to by the court, notwithstanding the fact that a fundamental breach has occurred. This is because, to re-emphasise a crucial point, the *intention* of the parties is the touchstone. [emphasis in original]

10.36 His Honour, sitting in the Court of Appeal, reiterated this position in *Sun Technosystems Pte Ltd v Federal Express Services (M) Sdn Bhd* [2007] 1 SLR 411. Noting that the Privy Council decision in *Sze Hai Tong Bank Ltd v Rambler Cycle Co Ltd* [1959] AC 576 provided authority for the contrary proposition (*ie* that the doctrine was a rule of law), Phang JA stated (at [20]):

> *Sze Hai Tong Bank* was decided during a time when the law had not settled in its more modern and established form as embodied in *Photo Production* ... More importantly, the doctrine of fundamental breach as a "rule of construction" embodied in *Photo Production* is both principled and logical, …and we take the opportunity to affirm its application in the Singapore context…As this court is presently the final appellate court, the Privy Council decision in *Sze Hai Tong Bank* is not binding on it. It may be regarded, at best, a decision of a court of co-ordinate jurisdiction and, if necessary, may be departed from by this court …

It is thus settled that the fundamental breach doctrine, as it applies in Singapore, is a rule of construction.

Conclusive evidence clauses

10.37 In *Pertamina Energy Trading Limited v Credit Suisse* [2006] 4 SLR 273, the Court of Appeal considered and affirmed the efficacy of a conclusive evidence clause in the following terms:

> The Customer hereby agrees … to examine all statements of account, bank statements, printed forms, deposit slips, credit advice notes, transaction advices and other documents (hereinafter in this Clause referred to collectively as "statements") supplied by the Bank setting out transactions on any of the Accounts and agrees that unless the Customer objects in writing to any of the matters contained in such statement within 14 days of the date of such statement, the Customer shall be deemed conclusively to

> have accepted all the matters contained in such statement as true and accurate in all respects.

The company had a deposit account with the bank, and had conferred on the bank the right to set off moneys in the account against the company's indebtedness to the bank. The defendant bank, acting on certain forged instruments, subsequently set off the money in the account against a drawdown by the company of a credit facility that had been established in the company's favour. The company claimed the return of the money it had deposited.

10.38 The Court of Appeal held that, although a bank had no mandate at common law to make payment on a forged instrument, and would hence be liable to its customer if it did so, the bank's conclusive evidence clause in the present case was worded sufficiently widely and clearly to exonerate the bank from the consequences of having paid out money illegitimately. V K Rajah J (as he then was) stated (at [60]) as follows:

> [I]n principle conclusive evidence clauses employed in a banker and corporate customer relationship afford a practical and reasonable device for pragmatic management of risk allocation. There is nothing intrinsically objectionable about such clauses provided they are properly and reasonably defined.

10.39 Rajah J took care (at [61]) to restrict the court's conclusion to cases where the customers were commercial entities:

> In the context of banks on the one hand (which would otherwise bear the onerous, if not near impossible task of detecting forgeries given the advent of modern technology) and commercial entities on the other (which only have to check their own records), we do not find it onerous or unreasonable to place the risk of loss on the latter if this has already been agreed upon. However, we are not required to express a general opinion as to the reasonableness of conclusive evidence clauses as and when applied to individuals and non-corporate customers since the issue does not arise in the present context. Each case will entail a careful examination of its own peculiar factual matrix starting with a careful scrutiny of the conclusive evidence clause that is being questioned.

Capacity

10.40 Another interesting question which arose in *Abdul Jalil bin Ahmad bin Talib v A Formation Construction Pte Ltd* [2006] 4 SLR 778 (see also paras 10.6 and 10.7 on "Formation") was whether the plaintiff's solicitors had the ostensible authority to settle the plaintiff's claim against the

defendant. Applying *Waugh v HB Clifford & Sons Ltd* [1982] Ch 374, Judith Prakash J was satisfied that the plaintiff's solicitors were indeed clothed with the relevant authority. Further, and more significantly, Prakash J also held that such ostensible authority could only be defeated by actual knowledge of the agent's lack of authority. Constructive or imputed knowledge would not suffice. The learned judge reasoned (at [34]) as follows:

> In my view, constructive knowledge cannot be sufficient for this purpose as when you are dealing with an apparent position the only way of nullifying such appearance would, logically, be actual knowledge that what appears to be the case is, in fact, not the case.

10.41 It is respectfully submitted, however, that this thorny issue may not always admit such a clear-cut solution. First, as the experience in other contexts (such as that involving unilateral mistakes, see para 10.61below) has shown, the distinction between actual and constructive knowledge is often an elusive one given that the fact of knowledge is determined objectively by drawing inferences from the circumstances. Secondly, if regard be had to the fact that ostensible authority is itself an objective notion, *ie* the authority which the agent reasonably appeared to have to the third party, the alleged illogic of denying authority on the basis that the third party ought to have known of the agent's lack of authority would seem much less evident.

Discharge of the contract

Discharge by agreement

10.42 In *GYC Financial Planning v Prudential Assurance Company Singapore (Pte) Ltd* [2006] 2 SLR 865 (see also para 10.4), Judith Prakash J clarified that although a termination clause had to be precisely observed by the terminating party, it did not follow that such a clause would be breached by giving a longer notice than that specified in the agreement. Nor is a termination notice defective only because it does not specify the duration of the notice period, as it suffices if the notified party was in fact given the contractually specified period of notice. Further, where an agreement is terminated in accordance with a provision which permits termination by notice, the terminating party's right to end the agreement is absolute and he is not obliged to furnish any reason for his decision.

Discharge by repudiatory breach

10.43 It is trite law that a contract may be discharged on the acceptance by one party of a repudiation of the contract by the other. It is also trite law that

such discharge has only prospective effect: it only releases the contracting parties from as-yet unperformed obligations under the contract. The discharge has no effect as to obligations arising prior to the discharge. But the application of these trite principles in the District Court case of *Ng Kim Siong t/a Regency Asia Building Services v Management Corporation Strata Title Plan No 1634* [2006] SGDC 121 illustrates the need to take care in the usage of the language of "repudiatory breach".

10.44 The plaintiff contracted with the defendant management corporation to provide cleaning services for the condominium managed by the defendant for the period of two years ending on 15 March 2004. The defendant expressly agreed that so long as the plaintiff complied with the terms, covenants, conditions and stipulations of the agreement throughout the period of the contract, the plaintiff could opt for an extension of the contract for a further two years on the same terms and at the same rate of payment by giving written notice of such intention *at least* three months prior to the expiry of the agreement (at [3]). Accordingly, on 28 November 2003, the plaintiff wrote to the defendant to make known his intention to exercise the option to extend the contract for a further two years. This met with no response from the defendant until February 2004. In the interim period, the defendant discovered that equivalent cleaning services could be procured from other service providers at a lower cost. It decided to award the cleaning contract to another company when the agreement with the plaintiff came to an end to reduce expenditures. This decision was communicated to the plaintiff on 19 February 2004 by letter, requesting also that the plaintiff hand over the keys to the condominium necessary for the carrying out of cleaning operations by 27 February 2004. The plaintiff responded by letter on 23 February 2004, stating that the premature demand for return of the keys amounted to a wrongful repudiation of the contract as well as its right to renew it. In a further letter, the defendant acknowledged that the date for handing over the keys ought to be postponed to 16 March 2004, but alleged that the plaintiff had provided unsatisfactory services with the result that the option for extension of the contract could not be made.

10.45 The learned District Judge Thian Yee Sze found that the *raison d'etre* for the defendant's refusal to renew the agreement with the plaintiff was its desire to cut costs (at [15]), that the plaintiff had fulfilled all the pre-conditions for exercise of the option to extend the contract and had the right to exercise it (at [30]). The grounds of decision do not, however, make it clear as to whether the learned district judge accepted that that right had been *exercised* by the plaintiff. This, perhaps, stemmed from the way the plaintiff's case had been pleaded in his Statement of Claim:

> 8. The Defendants have wrongfully repudiated the Cleaning Agreement and/or the Plaintiff's right to renew the Cleaning Agreement.

10.46 The plaintiff's case was that "the defendants had repudiated their agreement by renouncing their liabilities under it" (at [42]). Citing (at [44]) the summary of the law on repudiation of contract in the form of a renunciation of the contract at para 24-018 of the 29th edition of *Chitty on Contracts* with approval, the learned district judge observed (at [45]) that "the operative test in determining whether there is such an intention not to go on with the contract is 'whether the party renunciating [sic] has acted in such a way as to lead a reasonable person to the conclusion that he does not intend to fulfil his part of the contract …' " (paraphrasing the words of Devlin J in the case of *Universal Cargo Carriers Corporation v Citati* [1957] 2 All ER 70); it entailed *more* than just a " 'mere refusal or omission of one of the contracting parties to do something which he ought to do' under the contract" (following *Freeth v Burr* [1879] LR 9 CP 208), and required there to be an unwillingness or inability to perform some *essential aspect* of the contract. This, the learned judge opined, was a question of *fact*, for which the burden of proof lay on the plaintiff, being the party making the plea. In the opinion of the learned district judge, the plaintiff had failed to discharge this burden (at [46]).

10.47 A number of comments may be made in response to the findings made by the learned district judge above. First, the basis for holding that the question whether a particular course of action by a contracting party amounts to renunciation of the entire contract so as to entitle the other party to discharge the contract (if he should so elect) for repudiatory breach is a question of *fact* is debateable. Certainly, the process of establishing what occurred involves questions of fact. But surely the process of establishing the legal implications of those factual occurrences does not.

10.48 Second, the analysis at [46] makes it plain that in the court's view, the defendant's letters in February 2004 did not amount to *renunciations* of the contract, "the contract" being the original cleaning contract due to terminate *on 15 March 2004*. That seemingly being the case before the court, its reluctance to find that the defendant's conduct had caused the plaintiff to lose the *entire* benefit of the contract is understandable. Much of "the contract" had already been performed, and it would soon come to an end anyway. The significance of this is highlighted by the court's counter-example (towards the end of [46]) as to how differently it would have characterised the defendant's actions had they occurred near the *commencement* of the contract. Given the wording of the term permitting extension of the contract

at the option of the plaintiff, and given the court's findings that the preconditions for such exercise were satisfied, it is unfortunate that parties do not appear to have given the court the opportunity to consider whether the option had *in fact* been exercised by dint of the plaintiff's 28 November 2003 letter so as to extend the cleaning contract beyond its original termination date of 15 March 2004 until 15 March 2006. Had *that* been the case put before the court, a nice question would have presented itself as to whether the defendant's demand for return of the keys and appointment of another cleaning contractor at what would effectively have been the mid-point of the contract might constitute a *renunciation* of the defendant's obligations so as to deprive the plaintiff of the whole of the benefit of the contact *as extended*.

Acceptance of discharge by breach (whether actual or anticipatory)

10.49 In the case of *HG Metal Manufacturing Ltd v Nam Tat Hardware Co* [2006] SGHC 37, Woo Bih Li J had occasion to reiterate the trite rule that a contract is only discharged by one party's repudiatory breach on the other's acceptance of that breach. In this case, the plaintiff ("HG Metal") contracted on 6 September 2004 to purchase a quantity of mild steel from the defendant partnership ("Nam Tat"). Payment was to be made by way of letters of credit, one to be issued within seven days and the second within 14 days from the date of the contract. Under the terms of the contract, the plaintiff would take delivery of the steel in two batches upon receipt of the two letters of credit. Woo J's judgment does not make it more precisely clear, but it appears that "soon" afterwards, the plaintiff made it known to the defendant that it would not be able to issue the letters of credit as it was contractually obliged to. From the judgment, it seems to have been assumed that this amounted to an anticipatory repudiatory breach.

10.50 Certainly, if this was the case, it would have no effect *vis-à-vis* releasing the defendant from its own contractual obligations to remain ready, willing and able to deliver the quantities of steel, unless it could be found that Nam Tat had (1) accepted such repudiatory breach; and (2) communicated such acceptance to HG Metal. On these matters, Woo J found the defendant's case to be lacking.

10.51 The defendant's evidence was that in response to the communication from the plaintiffs that it would not be issuing any letters of credit, one of the defendant's partners had told a director of the plaintiffs that this rendered the contract "useless". Woo J found that this did not amount to an unequivocal statement of intent to treat the contract as being at an end. In this, Woo J was fortified by the defendant firm's actions in

allowing the plaintiffs to take part delivery of the steel even though no letter of credit had been received. The contract was thus still on foot.

10.52 As a useful counter-example, one might look to the conduct of the plaintiffs in the case of *Highness Electrical Engineering Pte Ltd v Sigma Cable Co (Pte) Ltd* [2006] 3 SLR 640. In this case, the plaintiff ("Highness Electrical") contracted to purchase electrical cables from the defendant ("Sigma") based on a schedule of agreed prices (fixed until the end of 2005). In 2004, the defendant held back deliveries of cables ordered by the plaintiff under the contract due to increases in the cost of raw materials used to fabricate those cables. Deliveries only resumed after the plaintiff agreed to an increase in the price to be paid. Even so, by early 2005, the defendant was still in arrears of delivery of cables ordered months earlier, and in February 2005, the defendant informed the plaintiff that it would be unilaterally treating the contract as being at an end as at April 2005. This last act was, plainly, an anticipatory repudiatory breach on the part of the defendant, and was accepted by the plaintiff as such: in contrast with the plaintiff in *HG Metal* (above), solicitors for the plaintiff in *Highness Electrical* stated plainly in their reply to the defendant that the plaintiff had accepted the defendant's anticipatory breach and was treating the contract as being at an end. Having both demonstrated the plaintiff's intent *and* communicated the same to the defendant, the contract had plainly been terminated.

10.53 More complicated are cases where the communication of acceptance of repudiation (due to non-payment of sums of money due under the contract) is followed by payment of those sums which are then accepted "without prejudice" to the payee's prior rights. This issue was revisited in the case of *Leivest International Pte Ltd v Top Ten Entertainment Pte Ltd* [2006] 1 SLR 888. In this case, a settlement agreement had been entered into between the landlord of certain premises and the tenant of those premises. Pursuant to this settlement agreement, a one-year lease for the premises was executed, with an option to renew. Unfortunately, the tenant was late in paying certain sums specified under the settlement agreement, leading the landlord to seek a declaration that this late payment amounted to a repudiation of the lease.

10.54 Kan Ting Chiu J held that the tenant's tardiness in making payment did amount to a repudiatory breach. The tenant's non-payment as at the due date was met by a letter from the solicitors for the landlord, demanding that the tenant deliver up possession of the premises. Had matters stopped there, Kan J agreed that there would clearly have been acceptance of the tenant's repudiatory breach of the settlement agreement. But matters did not so stop.

When payment was tendered two days later to the solicitors for the landlord, that payment was accepted, albeit, "without prejudice to our clients" (at [31]). Further, rent under the one-year lease continued to be demanded, paid and accepted (also, "strictly without prejudice to all our rights at law": at [37]).

10.55 Following *Davenport v The Queen* (1877) 3 App Cas 115, Kan J held that by its acceptance of the costs and its demand for and acceptance of the rent for the premises following the initial late payment, the landlord had waived the breaches and it could not, therefore, resurrect them: at [43]. It mattered not that these acceptances had been made "without prejudice": at [38] and [41].

Vitiating factors

Misrepresentation

10.56 The tort of fraudulent misrepresentation was considered at length in *Raiffeisen Zentralbank Osterreich AG v Archer Daniels Midland Co* [2007] 1 SLR 196. Certain structured trade finance transactions were entered into between the plaintiff bank and, *inter alia*, the defendant. The purpose of the transactions was to utilise the defendant's trade flows to raise cheaper financing. In brief, the transactions involved the defendant selling certain goods to a company within the Parmalat group on a deferred 360-day payment term. The promissory note, issued in favour of the defendant for the goods and the payment of which was guaranteed by Parmalat, was discounted by the bank. The promisor and Parmalat defaulted in payment on account of the latter's bankruptcy. In the action against the defendant, the bank alleged that the defendant had falsely represented that the sale transactions were genuine when in fact the defendant had no goods to sell at the relevant time which would have justified the issue of the promissory note. Andrew Ang J found that, although the representations were undoubtedly false, the false representations had not been made fraudulently as the defendant honestly believed that title to the goods would pass from the defendant to the buyer and that, in any event, issues of title were irrelevant to the plaintiff.

10.57 Ang J stated (at [40] and [42]) as follows:

> Dishonesty is the touchstone which distinguishes fraudulent misrepresentation from other forms of misrepresentation. This turns on the intention and belief of the representor. A party complaining of having been misled by a representation to his injury has no remedy in damages under

> the general law unless the representation was not only false, but fraudulent … Belief, not knowledge, is the test.

10.58 On inducement, his Honour opined (at [53] and [54]) that there were two aspects to the element of inducement:

> First, it is relevant to consider the state of mind of the representor as the plaintiff must establish an intent to induce. The representor is presumed to have so intended once materiality is proved. The evidential burden then shifts to the representee to displace the *prima facie* case … Second, it is relevant … to consider the representee's state of mind to see whether he altered his position as a result of receiving the representation. It is necessary to show actual inducement.

It is important to note that an intention to induce (as opposed to knowledge of the falsity of the statement) appears crucial for a finding of *fraudulent* misrepresentation. Mere knowledge that a statement made was false appears insufficient (see *eg Tackey v McBain* [1912] AC 186 and *Rex Goose v Wilson Sandford & Co* [2001] Lloyd's Reports PN 189).

10.59 It may also be inferred from Ang J's judgment that materiality of the falsehood was not a *separate* requirement for establishing fraudulent misrepresentation. Although Ang J distinguished materiality from inducement, his Honour recognised their close relationship, opining that the latter may be inferred from the former. The position may, however, be different in the case of *innocent* misrepresentation (see *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1995] 1 AC 501).

Mistake

10.60 In *Wellmix Organics (International) Pte Ltd v Lau Yu Man* [2006] 2 SLR 117 ("*Wellmix Organics*") (the facts of which were briefly stated in para 10.1 above on "Formation"), Andrew Phang Boon Leong J (as he then was) held that even if the parties had agreed to a consent unless order, such an agreement would have been vitiated by either mutual or unilateral mistake on the part of the defendant. The learned judge also took the opportunity to comment on various aspects of the doctrine of mistake. In respect of mutual mistakes, the learned judge observed (at [58]) that this category of mistakes completely overlaps with the doctrine of contract formation:

> Put simply, this particular aspect of the law relating to mistake is simply the result of *a lack of coincidence between offer and acceptance*. In other words,

> both parties are at *cross-purposes* and, hence, *no* agreement or contract has been formed as a result. [emphasis in original]

10.61 Of greater significance are Phang J's observations on the doctrine of unilateral mistakes, the ambit and rationale of which were recently clarified by the Court of Appeal in *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2005] 1 SLR 502 ("*Digilandmall*"). To briefly recall, the Court of Appeal held in *Digilandmall* that a unilateral mistake renders a contract void at common law only if the mistake was of a fundamental nature, and the non-mistaken party has *actual* knowledge of the other's error. Where actual knowledge has not been established, the contract may still be set aside in equity, but only if the non-mistaken party's conduct can be said to involve an element of impropriety. Proof that the non-mistaken party has had constructive knowledge of the error would not suffice for this purpose. In *Wellmix Organics*, Phang J commented on the practical difficulty of distinguishing between actual and constructive knowledge, particularly in view of the fact that subjective (actual) knowledge is often ascertained by reference to objective evidence. Indeed, he observes (at [66]) that "what constitutes actual knowledge might well be a high … level of constructive knowledge ... [and] the paradigm model of this would arise in the situation of 'Nelsonian knowledge'" (see also PW Lee, "Unilateral Mistake in Law and Equity – *Solle v Butcher* Reinstated" (2006) 22 JCL 81 at p 85). The learned judge is therefore of the view (at [68]) that the two types of knowledge are distinguished only by degree rather than kind. However, the practical difficulty arising from this fine conceptual distinction ought to be understood in its proper perspective:

> What is important and practical, … is that regardless of whether actual or constructive knowledge is found by the court in the case concerned, the requirement of knowledge is satisfied and justice is thereby achieved, assuming that the other necessary elements relating to the doctrine of unilateral mistake have been satisfied. (at [68])

10.62 More controversially, Phang J also proffered suggestions on rationalising the doctrines of unilateral mistake in law and equity. The learned judge contended (at [69]–[72]) that the two doctrines should in fact share a common formulation, differing only in their consequences. This may, in his view, have the practical effect of preferring the jurisdiction in equity, the application of which only renders a contract voidable (and not void) and which in turn avoids any adverse impact on the rights of innocent third parties. Although it is not explicit, the rationale underlying this proposed fused doctrine appears to be that of unconscionability and, indeed, Phang J would regard it to be a specific application of a broader doctrine of

unconscionability (see [71]–[72]; see also Andrew Phang, "Contract Formation and Mistake in Cyberspace – The Singapore Experience" (2005) 17 SAcLJ 361 at pp 390–395). Phang J was, of course, mindful of the fact that this proposal ran counter to the Court of Appeal's decision in *Digilandmall*. Hence, until and unless a change is effected by the appellate court or by legislation, the bifurcated jurisdiction affirmed in *Digilandmall* remains good law.

10.63 In *Royal & Sun Alliance Insurance (Singapore) Ltd v Metico Marine Pte Ltd* [2006] 3 SLR 333 (see *supra* para 10.14 on "The Terms of the Contract"), the High Court affirmed the established rule that a contract may only be rectified for common mistake where the contract erroneously fails to record the true intention of both contracting parties. In this case, the defendant failed to prove that a warranty was mistakenly included in a marine insurance policy and it followed that its plea of rectification had to be rejected.

Undue influence

10.64 In *Lal Hiranand v Kamla Lal Hiranand* [2006] SGHC 98, the High Court affirmed that the inquiry as to whether a contract had been procured by undue influence was essentially a factual one. The fact that the plaintiff, who was an established businessman with multiple interests in many parts of the world, had ready access to independent legal advice weighed heavily with the High Court. Although the decision has since been reversed on other grounds (see [2007] 2 SLR 165), on the issue of undue influence, Tay Yong Kwang J concluded that the "evidence adduced did not show, on a balance of probabilities, that the plaintiff was unable to exercise his free and informed judgment" (at [111]). Tay J also appeared to endorse (at [101]) the House of Lords decision in *Royal Bank of Scotland v Etridge* [2002] 2 AC 773.

Illegality

Restraint of Trade

10.65 In what may come to be seen as a textbook illustration as to how the issue of restraint of trade clauses ought to be dealt with, District Judge Mavis Chionh handed down a clear and thorough exposition of the salient legal issues in the case of *Collins & Aikman Floorcoverings Asia Pte Ltd v Low Su Peng Jeremy* [2006] SGDC 154 ("*Collins & Aikman*"). The legal issues to be considered in this connection were as follows:

(a) All covenants in restraint of trade were *prima facie* void and unenforceable unless – and this was the only justification – the restriction was shown to be reasonable, both by reference to the interests of the parties and the interests of the public: at [107].

(b) Such covenants would be viewed much more strictly when imposed on a servant in a contract of service, than when imposed in a contract for the sale of a business, primarily because the bargaining position of a servant in the former case was usually anything but equal to that of the prospective employer: at [108].

(c) In consequence, a covenant which restrained a servant from competing with the master should the master-servant relationship come to an end was always void as being unreasonable, unless there was some exceptional proprietary interest owned by the master that required protection: at [109].

(d) Proprietary interest took the form of either the employer's trade secrets or his trade connections: at [111].

(e) Proof of the existence of such proprietary interest was a question of *fact* depending on the evidence adduced in each case: at [114].

(f) The onus of proving such special circumstances as to justify a restraint fell upon the promisee (for example, by adducing evidence to show what was customary in the particular trade, what was usual among businessmen as to the terms of employment, and what particular dangers required precautions): at [110].

10.66 None of the above is contentious, but the judgment serves as a pertinent reminder that restraint of trade clauses are not to be given overly broad effect. Therefore, even though the courts do not appear to take a technical view as to what constitutes "property" or "proprietary interests" of the employer in this context (see, *eg*, *HRnet One Pte Ltd v Choo Wai Ying Adrian* [2006] SGDC 202, where District Judge Laura Lau took the view that the test was whether there was "any trade secret or identifiable asset inherent in the business of the [employer] which could *fairly be regarded* as the [employer's] property" [emphasis added]: at [49]), that does not absolve the need for the employer to *prove* the existence of such interest.

10.67 Thus, assertions by an employer that it has trade secrets meriting enforcement of a restraint of trade clause against an ex-employee must be

proved in order to overturn the starting presumption against the validity of such clauses, and, as the grounds of decision of the learned district judge in *Collins & Aikman* show, such proof may be found in the safeguards placed by the employer to protect such trade secrets, as well as the degree to which such information (or parts thereof) were freely available: see [116]–[139].

10.68 In relation to the alternative head of "proprietary interest", *viz*, the employer's business connections, *Collins & Aikman* also usefully highlights the point that what is critical is not merely the existence of business connections. Proof of the pertinent proprietary interest requires something more than evidence of the mere entry into business relations or the creation of running accounts with counter-parties on the basis of a public tender or publicly available information: see [144] and [145]. Having proven such connections, it has also to be shown that the ex-employee had been able to establish goodwill and influence over the counter-parties to such accounts (at [143]) *during* the term of his employment; goodwill and influence over counter-parties *predating* such employment would be ignored for these purposes (at [146]).

Moneylending transactions

10.69 Given the draconian effect which a finding of illegal moneylending has on the validity of contracts, a restrictive approach to its application is to be expected. This was made evident in what may become the *locus classicus* on the issue of what constitutes an unlicensed (and thus illegal) moneylending *business*, *City Hardware Pte Ltd v Kenrich Electronics Pte Ltd* [2005] 1 SLR 733 (discussed at (2005) 6 SAL Annual Review 160 at para 9.81). But what constitutes *moneylending*? This was the primary issue before Kan Ting Chiu J in the case of *Pankaj s/o Dhirajlal v Donald McArthy Trading Pte Ltd* [2006] 4 SLR 79 ("*Pankaj*").

10.70 In *Pankaj*, the plaintiff arranged for his bankers to issue letters of credit ("L/Cs") in payment of goods purchased by the defendant. In return, the defendant agreed to pay the plaintiff the principal sum of the L/Cs, a commission charge, and interest. The defendant having become indebted to the plaintiff pursuant to this agreement, proceedings were brought by the plaintiff when the debts were not repaid. In its defence, the defendant pleaded that the agreement was unenforceable as having contravened the Moneylenders Act (Cap 188, 1985 Rev Ed).

10.71 Kan J made short work of rejecting this defence. Although moneylending transactions in violation of the Act may go beyond the loan or payment of money from the "lender" to the "borrower", or some third party

on the directions of the "borrower" (at [17], adopting the analysis of Rajah J in *City Hardware*), not all forms of financial assistance involved the lending of money in breach of the Act (at [18]). Agreeing with the analysis of Lim Teong Qwee JC in *Nissho Iwai International (Singapore) Pte Ltd v Kohinoor Impex Pte Ltd* [1995] 3 SLR 268 (at [18]), Kan J held that arrangements such as those before him in *Pankaj* were well known to those concerned with the import and export trade and were *not* loans in nature or in form. Although extension of such L/Cs amounted to a form of financial assistance, usually for profit, "unless we take all forms of financial assistance for a profit as moneylending, the arrangement between the plaintiff and the first defendant is not moneylending because no money is lent": at [23].

Remedies

Remedies under the contract and remedies for breach of contract

10.72 Given the sophistication of construction contracts and, very often, the parties thereto, it is commonplace for obligors in breach of their obligations under such contracts to find that they may be subject to claims *pursuant* to the terms of the contract as well as claims for *breach* of the terms of the contract. Plainly, the principles relating to *remoteness of damages* are pertinent to the latter, but ought, in principle, have no bearing on the former. Confusion arises in these cases where the contractual claims pursuant to the contract are pre-conditioned on events which also amount to a contractual breach. One unfortunate example of this phenomenon appears to have cropped up in the case of *Sato Kogyo (S) Pte Ltd v RDC Concrete Pte Ltd* [2006] SGHC 213.

10.73 In this case, the plaintiff ("Sato Kogyo") contracted to purchase concrete from the defendant ("RDC"). The contract provided that the plaintiff would purchase approximately 70,000m^3 of concrete at specified prices between 1 September 2003 to 30 June 2006. On 5 April 2005, the defendant suspended supply of concrete, alleging non-payment. On 30 May 2005, the plaintiff terminated the contract because the defendant's concrete failed quality control requirements and because of delays in the supply of the concrete.

10.74 To begin with, Lai Siu Chiu J held that the contract of supply was non-exclusive, meaning that the plaintiff was free to purchase concrete from other suppliers; and that the defendant did not have to supply concrete to the plaintiff in preference to other customers: the defendant would not be in breach of its obligation to supply concrete so long as it supplied up to

70,000m^3 of concrete within the whole of the contract period (at [26]). The defendant's practice of supplying concrete on a first-come-first-served basis did not amount to a breach of the contract as there was no express or implied term giving the plaintiff priority of supply.

10.75 The next question was whether the plaintiff could recover from the defendant sums paid to such other suppliers in excess of the price specified in the contract between the plaintiff and the defendant. In the learned judge's opinion, this turned on the construction of two terms within the contract. The first, set out in Appendix 1A to the defendant's revised quotation to the plaintiff headed "Terms and conditions of supply", read as follows:

> D. All cube strength results must be made known to The Supplier [the defendant] within 7 days after the 28 days test result. Should there be cube failure, The Purchaser [the plaintiff] is to inform The Supplier in writing within 14 days, otherwise The Supplier shall not be held responsible for any such failure Should the concrete supplied fail to meet all compliance tests, The Supplier undertakes to supply to The Purchaser, free of charge, the volume of concrete judged defective. The Supplier shall not be liable for any claims whatsoever for consequential and/or other damages.

The second was found in the plaintiff's letter of intent, and stated at cl 3:

> Notwithstanding the Terms and Conditions of Supply in your quotation, you [the defendant] are fully aware and will comply with the LTA's latest revision of Materials and Workmanship Specification for Civil and Structural Works at no extra cost.

And further, at cl 8:

> In the event that your supply is unable to meet LTA's requirements, or you are unable to continue your supply, Sato Kogyo (S) Pte Ltd reserves the right to terminate your contract and retain and use both the retention sum and any outstanding payment due to you and seek for alternative source of supply. In addition, Sato Kogyo (S) Pte Ltd also reserves the right to seek from you any direct cost incurred due to your non-compliance.

10.76 Having found that on its proper construction, the right to seek an indemnity from the defendant for "direct costs incurred" under cl 8 could only be invoked if the pre-condition of termination of the contract under that clause had been satisfied, and since the plaintiff did not terminate the contract until 30 May 2005, the learned judge held that the plaintiff was precluded from claiming the cost differential of alternative suppliers prior to that date: at [46].

10.77 But it seems arguable, at least, that the remedies referred to in cl D to Appendix 1A and in cl 8 of the plaintiff's letter of intent were *distinct* from each other: cl D being aimed at modifying the defendant's *secondary* obligations on failure to perform its primary obligation to supply concrete of satisfactory quality, exempting it from any liability for, "consequential and/or other damages", whereas cl 8 provided for a contractual right of termination, a contractual right of set-off, and a contractual right of indemnification for "direct costs" incurred due to non-compliance with the contract. Thus, it might be said that one clause related to claims for common law damages for *breach* of contract, whereas the other related to claims *pursuant* to the contract.

10.78 It is not clear from the grounds of decision if the distinction was drawn to the attention of the learned trial judge. However, it may be that the issues may have been conflated in two contexts. First, the learned judge appears to have been concerned with the question whether the exemption provisions in cl A operated to preclude recovery under the indemnity provision in cl 8: see [51]. Secondly, and seemingly without providing any clear answer to the afore-mentioned, the learned judge seems to have proceeded (at [52]–[55]) to dismiss any recovery of the "price differential" following 30 May 2005 on the basis that such price differential was not a "direct loss" as a result of breach, but was a "non-natural" head of damage within the second limb of the test in *Hadley v Baxendale* (1854) 9 Exch 341 of which no evidence as to the defendant's actual knowledge thereof had been led: at [56]. This section of the learned judge's grounds of decision appears to conflate the issues of recovery of damages with the question as to whether the contractual indemnity under cl 8 included the post-May 2005 "price differentials" paid out by the plaintiff. Although the question of remoteness is entirely appropriate in the former context, its application in the latter is obscure. But perhaps this is to read too much into the judgment.

10.79 Perhaps all that the learned judge sought to do was to deal with these two claims in the *alternative*. That is certainly one possible reading of the judgment, given the learned judge's finding within the span of just one sentence, towards the end of [52], that "it would be straining the language to say the price differential ... would come under the meaning of 'direct cost'". That would, of course, require us to ignore the learned judge's reference to *Saint Line Limited v Richardsons, Westgarth & Co Limited* [1940] 2 KB 99 ("*Saint Line*") as being in support of her construction of the clause, given that *Saint Line* was concerned with what constituted "direct damage" resulting from breach of contract, so as to fall within the ambit of a clause exempting liability for indirect or consequential losses in that case.

Damages where both parties to a contract are in breach and the defence of contributory negligence

10.80 The case of *Jet Holding Ltd v Cooper Cameron (Singapore) Pte Ltd* [2006] 3 SLR 769 has already been discussed in the context of terms implied by law (see paras 10.28–10.32 above). As discussed above, this case held that the sub-contract for refurbishment of a slip-joint between the first and second defendants, namely, Cooper Cameron (Singapore) Pte Ltd ("Cameron") and Stork Technology Services Asia Pte Ltd ("Stork"), contained a term implied in law that Cameron would exercise reasonable care in the determination of the scope of work to be carried out by Stork on the slip-joint. As Cameron had failed to provide Stork with the pertinent dimensional drawings of the slip-join, Cameron was in breach of this implied term. The complication arose because Stork was itself in breach of its obligation under the contract to detect any deficiencies in the riser box to which the slip-joint was attached (a deficiency which directly led to the eventual failure of the refurbished slip-joint).

10.81 The Court of Appeal recognised that although Cameron was itself in breach of duty of care in the tort of negligence to the first and second plaintiffs, and would be liable in damages for their losses, given Stork's breach of its contractual obligations to Cameron as mentioned above, Stork was obliged to indemnify Cameron for such damages. However, given that Cameron was itself also in breach of *its* contractual obligations to Stork, Cameron was also obliged to indemnify Stork.

10.82 The Court of Appeal observed that there were two analytical approaches to break the circle of indemnification. The first would be to determine whether one obligation was precedent to the other (*ie* whether Cameron's implied obligation to take reasonable care was a condition precedent to Stork's express obligation under the contract); if this was so, unless breach of the precedent condition had been waived, Cameron would *not* be entitled to look to Stork for indemnification. This, though, was inapplicable on the facts: the court was not convinced that Cameron's obligation could, as a matter of construction, be taken to be a condition precedent to the performance of Stork's obligations. Even if, hypothetically, that had been the case, Stork's commencement of performance of its obligations would seem to amount to a waiver of Cameron's implied obligation to take reasonable care, and might even amount to a waiver of any breach of such condition (see [96]).

10.83 So Cameron's implied obligation was found by the court *not* to be a condition precedent to Stork's express obligations. Consequently, it was not

barred from seeking an indemnity from Stork for breaching its express obligations to conduct a dimensional inspection of the riser box *with reasonable care*. It was important to note, however, that Stork's own obligation was not an absolute one – it was, in fact, coincident with its duty of care in tort (see [100]). As such, the defence of contributory negligence as provided for by the Negligence and Personal Injuries Act (Cap 54, 2002 Ed), the principles of application of which were authoritatively set out by the Court of Appeal in *Fong Maun Yee v Yoong Weng Ho Robert* [1997] 2 SLR 297), would seem to be entirely apposite, this being a case where Stork's liability to Cameron in *contract* was *concurrent* with its liability to Cameron in *tort*. On the facts before it, the court was satisfied that Cameron's own negligence had contributed to 50% of the losses caused by Stork's breach. What this meant, in light of the finding in the court below that Stork and Cameron were equally liable to the first and second plaintiffs in the sum of US$1m, was that: (a) Cameron and Stork were *each* liable to pay to the first and second plaintiffs the sum of US$500,000; (b) given Stork's breach of its express contractual obligations in relation to Cameron, Cameron was entitled to be fully indemnified for that sum by Stork; (c) but since Stork could rely on the Negligence and Personal Injuries Act to seek apportionment of the loss given Cameron's own contributory negligence (which was also assessed at 50%), this meant that Cameron could only seek an "indemnity" or rather, a "contribution" from Stork in the sum of US$250,000 (at [120]–[122]). In effect, Stork would bear the responsibility for paying US$750,000 out of the US$1m awarded to the first and second plaintiffs.

10.84 The court recognised, however, that where there was no such concurrent liability, direct application of the statute would not be possible. Nevertheless, in *obiter dicta*, the court acknowledged that similar effects might be fruitfully arrived at in the appropriate case through the application of a variety of other approaches (as have already surfaced in various parts of the Commonwealth). For example: "anticipatory mitigation" (at [105]); treating losses for which the plaintiff was contributorily negligent as being "too remote" (at [106]); implying a further term *in fact* that the parties would exercise due care for his or her interest (at [107]); or a denial of causation for the loss (at [108]) – any of these might usefully assist in the development of this corner of Singapore common law. In the court's view, all of these approaches, just like the question of *apportionment* under the Negligence and Personal Injuries Act, stemmed from the rationale of fairness (at [109]).

10.85 A note of caution, however, was raised in relation to the relevance of any doctrine derived from the "reasonable expectations of honest men" as set out by the Court of Appeal in *Tribune Investment Trust Inc v Soosan Trading Co Ltd* [2000] 3 SLR 405 to the development of this area of the common law. While recognising that the concept was an important one, the Court clarified that it had not, as yet, "attained the status of a substantive legal doctrine in and of itself" (at [111]) and indicated that further development of this part of the common law would likely have to be by reference to the other "devices" as identified in earlier parts of its judgment.

Damages for expenses incurred prior to breach

10.86 In the case of *Van Der Horst Engineering Pte Ltd v Rotol Singapore Ltd* [2006] 2 SLR 586, Andrew Ang J had occasion to apply the ruling in *Anglia Television Ltd v Reed* [1972] 1 QB 60 ("*Anglia Television*") permitting damages to be assessed on the basis of expenses incurred but which would have been recouped out of the revenues to be generated had the promisor not breached the contract, whether such expenses accrued before or after the contract. In this case, the plaintiff, Van Der Horst Engineering Pte Ltd ("VDH") entered into a subscription and options agreement (the "SOA") with the defendant, Rotol Singapore Ltd ("Rotol"). Under the SOA, VDH agreed to subscribe for 110m new shares in Rotol at 11.5¢ per share. The SOA also granted VDH a call option for another 110m new shares at the same subscription price of 11.5¢. On the execution of the SOA and pursuant to its terms, VDH paid a sum of $100,000 to Rotol as earnest money. But following from this, VDH discovered that Rotol had breached certain terms under the SOA. Ultimately, these led VDH to terminate the SOA, and to commence legal proceedings to obtain a refund of the earnest money, as well as special and general damages.

10.87 Leaving aside the issue of the refund of the earnest money, VDH claimed, as damages, its legal and professional fees in due diligence and in the negotiation and preparation of the SOA with Rotol. These were, of course, incurred prior to Rotol's breach of the contract. Nevertheless, Ang J applied the principle set out in *Anglia Television* and permitted VDH to recover these pre-breach reliance expenditures, holding that it was within the contemplation of the parties that these pre-breach expenditures would be recouped from the benefit of Rotol's performance of the contract – see [54].

10.88 Ang J noted that a plaintiff could either recover for gains prevented by the breach of contract (*ie* on an "expectation loss" basis) or, if such gains could not easily be quantified or were unlikely, owing to the contract being

unprofitable, he could alternatively, claim expenses rendered futile by the breach (*ie* on a "reliance" basis) – at [54]. But this does not mean that plaintiffs should be allowed to get out of a bad bargain. The learned judge noted at [55]:

> [I]n entering into the SOA, VDH expected to derive a benefit from Rotol's performance of the SOA. That such benefit is not easily reducible to a monetary figure should not preclude recoupment of the expenses incurred if the contract was not duly performed. To put it another way, it may reasonably be inferred that, to VDH, the benefit to be derived from Rotol's performance of the SOA would have been worth at least the expenditure incurred by VDH. (To that, a qualification ought to be made; if the subscription for the shares under the SOA was a bad bargain, Rotol could not put itself in a better position than if the SOA had been duly performed. However, there was no suggestion by Rotol that such were the circumstances here).

Damages for loss of a chance

10.89 The issues discussed in the Court of Appeal case of *Asia Hotel Investments Ltd v Starwood Asia Pacific Management Pte Ltd* [2005] 1 SLR 661 ("*Asia Hotel Investments*") (see (2004) 5 SAL Ann Rev 196 at paras 9.109–9.127) were usefully applied and clarified by Tay Yong Kwang J in his grounds of decision in the case of *Justlogin Pte Ltd v Oversea-Chinese Banking Corporation Ltd* [2007] 1 SLR 425 ("*Justlogin Pte Ltd*"). On the thorny issue as to the standard of proof required for a successful claim for damages for breach of contract causing the loss of a chance of a particular favourable outcome, Tay J focussed at [34] on a particularly infelicitously worded section in the grounds of decision delivered by the majority in *Asia Hotel Investments*:

> 135 Once causation is established for the loss of a chance, all that is needed to be shown is that the chance which was lost was real or substantial. It is not the loss of practically any chance which will give rise to a remedy …
>
> …
>
> 137 However, what would constitute a real or substantial chance need not be proved on the balance of probabilities. …

10.90 Taken out of context, [137] of *Asia Hotel Investments* could well be taken to mean that a standard of proof *lower* than the balance of probabilities is to be applied to determine the question as to whether a particular breach of contract has caused the loss of a real or substantial chance, a position

which was emphatically rejected by the seemingly dissentient grounds of decision handed down by Yong Pung How CJ in that case. However, read within the totality of the grounds handed down by Chao Hick Tin JA (as Tay J usefully sets out at [34] of his grounds of decision in *Justlogin Pte Ltd*), the majority's position is plain: there is no reason in principle why a plaintiff may not successfully prove that it has lost a real or substantial chance of a favourable outcome when that real or substantial chance could only be rated at or below 50%. That percentage rating (even if lower than 50%) would simply be just another *fact* for which the standard of proof was the usual one, though proof of chances rated at a point so low as to be *speculative* would still be precluded. Thus, as Tay J points out (at [38]), in cases of loss of a chance, "[w]hat we are concerned with is the loss of a chance of a favourable outcome rather than the favourable outcome itself".

10.91 At this juncture, it is helpful to note that the analysis would have been very different had the chance of the favourable outcome (being the acquisition of the assets of a company of which the defendants were the majority shareholder) been solely dependent on the plaintiff's own actions and decisions: they were not – the chance of a favourable outcome was dependent on the positions to be taken by the minority shareholders of the target company (as the learned judge recognised, at [40]). In cases where the chance of a favourable outcome is solely dependent on the plaintiff, the plaintiff must prove on a balance of probabilities that it would have taken such steps as would bring about that very outcome. For a recent discussion of the distinction between these two types of claim, see J Poole, "Loss of chance and the evaluation of hypotheticals in contractual claims" [2007] LMCLQ 63.

10.92 So, in relation to claims for loss of a chance of a favourable outcome dependent on third parties, there are two stages to the enquiry: first, establishing that the defendant's breach has caused the plaintiff the loss of a chance (not a certainty) of a particular outcome; and second, establishing the *value* of that loss. As to the second stage of valuation, Tay J applied a robust approach, ascertaining firstly, the net monetary gain to the plaintiff had the defendant not breached its obligation under their contract *on the assumption* that such gains were an absolute certainty; and secondly, discounting that gain by reference to the percentage chance that the plaintiff might have successfully derived such gains: at [77] (consistent with the approach taken in *Chaplin v Hicks* [1911] 2 KB 786).

Mitigation

10.93 The facts of the case of *Highness Electrical Engineering Pte Ltd v Sigma Cable Co (Pte) Ltd* [2006] 3 SLR 640 ("*Highness Electrical*") have already been set out above (*supra*, para 10.52). Apart from being a useful illustration as to the importance of clearly communicating one's acceptance of the other's anticipatory repudiatory breach so as to terminate the contract, it is a timely reminder of the well-accepted rule that, although acceptance of an offer of performance from the party-in-breach might well amount to a reasonable mitigatory step, such acceptance is not expected in all cases. Rather, such acceptance will only be treated as a reasonable mitigatory step in instances where the innocent party still retains confidence in the ability of the party-in-breach to perform its part of the bargain. On the facts of *Highness Electrical*, given the repeated difficulties which the plaintiff had encountered with the defendant, no such confidence could be entertained. Accordingly, the plaintiff could not be said to have failed to mitigate its losses when it refused to accept the defendant's offer to deliver electrical cables as per the terms of the original contract.

Measure of damages for breach of contract for sale of goods

10.94 The facts of the case of *Panwah Steel Pte Ltd v Burwill Trading Pte Ltd* [2006] 4 SLR 559 have already been discussed in the related case of *Panwah Steel Pte Ltd v Koh Brothers Building & Civil Engineering Contractor (Pte) Ltd* [2006] 4 SLR 571 (see discussion at paras 10.12–10.14 on "Construction of Terms"). Apart from providing guidance on that issue, in this case, the Court of Appeal also provided guidance on the application of s 51(3) of the Sale of Goods Act (Cap 393, 1999 Rev Ed), which reads:

> Where there is an available market for the goods in question, the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered or (if no time was fixed) at the time of the refusal to deliver.

10.95 As the Court of Appeal noted, this provision turns on the meaning of what constitutes "an available market". Usefully adding to the scarce commentary on the concept (culled from paras 16-059 and 16-062 of *Benjamin's Sale of Goods* (A G Guest gen ed) (Sweet & Maxwell, 6th Ed, 2002), the Court of Appeal noted (at [34]) that:

> [T]he relative dearth of guidance with respect to what constitutes "an available market" is perhaps due to the fact that this is very much a factual inquiry ... For example, much would turn on the nature of the product

> concerned, the quantities involved, the available sources of supply, the timeframe involved as well as the prices and price movements – to take but a few of the more common factors. What this means, on a more general level, is that one has to be rather careful in citing past precedents – even where the same product is concerned. The citation of precedents for the purpose of drawing general principles for application to the facts at hand do not [*sic*], of course, pose any difficulties. Difficulties, however, will arise when one attempts to cite a prior precedent in order to persuade the court to adopt the precise figures therein – or even figures which are close to it. This is not to state that the court will never apply a precedent in such a specific fashion. However, the facts would need to be virtually on "all fours" with the facts in the case at hand.

10.96 Given the factual nature of the inquiry as to what constitutes an available market for the purposes of quantifying Panwah's losses as a result of Burwill's short delivery on the two Burmese contracts, the Court of Appeal took the view that the Building and Construction Authority ("BCA") and International Enterprise Singapore ("IE") figures adduced by Panwah, being derived from the average of prices from many contracts, were more consistent with their derivation from a market, as compared with the approach taken by the trial judge, which had been to rely on the price of the Second Burmese Agreement. Therefore, although, the Court of Appeal accepted the trial judge's reservations as to the applicability of the BCA prices (which were for exports), it took the view that the IE prices ought to be taken as the yardstick for this particular set of proceedings. Nevertheless, the Court of Appeal took pains to emphasise that this ought not to be taken as setting down any general rule that IE prices ought invariably to be taken as constituting "market prices" in the future (at [37]).

Waiver of right to damages for breach of contract

10.97 The High Court has recently adopted the position taken by the Hong Kong courts in relation to the burden of proof as to the issue of waiver of one's right to damages for breach of contract. In *TCL Industries (Malaysia) Sdn Bhd v ICC Chemical Corp* [2006] SGHC 88, the learned judge noted (at [88])that:

> At law, as pointed out in the plaintiff's closing submissions (citing *P&M Industrial Company Limited v Winner Bob (HK) Company Limited* [2000] 233 HKCU 1), the defendant bears the burden of proving clear and unequivocal words or acts on the part of the plaintiff that it waived its right to damages or claims.

10.98 Though this is helpful as far as the question of burden of proof is concerned, because the trial judge was not satisfied that the defendant had discharged this burden, the doctrinal question that would necessarily follow as to the legal or equitable basis for such waiver having any effect did not require examination. For a discussion of these difficulties, see A Mandaraka-Sheppard, "Demystifying the Right of Election in Contract Law" (2006) 18 SAcLJ 60, as well as G H Treitel, *The Law of Contract* (Thomson Sweet & Maxwell, 11th Ed, 2003) at pp 102–124.

10.99 Some of these difficulties were, however, acknowledged by Belinda Ang Saw Ean J in *The Pacific Vigorous* [2006] 3 SLR 374. Having noted that the abandonment of an accrued right to damages is not something to be facilely inferred (at [10]), Ang J went on to quote Dr Sheppard's analysis (*supra*) with approval. :

> Dr Sheppard observed that once a right after breach has accrued, a release or discharge of that right is either by deed or upon consideration. She also noted that for a finding of an effectual total abandonment of rights one should be looking at whether or not the elements of equitable or promissory estoppel exist. As stated, the defendant did not raise estoppel and there was good reason for that. The defendant would not have been in a position to raise common law estoppel or a promissory estoppel. In both cases, there would have to be some sort of acting on the representation. The representee must have acted on the representation to his detriment.

10.100 Although one cannot but agree with the observation that any abandonment of an accrued right of action can only be given effect at common law where consideration has been furnished or if a deed to that effect has been executed (see, *eg* A Phang, *Cheshire, Fifoot & Furmston's Law of Contract – Singapore and Malaysian Edition* (Butterworths, 1994), at pp 802–805: the presence of consideration or a deed would, in effect, give rise to a discharge of the contract by agreement), the seeming conjunction between these common law mechanisms and the doctrine of *estoppel* (whether in its promissory or other forms) suggested by Ang J's choice of words ("... also noted that for a finding of an effectual total abandonment of rights one should be looking at whether or not the elements of equitable or promissory estoppel exist ...") is unfortunate. Rather, Dr Sheppard's point seems to have been that the finding of the presence of equitable or promissory estoppel would be an *alternative* to consideration or a seal, her ultimate conclusion being that the unwieldy doctrine of "waiver" ought to be seen as comprising four different components:

> Reviewing the authorities, it has been revealed that there is no meaningful use of "waiver". The instances in which it has been used can be limited to

cases where the contract remained unaltered by a mere concession, or there was a binding variation, or equitable estoppel, or election. [(2006) 18 SAcLJ 60 at para 111]

Election between inconsistent causes of action, rights and remedies

10.101 What is of greatest interest in *The Pacific Vigorous* [2006] 3 SLR 374 is the learned judge's treatment of the very difficult area relating to election between inconsistent causes of action. As will be recalled, in this case, the respondent-plaintiff, Agritrade, had brought *in rem* proceedings against the appellant-defendant, Pacific Vigorous, for mis-delivery of goods. In breach of the contract of carriage entered into between Agritrade and Pacific Vigorous, the appellant delivered the cargo in question to Bhatia, even though the bills of lading for the cargo had not been presented – they were still in Agritrade's possession. Agritrade therefore brought proceedings against Pacific Vigorous for breach of contract for mis-delivery and sought summary judgment.

10.102 Resisting the application, counsel for Pacific Vigorous had argued before the assistant registrar that there were three triable issues giving rise to defences to Agritrade's actions. The assistant registrar gave leave to defend, prompting Agritrade to bring the present appeal before Belinda Ang Saw Ean J. Ang J allowed the appeal and ordered that interlocutory judgment be entered for Agritrade, with damages to be assessed. In so doing, Ang J seems to have also considered what seems to have been a fresh submission by counsel for Pacific Vigorous (which the learned judge was entitled to do, since such appeals operate by way of re-hearing): that Agritrade's actions subsequent to the mis-delivery precluded the bringing of such an action.

10.103 Counsel's argument ran thus: Bhatia had, in fact, contracted to purchase the cargo in question. Despite not being in possession of the relevant bills of lading for the cargo, by agreeing to indemnify the defendant, Bhatia managed to get delivery of the cargo. On delivery, Bhatia discovered that the cargo did not conform to their contract description (as per its contract of sale with Agritrade). Nevertheless, Bhatia chose not to reject the goods but elected to pay Agritrade in part, making a deduction to reflect its losses as a result of the non-conformity of the goods with the contract description. This part payment was accepted by Agritrade. This, counsel submitted, amounted to an election by Agritrade to treat the earlier defective performance by Pacific Vigorous as good delivery under the contract of carriage. Counsel submitted that Agritrade was therefore precluded from pursuing its mis-delivery claim against Pacific Vigorous for breach of contract. That "right" was alternative to and inconsistent with Agritrade's "right" against Bhatia under the contract of sale: at [11].

10.104 After noting that care ought to be taken in reference to cases on election and the distinction that ought to be drawn between cases of election between rights and those involving election between remedies (at [13]), Ang J disposed of counsel's submission as follows (at [18]):

> No election arose in the sense that the defendant was wrong in contending that Agritrade had two inconsistent rights. The case for the defendant did not involve the pursuit of two alternative and inconsistent rights argued for by [counsel for Pacific Vigorous]. The "inconsistent rights" as formulated by [counsel] were:
>
> > (a) the right to treat the delivery of the cargo as wrongful and to pursue the defendant and Bhatia for conversion of the cargo; and
> >
> > (b) the right to treat the delivery of the cargo as lawful and to pursue Bhatia for the price of the cargo.
>
> The claims here fell under two contracts giving rise to separate and independent causes of action and they were against two different persons. The rule against double recovery imposed a limitation on a plaintiff like Agritrade's ability in such a situation to recover in the aggregate from one or more defendants an amount in excess of its loss. The fact that there were no inconsistent rights was sufficient to dispose of the doctrine of common law election.

10.105 That Ang J's conclusion was correct cannot be disputed, although it appears that the distinct rule as to double recovery (which operates *post*-judgment) may have been conflated with the rule as to election between inconsistent rights (which operates *pre*-judgment). The point which the learned judge sought to make was, perhaps, this: although there was no inconsistency between Agritrade's rights *vis-à-vis* Pacific Vigorous (for mis-delivery on the carriage contract) and Bhatia (for non-payment of the full price on the contract for sale of the goods comprising the cargo) and there was thus no need for Agritrade to elect between the two, at judgment, the principle against double recovery would operate to preclude a full award of damages on both contracts without taking into account any award on the other.

10.106 Difficulties, however, are created by the learned judge's observations (at [19]) that:

> Agritrade's remedies as between Bhatia on the one hand and the defendant on the other are cumulative, not alternative, remedies so much so that Agritrade was not required to choose between remedies.

10.107 With respect, these observations, and the exposition that follows, would seem to add to the confusion between election between rights and remedies for which warning had been sounded in an earlier part of the judgment. Having accepted counsel's submissions to be directed at the doctrine of election between inconsistent rights, the reversion to an analysis based on election between inconsistent *remedies* is inexplicable. If these observations were intended to found an alternative ground for the learned judge's decision, that intention is certainly not made plain, nor were the reasons as to *why* or *how* counsel's submissions might reasonably be viewed as going towards the question of inconsistent remedies set out.

Equitable relief for breach of contract

10.108 The case of *Lee Chee Wei v Tan Hor Peow Victor* [2006] SGHC 116 ("*Lee Chee Wei*") raises some interesting questions. The facts, as found by the trial judge, were these. In February 2005, the plaintiff entered into a contract with the fourth defendant, acting as agent for the first and third defendants, wherein the plaintiff's entire shareholding in a private limited company called Distributed Management Solutions Ltd ("DMS") was to be sold to the first and third defendants for a sum of $4.5m. An advance payment of $750,000 was paid, with the balance to be paid, at the latest, on 30 April 2005 (by which date it was expected that DMS would have been successfully listed on the Singapore Exchange). It appears to have been accepted that even though the contract was ratified by the first and third defendants in March 2005, the balance of the $4.5m was not paid, even though the plaintiff was ready and willing to hand over the requisite share transfer documents (see [12]). The first and third defendants were thus plainly in breach of their obligations as purchasers under their contract with the plaintiff.

10.109 The difficulties with the case begin with the remedies sought by the plaintiff. The plaintiff's prayers for relief are not set out in full in the judgment. But it seems the plaintiff primarily sought the remedy of specific performance or, alternatively, for damages in lieu of specific performance (see at [9]). Choo Han Teck J observed that even if one accepted that shares in a private limited company are unique or have intrinsic value as such, "that would only be a perspective from the point of view of the purchaser. The vendor's interest in the contract of sale was strictly monetary. What he wanted was payment of the purchase price" (at [9]). It would thus not be appropriate to make an order of specific performance in favour of the *vendor* of such shares. The alternative prayer for damages was, in turn, dismissed on the procedural point that the plaintiff had not pleaded for such damages *to be assessed*, nor had the counsel for the plaintiff applied for the pleadings to

be amended until it was far too late. This was critical, because the plaintiff did not adduce any evidence at trial as to his losses: see [10] and [11].

Refund of advance payments

10.110 The above does not present much difficulty. What *is* seemingly more difficult, appears at [12] of the learned judge's grounds of decision. This merits quoting in full:

> If neither specific performance nor an order for the assessment of damages was given, it followed that the plaintiff was obliged to return the $750,000. He would be entitled to retain the money only if the contract provided that it was paid as a non-refundable deposit or that the plaintiff had performed his part of the bargain. He might have been ready and willing to do so, but the fact was that he did not hand over the executed transfer forms to the defendants. On the longstop completion date (30 April 2005) he was to hand over the transfer documents duly executed but did not do so on account of the fourth defendant not appearing. I noted that cl 4.3 of the Contract provided that: "No Party shall be obliged to perform any of its obligations under cl 4.2 unless (simultaneously with such performance) the other Party performs all its obligations under that Clause." This meant that the plaintiff was not obliged to execute the transfer documents and could not be said to be himself in breach on account of not performing his part, but it could not mean that he was entitled to keep any money already paid unless the Contract expressly or clearly indicated that that money was not required to be returned in the event of a breach.

10.111 Care should be taken in reading this part of Choo J's judgment. First, it is settled law that advance part-payments of the purchase price under a contract are, in principle, recoverable by the payer from the payee, even where the payer is in breach of contract by not making the balance payment: see *Dies v British and Internal Mining and Financial Corp Ltd* [1939] 1 KB 724. However, if such advance payment has been deposited as earnest money which payer and payee intended to operate as a guarantee of due performance of the payer's obligations, at common law, such earnest money need not be returned and is instead forfeited by the payee (subject to the payer being able to persuade the court to grant him equitable relief against forfeiture): see *Howe v Smith* (1884) 27 Ch D 89. Although Choo J noted that there was no express provision in the contract that such advance payments would be forfeited by the plaintiff (which would put the question beyond doubt), it remains a question of *construction* of the terms of the contract as to whether the term requiring the advance payment is to be construed as taking the former form rather than the latter.

10.112 Choo J then suggests that had the plaintiff *performed* his part of the bargain by handing over to the purchaser defendants the share transfer forms, there would have been no need to return the $750,000. But it seems it would not have been sufficient for the plaintiff to be *ready and willing* to do so. The wording in the judgment that, "[the plaintiff] might have been ready and willing to do so, but the fact was that he did not hand over the executed transfer forms to the defendants …" suggests actual performance is required. With respect, this obscures the important role that the *tendering* of performance plays in contract law. In *Startup v Macdonald* (1843) 6 Man & G 593, it was stated (at 610) that:

> In every contract by which a party binds himself to deliver goods or pay money to another, he in fact engages to do an act which he cannot completely perform without the concurrence of the party to whom the delivery or the payment is to be made. Without acceptance on the part of him who is to receive, the act of him who is to deliver or to pay can amount only to a tender. But the law considers a party who has entered into a contract to deliver goods or pay money to another as having, substantially, performed it if he has tendered the goods or the money ... provided only that the tender has been made under such circumstances that the party to whom it has been made has had a reasonable opportunity of examining the goods, or the money, tendered, in order to ascertain that the thing tendered really was what it purported to be.

10.113 In light of the above, unless the effect of *Lee Chee Wei* is to repudiate the role of tender of performance in instances of sale of *shares* (as opposed to goods), Choo J's analysis here requires some expansion: the flaw in the plaintiff's case lay not in the fact that he might have been *ready and willing* to execute and deliver the share transfer forms, nor the fact that he did not actually execute and deliver them. Rather, the critical point was that the plaintiff did not *tender* such performance. That is to say, the plaintiff does not seem to have *attempted* performance of his obligations under the contract (or, at least, the facts as set out in the judgment do not suggest that he did). The key concept is not that performance be "actual". It is enough if performance be attempted, for actual performance of the obligation in this contract could not have been completed without the cooperation of the defendants. And this underpins the otherwise odd failure of plaintiff's counsel to bring an action for a fixed sum against the defendants (as noted above): without such tender or attempted performance, the balance of the purchase price was never *due*.