

9. CONTRACT LAW

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Formation of contract

Offer and acceptance

9.1 The rudimentary principle that a contract is only concluded upon the *unconditional* acceptance of an offer was applied in *Koon Seng Construction Pte Ltd v Siem Seng Hing & Co (Pte) Ltd* [2005] SGHC 8, where the alleged contract failed in the absence of an unqualified acceptance.

Certainty and completeness

9.2 The question whether an *unsigned* memorandum of understanding (“MOU”) could amount to an *oral* agreement arose in *Petrosin Corp Pte Ltd v Clough Engineering Ltd* [2005] SGHC 170. In this case, the plaintiff had assisted the defendant in securing a construction project in Pakistan on the understanding that it would be appointed as the latter’s subcontractor for the project, on terms allegedly contained in the MOU. Tay Yong Kwang J held (at [90]–[91]) that the MOU did not amount to an oral agreement as the parties were not *ad idem* as regards its content and had intended to be bound only by a signed written contract.

9.3 Tay J proceeded to observe (at [92], *obiter*) that if the parties’ agreement had in fact been established, the MOU would have placed the defendant under certain obligations, such as to co-operate with the plaintiff

in working out the terms of the subcontract. This would have been so even though the mechanics of how such obligations were to be performed were not fully set out. Tay J further observed (*ibid*) that “[the] document in question may have been termed an MOU instead of a contract or agreement ... but nomenclature alone does not a contract make or unmake”. These observations may be indicative of greater judicial willingness to contemplate a more moderate approach towards the recognition of pre-contractual “good faith” obligations than that traditionally represented by the English decision of *Walford v Miles* [1992] 2 AC 128.

9.4 The interesting question which arose in *Yip Jenn Yeuan v Ng Ah Chen* [2005] SGHC 21 was whether a settlement agreement as regards *liability* (but not quantum) in respect of a tort claim could form the basis of a separate action in contract. Choo Han Teck J held that it did not. Whilst the parties’ agreement on liability would have been binding on the defendant if the plaintiff had pursued the tort claim, it did not confer on the plaintiff a separate right in contract. An “agreement” which did not specify the quantum of damage – an essential term of the contract – or a particular mechanism for determining the same was incomplete and therefore unenforceable.

Identification of contracting parties

9.5 In the unreported decision of *Advantest Corporate Office (Singapore) Pte Ltd v SL Link Co Ltd* [2005] SGHC 75, a dispute arose as to whether the plaintiffs (“Advantest”) had entered into a contract with SL Link Co Ltd (“SL Link”) (a company registered in Taiwan) or Solar Link Co Ltd. The complication arose from the fact that both Solar Link Co Ltd and SL Link were Taiwan-registered companies. In consequence, their official registered names were in Mandarin. The critical difference was that Solar Link Co Ltd was in liquidation at all material times.

9.6 In prior dealings, the plaintiffs had received invoices bearing SL Link’s name in Mandarin and its Taiwanese company registration number, but also bearing the English name “Solar Link Co Ltd”. In subsequent negotiations with the plaintiffs, the representatives of the counter-party to the contract exchanged business cards. On one side, they bore the name “Solar Link Co Ltd”. On the other, they bore the Mandarin name of SL Link. Joint presentations were also made, purportedly on behalf of SL Link (using its Mandarin name), although the English name “Solar Link Co Ltd” was also applied to it. Ultimately, two agreements were finalised. The first “Appointment Agreement” was drafted in Mandarin and named SL Link (in

Mandarin) as a party. Among others, this agreement was executed by the chair of SL Link's board of directors. Following this, a second "Manufacturing Agreement" was executed, but in English. As SL Link referred to itself in English as "Solar Link Co Ltd", the Manufacturing Agreement named Solar Link Co Ltd as one of the parties.

9.7 At [26], the trial judge accepted the evidence of the managing director of the plaintiffs that it had always been represented to him that the name of the counter-parties in English was Solar Link Co Ltd. However, there was no finding as to the subjective state of mind of the counter-party's representatives. Since the issue was whether, on an objective basis, the plaintiffs contracted with SL Link or Solar Link Co Ltd, it followed that the subjective intentions of the parties were not critical. Plainly, given the evidence and the findings of the court, the counter-party was SL Link.

9.8 In similar vein, in *C S Geotechnic Pte Ltd v Neocorp Innovations Pte Ltd* [2005] SGHC 116 (see para 9.22 below on "Estoppel"), it was held that where there was clear evidence that a party had entered into a contract with the intention of being bound, it could not plead that it was not a true party to the agreement because it had contracted on another's behalf.

Contract formation and formalities in cyberspace

9.9 The High Court made landmark rulings in *SM Integrated Transware Pte Ltd v Schenker Singapore (Pte) Ltd* [2005] 2 SLR 651 (see para 9.43 below on "Implied Terms" and paras 9.88–9.95 below on "Mitigation") when it had to decide whether an alleged agreement for lease negotiated orally and through e-mail exchanges constituted an enforceable contract. In this case, the defendant (the lessee) argued that there was no concluded contract because the parties had not signed any written agreement for a lease, and that the negotiations were conducted on a "subject to contract" basis. Rejecting these contentions, Judith Prakash J found that the parties had negotiated with a view to create binding obligations, and had in fact agreed to the essential terms of the lease as evidenced by a number of e-mail correspondences.

9.10 More significantly, the defendant argued that any such lease, even if it existed, was not enforceable because it did not meet the formal requirements of s 6(d) of the Civil Law Act (Cap 43, 1999 Rev Ed) ("CLA"). This provision required agreements relating to the sale or disposition of immovable property, or any interest therein, to be evidenced by a written memorandum or note signed by the person to be charged. The relevant e-

mails, the defendant contended, were not a sufficient memorandum and were also not signed by the defendant. It sought to fortify its case by reference to s 4(1)(d) of the Electronic Transactions Act (Cap 88, 1999 Rev Ed) (“ETA”). Although ss 7 and 8 of the ETA respectively anticipated that electronic records and signatures could in general satisfy legal requirements for written information and signatures, the application of these provisions was specifically excluded by s 4(1)(d) of the ETA in respect of contracts relating to immovable property. The effect of this exclusion, the defendant submitted, was that s 4(1)(d) of the ETA had rendered e-mails and other electronic records *incapable* of satisfying the formal requirements of s 6(d) of the CLA.

9.11 Prakash J disagreed with the defendant. As the primary purpose of the ETA was to facilitate commerce by enabling reliance on electronic communication in commerce, it should not be interpreted to disable such reliance. The learned judge was of the view that s 4(1) of the ETA merely disapplied the provisions of the ETA for purposes of establishing the formality requirements relating to the excluded contracts; it did not negate the evidential value of electronic communications at common law. The question whether an e-mail could satisfy the formal requirements of s 6(d) of the CLA was to be determined by construing that provision, quite apart from the ETA.

9.12 Turning to s 6(d) of the CLA, Prakash J arrived at the following conclusions:

(a) Two specific e-mails exchanged by the parties constituted a sufficient memorandum for the purposes of s 6(d) of the CLA because these e-mails evidenced their agreement to the essential terms of the lease. It was well-established that such a memorandum did not have to be in a single document (at [73]).

(b) The e-mails satisfied the requirement for “writing” (as defined in s 2 of the Interpretation Act (Cap 1, 2002 Rev Ed)) because they contained words which could be displayed in a “visible form”. Such an interpretation had the effect of updating statutory language to reflect technological changes since its legislation, and, more importantly, addressed the mischief underlying s 6(d) of the CLA. In Prakash J’s words (at [80]):

The aim of the Statute of Frauds was to help protect people and their property against fraud and sharp practice by legislating that certain types of contracts could not be enforced unless there was

written evidence of their existence and their terms. Recognising electronic correspondence as being “writing” for the purpose of s 6(d) of the CLA, would be entirely consonant with the aim of the CLA and its predecessor, the Statute of Frauds, as long as the existence of the writing can be proved.

(c) A memorandum may be regarded as having been “signed”, for purposes of s 6(d) of the CLA, if it appeared in such form as was sufficient to authenticate the identity of the author. This could take the form of handwritten or printed signatures. In the case of the latter, no real distinction could be drawn between a typewritten signature, and one that was typed onto and sent with an e-mail (at [91]). Significantly, Prakash J went further and held that even if the author’s name had not been appended to the body of an e-mail message, it was “signed” because the author’s name appeared next to his e-mail address at the head of the message (at [92]).

9.13 Given the phenomenal extent to which the electronic and digital platforms have replaced paper as a communication medium, the importance of *SM Integrated Transware Pte Ltd v Schenker Singapore (Pte) Ltd* cannot be overstated. Indeed, the issue soon arose in a different context in a series of related decisions. In *Chor Pee & Partners v Wee Soon Kim Anthony* [2005] 3 SLR 433, the court had to consider whether a solicitor had entered into a fee agreement with his client; and, if so, whether the agreement fulfilled the requirements for writing and signature under s 111 of the Legal Profession Act (Cap 161, 2001 Rev Ed) (“LPA”). Although the High Court ultimately found that no such agreement existed, Lai Siu Chiu J acknowledged (at [51]) that the decision in *SM Integrated Transware Pte Ltd v Schenker Singapore (Pte) Ltd* would require a review of the requirement for handwritten signatures in relation to such agreements. (In a related proceeding, Lai Kew Chai J went further to hold that e-mails were likely to meet the formal requirements of s 111 of the LPA: see *Wee Soon Kim Anthony v Lim Chor Pee* [2005] 4 SLR 367 at [36]–[39].)

9.14 The Court of Appeal, however, found that the parties had in fact agreed to an *oral* fee agreement: see *Wee Soon Kim Anthony v Chor Pee & Partners* [2006] 1 SLR 518. As the formal requirements of s 111 of the LPA were intended for the protection of the client, the absence of a signed, written agreement did not prevent the client from enforcing it. That being the case, it could well be that the Court of Appeal did not think it necessary to address the issue as to whether the e-mails satisfied the statutory requirements as to form. This leaves open the question whether e-mail correspondence satisfies the requirement for writing under s 111 of the LPA.

It is submitted that in principle, where authenticity and agreement are undisputed, electronic records should be no less effective than paper.

Consideration

9.15 Where there is no doubt that the parties to a commercial agreement were *ad idem* and intended to be bound, it appears a plea of want of consideration will rarely, if ever, succeed. Feeble attempts to impeach contracts on this ground were made, unsuccessfully, in *Oversea-Chinese Banking Corp Ltd v Infocommcentre Pte Ltd* [2005] 4 SLR 30 (see para 9.32 below with regard to “Construction of terms”) and *Premium Funding Singapore Pte Ltd v SHC Capital Ltd* [2005] SGHC 196.

Estoppel

9.16 Promissory estoppel requires proof of an unequivocal representation upon which reliance was placed. Mere silence does not generally suffice, but where there is a duty to speak, silence may constitute a representation. These principles were affirmed by the High Court in *QBE Insurance (International) Ltd v Winterthur Insurance (Far East) Pte Ltd* [2005] 1 SLR 711.

9.17 In this case, an action (“the claim”) was commenced against an insured who was covered under two policies issued by the plaintiff and the defendant respectively. The plaintiff took control of the claim on the understanding that it would obtain legal advice on whether the defendant’s policy would be invoked to meet the claim, and to allow the defendant to take over the control of its defence in such event. Subsequently, however, the plaintiff independently conducted (and concluded) the defence of the claim without reference to the defendant, and then brought the present action on the basis that the defendant had agreed to make a contribution of 50% towards the claim. Andrew Ang JC (as he then was) held that there was no evidence of any agreement to contribute (at [19]).

9.18 Leaving aside the question of reliance, the learned judge observed, *obiter*, that if such an agreement had existed, the plaintiff would have been estopped by reason of its conduct from asserting its strict legal right in relation to obtaining a contribution from the defendant. The maintenance of complete silence and failure to respond to the defendant’s requests for information amounted to a representation that the plaintiff accepted sole responsibility for the claim. Notably, Ang JC also observed (at [25]) that in such an event, the estoppel would operate to *extinguish* the plaintiff’s rights because having deprived the defendant of the opportunity to independently

investigate and manage the claim, the parties could never be restored to their status quo *ante*.

9.19 In *Singapore Telecommunications Ltd v Starhub Cable Vision Ltd* [2006] 2 SLR 195 (see paras 9.23–9.29 below with regard to “Construction of terms”, and paras 9.47–9.53 below on “Exception clauses”), the Court of Appeal took the opportunity to reiterate (at [28], citing *Republic of India v India Steamship Co Ltd (No 2)* [1998] AC 878 at 913), the minimum requirements for establishing estoppel by convention:

- (a) the parties to a transaction [have] acted on an assumed state of facts or law;
- (b) the assumption is either one which both parties share or one which is made by one party and acquiesced in by the other; and
- (c) in the case of a shared assumption, there is either an “agreement or something very close to it” in respect of the assumption.

9.20 If established, estoppel by convention would preclude one or both parties from going back on that assumption if it would be “unjust or unconscionable” for one or both of them to do so (at [28]).

9.21 The Court of Appeal also clarified (at [27]) that although the *subsequent* conduct of contracting parties was not generally admissible as evidence of their subjective intention at the time of contract, such conduct would be admissible to prove that they had made a new contract, or that such conduct constituted the basis of an estoppel. At the same time, however, the court should guard against the use of the doctrine of estoppel by convention “as a means to admit, as it were by the back door, evidence of the parties’ alleged subjective intentions and negotiations to ascertain the meaning of contractual documents where such evidence would otherwise be inadmissible” (at [27]). See also para 9.28 below on “Construction of terms”.

9.22 Similar observations were made by the High Court in *China Construction (South Pacific) Development Co Pte Ltd v Spandek Engineering (S) Pte Ltd* [2005] SGHC 86, which was affirmed on appeal: see *Spandek Engineering (S) Pte Ltd v China Construction (South Pacific) Development Co Pte Ltd* [2005] SGCA 59. See also *C S Geotechnic Pte Ltd v Neocorp Innovations Pte Ltd* [2005] SGHC 116 (*supra* para 9.8 on “Identification of contracting parties”).

The terms of the contract

Construction of terms

9.23 The Court of Appeal decision, in *Singapore Telecommunications Ltd v Starhub Cable Vision Ltd* (*supra* para 9.19) (see also paras 9.19–9.21 above on “Estoppel” and paras 9.47–9.53 below, with regard to “Exception clauses”), affirmed once again the contextual approach to construction of contracts, which required the court to look at the language of the contract and the context in which the words were used.

9.24 A network lease agreement (“NLA”) was entered between Singapore Telecommunications Ltd (“SingTel”) and Starhub Cable Vision Ltd (“SCV”) pursuant to which SingTel was to lease its nationwide system of optic fibres and underground ducting to SCV. This allowed SCV to serve its cable television customers by transmitting cable television signals through SingTel’s network without building its own infrastructure.

9.25 Due to the inability of the parties to reach a final agreement with respect to all the properties that were ultimately to be served by SCV, the NLA specifically authorised SCV to access the network for content-provision to high-rise residential apartments in public and private housing only. No authorisation was given in relation to network access for content-provision to commercial and low-rise residential properties (“the excluded properties”). Although negotiations for separate agreements in respect of the excluded properties continued, they ended in failure.

9.26 Some time after the cessation of negotiations, SingTel discovered that SCV had linked its own fibres and ducts to those leased under the NLA to serve the excluded properties. SingTel contended that this “tapping” was a breach of the NLA. At trial, the High Court (*Singapore Telecommunications Ltd v Starhub Cable Vision Ltd* [2005] 3 SLR 236) held that while tapping was not expressly prohibited by the NLA, it was clearly not authorised (at [26]).

9.27 In reaching his conclusion as to the effect of the parties’ agreement, the trial judge relied on the draft minutes of a meeting between the parties, a footnote in a paper by the Telecommunications Authority of Singapore (“TAS”) to SCV entitled “SingTel’s Lease of Ducts/Fibre to SCV for its Roll-out to Landed Properties” and an e-mail from SCV’s Senior Manager (Regulatory Affairs and Operations) to its Senior Vice President (Broadband Engineering Services). The trial judge opined (at [25]):

Although the effect of the [NLA] cannot be construed according to the TAS paper or SCV's internal memorandum, these documents were relevant as they lent support and weight to [SingTel's] assertion that there was no agreement that tapping was allowed.

And, without the NLA, SCV had no right to transmit any signals through SingTel's network (at [19]):

If SCV did not have a right to tap [to serve the excluded properties], it cannot be entitled to do it just because there is no specific prohibition against it.

All of this led the learned trial judge to conclude that SCV was indeed in breach of the NLA (at [66]), a conclusion with which the Court of Appeal was apparently in agreement (*supra* para 9.19 at [45]).

9.28 On appeal (*supra* para 9.19), Belinda Ang Saw Ean J (delivering the grounds of decision of the court) affirmed the general principle that extrinsic evidence is not admissible for the construction of a written contract and the parties' intention must be determined, on legal principles of construction, from the words they have used (at [24]). However, the language of the contract must be read in the context in which the words were used. This requires regard to be had to the "surrounding circumstances", which would include the commercial purpose of the contract, the genesis of the transaction, the background, the context and the market in which the parties were operating (at [24]), citing Lord Wilberforce's observations in *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989 at 995–996 with approval). A proven common assumption *prior* to the agreement is an objective fact that the court can and should take into account as part of the factual matrix within which the contract was made (at [27]). The law thus differentiates between admissible background evidence of the nature and objectives of a contract and inadmissible evidence of negotiations and of the parties' subjective intentions. In the circumstances, the court affirmed the trial judge's finding as to the construction of the NLA.

9.29 Notwithstanding the care taken in the construction of the NLA, there may remain a slight difficulty: even if, as the trial judge noted, SCV had tapped SingTel's network in an unauthorised manner, it does not necessarily follow that such unauthorised access will amount to a breach of *contract*. Although it was clearly found that there was no express contractual prohibition, the trial judge did not appear to make any finding that there was an implied term prohibiting tapping for content delivery to the excluded properties. Unless such a term was implied, it is unclear how SingTel's

remedy could be said to lie in contract. Certainly, even without such a finding, SCV's unauthorised access would not go without remedy: a remedy might lie in autonomous unjust enrichment. Some residual doubt therefore remains as to the underlying cause of action in support of the judgments handed down by the court.

9.30 The general principles of contract construction were also applied by the High Court in *China Construction (South Pacific) Development Co Pte Ltd v Spandek Engineering (S) Pte Ltd* [2005] SGHC 86 (*supra* para 9.22).

9.31 In *Evergreat Construction Co Pte Ltd v Presscrete Engineering Pte Ltd* [2006] 1 SLR 634 (see also para 9.44 below, with regard to "Implied terms"), the High Court applied the general principle that a party in default under a contract cannot take advantage of his own wrong to qualify the operation of an express term. V K Rajah J opined (at [51]) as follows:

In essence, even if the parties expressly provide that the contract shall *ipso facto* determine upon the happening of a certain event, such a provision is to be construed subject to the principle that no man can take advantage of his own wrong, so that one party may not be allowed to rely on such a provision where the occurrence of the event is attributable to his own act or default ... This principle is also referred to as the "*prevention principle*" and is wedded to notions of fair play and commercial morality. It offends all sensible norms of commercial intercourse to allow a party in breach of its contractual obligations to rely on its very breach to either evade responsibility or, even more farcically, to assert that the other contracting party must also willy-nilly accept or sustain the consequences of that breach. [emphasis in original]

In order to invoke this principle, however, it must be shown that the contractual right or benefit that a party is asserting or claiming is a direct result of that party's prior breach of contract (at [52]). To do so, it would be necessary to identify the relevant breach, the factual consequences flowing from the breach and the advantage the party in breach was seeking to assert.

9.32 The question whether a bank was excluded from exercising an express discretionary right to recall a loan facility was considered in the case of *Oversea-Chinese Banking Corp Ltd v Infocommcentre Pte Ltd* (*supra* para 9.15 on "Consideration"). The plaintiff bank had granted an overdraft facility to the defendant for its "working capital purposes". The terms of the facility expressly empowered the bank to call for repayment on demand. The facility was secured by a mortgage of the defendant's only asset, a piece of vacant land, and a director's guarantee. When the plaintiff terminated the facility and demanded repayment, the defendant was unable to comply with

the demand. Summary judgment was obtained by the bank, against which judgment the defendant appealed.

9.33 The defendant contended that the facility was extended for the primary purpose of developing the land. In the circumstances, and relying on the unreported English decision of *Titford Property Co Ltd v Canon Street Acceptances Ltd* (Ch D, 22 May 1975) (“*Titford*”), a provision for repayment on demand would be repugnant to that purpose and should thus be disregarded (at [48]). V K Rajah J distinguished *Titford* on the facts, observing (at [50]) that while the facility there was for a fixed term and the documentation clearly indicated the bank’s unequivocal commitment to allow the borrower’s achievement of the loan’s specific object, the factual matrix in the present case was rather different. There was neither a fixed term nor any special or particular purpose. In fact, the bank had unfailingly reiterated its overriding right to recall the facility on demand (at [56]). His Honour opined that the decision in *Titford* did not lay down any principle of general application but was a decision that was peculiar to its factual matrix (at [49] and [51]). Rajah J endorsed (at [52]) the approach adopted by Gibson J in *Williams and Glyn’s Bank Ltd v Barnes* [1981] Com LR 205 and observed (at [54] and [55]) as follows:

[A]n express term that an overdraft facility is repayable on demand will usually be given effect to although this is not invariably the position, particularly if the purported right is repugnant to an agreement the parties have reached on the express purpose and/or duration of the facility. Banks and their advisers should take pains to spell out clearly the parties’ intentions and rights. From time to time a bank may find that reliance on a standard printed term conferring a general right of recall may be found to be misplaced if such a general right collides plainly with the agreed intent and/or purpose of a loan.

It seems plain to me that whether a facility is recallable on demand or not is in the final analysis simply an issue of interpretation. Substance takes precedence over form. Labelling a term loan “an overdraft facility” will not alter the substance of that facility. In every case the court should be astute enough to probe the relevant factual matrix to ascertain the purpose of the loan and the lender’s rights that prevail within that matrix.

9.34 The question of the admissibility of expert evidence to aid in the construction of the terms of documentary credits was raised in *Standard Chartered Bank v Korea Exchange Bank* [2005] SGHC 71. Leave of court was sought to introduce the affidavits of an American law professor and a retired legal counsel, both of whom were held out as experts. Andrew Ang JC (as he then was) affirmed (at [20]) the basic rule of contract construction:

When a contract is in writing and its meaning is clear, the basic rule is that no extrinsic evidence may be adduced to modify the meaning of the words used. In this context, it is said that the construction of a document is a question of law. The court does not take into account the evidence of witnesses in determining the meaning and interpretation of a document or provisions within a document ... Evidence, however, may be adduced to show that certain words used in the contract have a particular meaning distinct from their ordinary meaning. Where the meaning is unclear, evidence of the circumstances surrounding the making of the contract (but not of the negotiations) may be adduced as an aid to interpretation of the written words.

In a commercial context, evidence of trade customs may be adduced to assist in the construction of a contract (at [21]). This principle, however, is only applicable where the party is seeking to rely on a particular custom. Otherwise, it is not for a witness, expert or otherwise, to state his views as to the meaning of ordinary English words in a written contract (at [22] citing *Seaconsar Far East Ltd v Bank Markazi Jomhourī Islami Iran* [1999] 1 Lloyd's Rep 36). In the context of the present case, the issue before the court was strictly one of construction of the relevant contractual documents. As there was no suggestion that the words used in these documents had a particular meaning distinct from the ordinary meaning, nor was there reliance upon a particular custom, evidence of banking practice was therefore inadmissible. In the circumstances, the court dismissed the application.

9.35 The relevance and importance of the factual matrix in the construction of contractual terms was also highlighted in *Sie Choon Poh v Amara Hotel Properties Pte Ltd (No 2)* [2005] 3 SLR 576 (see para 9.54 below under "Exception clauses").

The parol evidence rule

9.36 The parol evidence rule as embodied in ss 93 and 94 of the Evidence Act (Cap 97, 1997 Rev Ed) was considered at length in the High Court decision of *China Insurance Co (Singapore) Pte Ltd v Liberty Insurance Pte Ltd* [2005] 2 SLR 509. The question before the court was whether the insurance policy issued by the plaintiff covered the same subject matter and risk as the policy issued by the defendant, constituting a case of double insurance so that the latter would be legally obliged to contribute towards any payment made by the plaintiff to the insured. The defendant sought to admit affidavit evidence to show that the subject matter and risk covered under its policy differed from that under the plaintiff's policy.

9.37 Andrew Phang JC (as he then was) held that on a plain and reasonable construction of the documents themselves it was amply clear that the risks covered in the respective policies were different (at [30]). His Honour also found the affidavit evidence tendered by the defendant to be “relevant, admissible and persuasive”, conclusively determining the case in the defendant’s favour (at [31]).

9.38 On whether the evidence was excluded by s 94, Phang JC held that the section, by virtue of the phrase “as between the parties”, contemplated documents which were bilateral and dispositive in nature and did not apply to fact situations where both parties were essentially strangers to each other’s contracts. As the insurance policies in the present case were clearly non-dispositive documents, s 94 was inapplicable (at [31], [34] and [36]). Phang JC was, however, of the view that the documents fell within the broader ambit of s 93.

9.39 Whilst acknowledging (see discussion at [37]–[44]) that unresolved issues remained as to the precise relationship between ss 93 and 94, in particular whether, s 93 notwithstanding, there were common law exceptions to the parol evidence rule that applied to permit admission of evidence, his Honour was of the view that common law exceptions that were not inconsistent with the provisions of the Evidence Act should continue to be applicable (at [41] and [45]).

9.40 In the circumstances, his Honour considered two common law exceptions to be of relevance. The first was the well-established principle that permitted resort to extrinsic evidence to aid the court in establishing the factual matrix, knowledge of which was crucial in the construction of contractual terms (at [46]). In Phang JC’s view, this general principle was applicable even where the contract documents were unambiguous, as “any aid to construction which does not add to, vary or contradict the relevant documents ought to be permitted” (at [51]; *cf China Construction (South Pacific) Development Co Pte Ltd v Spandek Engineering (S) Pte Ltd* (*supra* para 9.22) at [26]). A second common law exception that was applied in the present case was that which related to the admissibility of extrinsic evidence to identify the subject matter of an agreement (at [54]). In the final analysis, the extrinsic affidavit evidence tendered was admissible and established the case clearly in the defendant’s favour (at [55]).

9.41 Phang JC made two further noteworthy observations. First, the principle that extrinsic evidence was admissible as an aid to construction might arguably not be an *exception* to the parol evidence rule as such but is

rather “simply a logical and commonsensical legal principle that courts ought to apply as a matter of course – if nothing else, because in the real world, one cannot divorce the application of the relevant legal principles from the context in which they must necessarily operate” (at [52]). The Court of Appeal decision in *Singapore Telecommunications Ltd v Starhub Cable Vision Ltd* (*supra* para 9.19)(discussed at paras 9.19–9.21 above with regard to “Estoppel” and paras 9.23–9.29 above on “Construction of terms”) might arguably lend some support for this view. The court did not consider the parol evidence rule and indeed, there was probably no reason to as the evidence was adduced, not to contradict or vary the terms of the written contract, but to confirm the ambit of the agreement in question.

9.42 Second, Phang JC expressed the view that while the parol evidence rule does serve an important practical function (at [59]), the time is nevertheless ripe for a legislative reconsideration of this “very problematic rule as embodied within equally problematic statutory provisions” (at [66]). In his opinion (at 58):

To the extent, therefore, that the parol evidence rule (as embodied in the local context within ss 93 and 94 of the Evidence Act) may be utilised as instruments to exclude what, on a commonsensical view, ought to be admissible and relevant evidence, and thereby hinder the attainment of a fair and just result, a measure of reform may be necessary. Such reform must, of course, be effected by the Legislature ...

Implied terms

9.43 In *SM Integrated Transware Pte Ltd v Schenker Singapore (Pte) Ltd* (*supra* para 9.9) (see also para 9.9–9.12 above on “Contract formation and formalities in cyberspace” and paras 9.88–9.96 below on “Mitigation”), it was argued that the lease agreement in question was subject to a condition precedent that was not fulfilled, and that the condition precedent was an implied term of the contract. Judith Prakash J affirmed (at [96]) the well-established principles for the implication of contractual terms, noting that “the touchstone for the implication of terms is necessity and not merely reasonableness, and that a necessary term to be implied must always be equitable and reasonable”. On the facts, the court found that the alleged term was neither necessary for the business efficacy of the lease, nor had it been agreed to by *both* parties, being a term that was essential only from the *lessee’s* point of view. In the circumstances, the court was unable to hold that the lease was subject to an implied condition precedent (at [101]).

9.44 In *Evergreat Construction Co Pte Ltd v Presscrete Engineering Pte Ltd* (*supra* para 9.31, with regard to “Construction of terms”), V K Rajah J opined (at [48]) that “when parties make and seal a contract, they are deemed to have done so on the basis that they intend and desire the contract to be performed and taken to its conclusion”. Therefore, it followed that where both parties to a written contract have agreed to do something which required the concurrence of both parties, the contract would be construed so as to impose on the parties an implied obligation to co-operate, even in the absence of express words to that effect (at [49]).

9.45 Interestingly, Rajah J did not appear to have considered whether the general conditions for the implication of a term have been satisfied, the tenor of the judicial language used suggested that an obligation to co-operate would be imposed even in the absence of an implied term to that effect (*cf North Sea Energy Holdings NV v Petroleum Authority of Thailand* [1997] 2 Lloyd’s Rep 418 at 430; affirmed by the Court of Appeal in [1999] 1 Lloyd’s Rep 483). Perhaps detailed consideration of the issue was unnecessary for decision in the present case but clarification on the necessary conditions for the imposition (as opposed to implication) of such an obligation would certainly be helpful.

9.46 For another case which considered the manner in which contractual terms may be implied, see *Panwah Steel Pte Ltd v Koh Brothers Building & Civil Engineering Contractor (Pte) Ltd* [2006] 1 SLR 788.

Exception clauses

9.47 The principles applicable to the construction of an exemption clause were considered in the Court of Appeal decision of *Singapore Telecommunications Ltd v Starhub Cable Vision Ltd* (*supra* para 9.19) (see also paras 9.19–9.21 above on “Estoppel” and paras 9.23–9.29 above on “Construction of terms”). The facts of the case have already been summarised (see paras 9.24–9.27 above). Article 8.5(a) of the NLA (which was set out in the High Court’s judgment, *supra* para 9.26 at [60]) provided as follows:

Notwithstanding any other provisions of this Agreement and regardless of any fault or negligence of [SCV] or [SingTel], neither Party shall be liable to the other for any indirect, incidental, consequential, or special damages (including, without limitation, damages for harm to business, lost revenues, or lost profits) regardless of the form of action or whether such Party had reason to know of such damages ...

At trial, the High Court had held that although SCV had breached the NLA, SingTel's claim for lost rental fell within the "lost revenues" class of excluded liabilities and was therefore not recoverable (see High Court's judgment at [63] and [64]).

9.48 The Court of Appeal disagreed with the trial judge. Belinda Ang Saw Ean J observed (at [52]) as follows:

[T]he trial judge overlooked the importance of adopting in this case a contextual approach when interpreting a contractual term. Under the contextual approach, the scope of Art 8.5(a), which is very broadly worded, may be cut down in the light of "the purpose of the contract and the circumstances in which the contract was made" ... Article 8.5(a) should be construed in the context of the contract as a whole. The focus on the purpose of the contract and the circumstances in which it was made is particularly apt where exemption clauses are concerned. The general rule should be applied that if a party otherwise liable is to exclude or limit his liability or to rely on an exemption, he must do so in clear words; any ambiguity or lack of clarity must be resolved against that party ... The principle that exemption clauses must be construed strictly entails, as this court held in *Hong Realty (Pte) Ltd v Chua Keng Mong* [1994] 3 SLR 819 ("*Hong Realty*") at 825, [19], that the application of such clauses must be restricted to the *particular circumstances* the parties had in mind at the time they entered into the contract. [emphasis in original]

9.49 In construing any term of a contract, the primary obligation of the court is to give effect to the intentions of the parties as exhibited in their written agreement. While the court will look at the natural and ordinary meaning of the words used, the contextual approach to contract construction requires consideration of the contract as a whole, and not merely the words in issue. Only when the meaning of the exclusion clause, *read in context*, is clear and unambiguous will it be given effect. Within a particular factual matrix, the function of an exclusion clause might, on a true construction, qualify the main purpose of the contract. In such a case, the clear meaning of the exclusion clause must be given effect to, notwithstanding a seemingly fundamental breach of contract.

9.50 This, however, was not the case in *Singapore Telecommunications Ltd v Starhub Cable Vision Ltd*. As Ang J pointed out (at [55]):

A separate agreement on the lease of the Facilities in relation to Excluded Properties was envisaged. In these circumstances, it would be astonishing (unless compelled to do so by the words used in the NLA) to attribute to the parties an intention to exclude a liability for tapping, a subject matter which they never thought about ... That Art 8.5(a) does not apply, extend

to or embrace tapping accords with the commercial purpose and construction of this provision. The commercial purpose of Art 8.5(a) was to protect each party to the NLA against the risk of non-performance or mis-performance by the other in relation to Permitted Properties. Put another way, Art 8.5(a) was meant to apply only where the types of damages listed arose while the parties were doing what was contemplated under the NLA, *ie*, using the Facilities to provide cable television services to Permitted Properties.

9.51 Ang J's statement (at [52]) that "the application of such clauses must be restricted to the particular circumstances the parties had in mind at the time they entered into the contract" raises the spectre of the "four corners" rule. The rule was expressed by Scrutton LJ in *Gibaud v Great Eastern Railway Company* [1921] 2 KB 426 at 435 as follows:

[I]f you undertake to do a thing in a certain way, or to keep a thing in a certain place, with certain conditions protecting it, and have broken the contract by not doing the thing contracted for in the way contracted for, or not keeping the article in the place in which you have contracted to keep it, you cannot rely on the conditions which were only intended to protect you if you carried out the contract in the way in which you had contracted to do it.

9.52 While there remains doubt as to whether such a principle applies in respect of exclusion clauses generally, it is clear that those cases cited in support concerned radical deviations or departures from the *performance contemplated by the contract*. In the present case, what SCV did would certainly not qualify as performance of its obligations under the NLA, which, as Ang J pointed out, was in respect of specified properties only.

9.53 Although strictly unnecessary for the purposes of the decision, the court proceeded to interpret the exclusion clause, and held (at [67]) that the true scope and effect of the clause in question was to exclude contractual claims for losses which would have been recoverable under the second limb of the rule in *Hadley v Baxendale* (1854) 9 Exch 341; 156 ER 145. (*Quaere*, however, if this line of analysis would have been necessary if in truth, SingTel's cause of action lay not in breach of contract, but in autonomous unjust enrichment? See para 9.29 above.)

9.54 In *Sie Choon Poh v Amara Hotel Properties Pte Ltd (No 2)* [2005] 3 SLR 576, the High Court considered the meaning of the term "gross negligence" in the context of a covenant to repair. The lease agreement contained an exception clause which released the landlord, in the absence of any "gross negligence" on the part of the landlord, from any liability for any

loss, damage or injury suffered by the tenant as the result of any event that occurs in the leased premises (at [3]). The court had, therefore, to consider if the landlord was “grossly negligent” and thus disentitled from relying on the clause.

9.55 Lai Kew Chai J observed (at [6]) that the term “gross negligence” as a concept was not susceptible of definition:

This is because the circumstances giving rise to the duty to act, including the duty to remove a potentially damaging or dangerous situation, vary from case to case and they also vary in infinite degree. It should be recognised that it is a practical impossibility that all the relevant circumstances which point to the degree of the negligence involved should be the same in any two cases that may arise.

As this would be a factual inquiry, Lai J opined (at [8]) that the particular circumstances at play in each case have to be examined and evaluated. In particular, Lai J considered (*ibid*) the following factors to be important in determining whether the fault of a defendant is so much more than merely ordinary neglect as to amount to great or gross negligence:

- (a) notice or awareness of the existence of the risk;
- (b) the extent of the risk;
- (c) the character of the neglect;
- (d) the duration of the neglect; and
- (e) the ease or difficulty of fulfilling the duty.

Vitiating factors

Misrepresentation

9.56 The law of misrepresentation was extensively considered by the Court of Appeal in *Jurong Town Corp v Wishing Star Ltd (No 2)* [2005] 3 SLR 283. Jurong Town Corporation (“JTC”) was the developer of a research complex. Through its subsidiary, Jurong Consultants Pte Ltd (“JCPL”), tenders were invited for façade works, and ultimately, Wishing Star Ltd (“WSL”) was awarded the contract. The contract was terminated on the ground of misrepresentation three months later. In an action for wrongful termination, JTC applied for the issue of misrepresentation to be tried first. At trial (*Wishing Star Ltd v Jurong Town Corp (No 2)* [2005] 1 SLR 339), while

it was found that WSL had indeed made false representations as to its satisfaction of the tender evaluation criteria, the court found that JTC had not relied on the misrepresentations. It was further held that JTC had in any event affirmed the contract after it had knowledge of the misrepresentations.

9.57 On appeal, the Court of Appeal found that WSL had made untrue representations, and further found that these representations were made fraudulently as WSL made them in the knowledge that they were untrue. Referring to s 1 of the Misrepresentation Act (Cap 390, 1994 Rev Ed), the court observed (at [76]) that the fact that the representations had been incorporated as terms of the contract did not mean that JTC's cause of action should be for breach of contract. Neither did the nature of the contract require any stricter view as to whether there was misrepresentation in law. The nature of the contract involved should not affect the legal issue (*per* Woo Bih Li J), delivering the judgment of the court, at [78]):

[I]t is immaterial in law whether a construction contract or some other contract is involved. A construction contract may, generally speaking, make findings of misrepresentation more difficult than ... a simple contract to purchase a car. However, that is a different point from imposing some sort of higher threshold for construction contracts.

9.58 On the issue of inducement, WSL made two main submissions. First, it was submitted that JTC, through JCPL, had known of the misrepresentations and was indifferent to them. WSL relied on the less than conscientious attitude of JCPL to support its contention. The Court of Appeal, however, rejected the submission. In the court's opinion, while such conduct demonstrated JCPL's deficiency in carrying out its responsibilities, this was not the same as non-inducement (at [105]). The court placed particular emphasis on the fact that WSL had made the representations fraudulently, and having done so, it did not "lie in the mouth of WSL" (at [99]) to argue that the representations did not induce the award of the contract.

9.59 Relying on *Attwood v Small* (1835–1838) 6 Cl & Fin 232; 7 ER 684; [1835–1842] All ER Rep 258, WSL also submitted that as JTC had JCPL evaluate WSL's representations, JTC had not relied on the representations but on JCPL's evaluation. The court disagreed, observing (at [113]–[114]) as follows:

We see no logic, firstly, in penalising a party who has chosen to act carefully but failed, whether due to negligence or otherwise, to discover the fraud. Put in another way, such a proposition would encourage the indolent. Secondly, such a proposition would also encourage fraud.

It is our view that such a proposition cannot be valid. A person who has made a false representation cannot escape its consequences just because the innocent party has made his own inquiry or due diligence, unless the innocent party has come to learn of the misrepresentation before entering into the contract or does not rely on the misrepresentation when entering into the contract. This is all the more so when the representation is made fraudulently. We would add that it matters not whether the inquiry or due diligence is conducted by the innocent party or his agents or both. The principle is the same.

9.60 The court was of the view that the expertise and experience of JTC and JCPL did not mean that they were not induced by the representations (at [115]). The representations, which in the court's view were calculated by WSL to induce the award of the contract, were material in that no reasonable person would have considered them unimportant (at [119]). Thus, while JCPL did make its own evaluation, it had also been induced by the representations to recommend the award of the contract to WSL.

9.61 In dealing with the question whether JTC had affirmed the contract upon knowledge of the misrepresentations, the Court of Appeal laid down the following general principles:

(a) Before an election can be made, the injured party must have knowledge not only of the facts which gave rise to the right to rescind, but also that the law gave him the right to rescind. However, knowledge of the mechanics of exercising the right to terminate was not a prerequisite to election (at [164]).

(b) A binding election requires the injured party to communicate his choice to the other party in clear and unequivocal terms, and he will not be bound by a qualified or conditional decision (at [171]).

(c) Election can be express or implied and will be implied where the injured party acts in a way which is consistent only with a decision to keep the contract alive or where he exercises rights which would only be available to him if the contract had been affirmed (at [171]).

(d) The court should not adopt an unduly technical approach to deciding whether the injured party has affirmed the contract. Very clear evidence that the injured party has chosen to go on with the contract notwithstanding the other party's repudiation is required before a finding of affirmation is made. An injured party

does not automatically lose his right to treat the contract as discharged merely by calling on the other party to reconsider his position and recognise his obligations (at [172]).

(e) An election to affirm by the injured party may be conditional, and upon the failure of the condition, the injured party's right to rescind re-emerges (at [184]–[189]).

9.62 In the circumstances, the Court of Appeal found that JTC had made a conditional election to affirm the contract, but as WSL had failed to meet the conditions, the right to terminate for misrepresentation re-emerged and the contract was thus validly terminated by JTC.

9.63 In *Oversea-Chinese Banking Corp Ltd v Infocommcentre Pte Ltd* (*supra* para 9.32, with regard to “Construction of terms”), the High Court affirmed that for a party to succeed in a contention of misrepresentation, the party must demonstrate not only that there had been a false representation made by the other party but also that an inducement arose out of that misrepresentation (at [32]). On the facts, there was no actionable misrepresentation as neither factor was established. The factual inquiry is thus of primary importance.

9.64 In *Leow Chin Hua v Ng Poh Buan* [2005] SGHC 39, the plaintiff alleged that he had been induced to invest large sums of money in a business by the defendant's fraudulent misrepresentations of fact. Of the four representations relied upon, Tan Lee Meng J found two to be statements of intention, as these had related to what would be done in the future. While a statement of an intention not presently held by the maker would amount to a misrepresentation of the maker's state of mind, and would hence be a false statement of fact, there was no attempt by the plaintiff in the present case to show the defendant's state of mind at the time the statement was made. As for the other two statements, Tan J found on the evidence that the defendant had not made those statements. In any event, the court found that, the plaintiff, being an experienced businessman, had been fully aware of the financial position of the business. In the circumstances, there was no actionable misrepresentation.

Undue influence

9.65 In *Gan Cheng Chan v Gan Meng Hui* [2005] SGHC 55, a father sued his daughter for specific performance of an agreement which obliged her, *inter alia*, to make an interest-free loan to her father, or in the alternative, damages for breach. Lai Siu Chiu J stated (at [49]) as follows:

The defendant based her case entirely on presumed undue influence for which her own counsel acknowledged that the following conditions must be present:

- (a) the existence of a special relationship which enabled one party to it to influence the decision of the other; and
- (b) the resulting transaction was manifestly disadvantageous to the person subject to the influence.

In the circumstances, the court found that while the parent-daughter relationship was one which enabled the father to influence the decision of the daughter, the agreement could not be said to be manifestly disadvantageous to the daughter (at [50]–[52]). This was because the agreement was part of a family arrangement, and family arrangements are (at [43], citing *Peh Nam Kee v Peh Lam Kong* [1996] 1 SLR 75) “very special creatures which have to be treated rather differently” from commercial transactions or transactions between strangers. On the facts, Lai J found the family arrangement to be “beyond criticism” (at [44]).

9.66 Two observations may be made here. First, it should be noted that even if the two “conditions” for presumed undue influence had been established, it would not follow that the transaction will necessarily be set aside. This is because the ascendant party (the plaintiff father in this case), may be able to rebut the presumption that he had used undue influence. The presence of the parent-daughter relationship, which Lai J considered (at [50]) as “undoubtedly” fulfilling the first condition, merely raises a *presumption* that one party had *influence* over the other. The presumption of *undue influence* only arises if the second condition (stated here as manifest disadvantage) is present.

9.67 The second observation relates to the continued utility of the second condition of manifest disadvantage. In *Royal Bank of Scotland plc v Etridge (No 2)* [2002] 2 AC 773 (“*Etridge*”), the House of Lords substituted this test with a requirement that the transaction was one which “calls for explanation” (at [24]). The question, therefore, should not simply be whether the transaction was “manifestly disadvantageous” to the defendant, but whether, in the context of the parties’ relationship, it was one that required explanation. The *Etridge* test was in fact utilised in the almost contemporaneous decision of the High Court in *Oversea-Chinese Banking Corp Ltd v Tan Teck Khong* [2005] 2 SLR 694.

9.68 In *Oversea-Chinese Banking Corp Ltd v Tan Teck Khong*, an elderly lady had executed a mortgage over her property in favour of the plaintiff

bank to secure a loan to one of her sons. On whether the mortgage was executed under the undue influence of the son, Kan Ting Chiu J made (at [34]–[35]) the following observations with respect to the applicable principles:

The law also presumes undue influence in some situations. Presumed undue influence, described as Class 2 undue influence, falls into two types, Class 2(A) and Class 2(B). ...

When a claim is made on the basis of the presumption, there must be proof of the existence of the relationship. When a Class 2(A) or Class 2(B) relationship is proved, and the transaction is not readily explicable, a presumption arises that undue influence has been exerted. The presumption is rebuttable. It only shifts the burden of proof to the alleged wrongdoer to offer a proper explanation for the transaction.

On the facts of the case, Kan J found (at [40]) the transaction to be manifestly one-sided and not readily explicable by the mother-son relationship.

9.69 It is also noteworthy that Kan J retained the classificatory scheme for undue influence cases established in the earlier English decision of *Bank of Credit and Commerce International SA v Aboody* [1990] 1 QB 923 and utilised by Lord Browne-Wilkinson in *Barclays Bank Plc v O'Brien* [1994] 1 AC 180. The utility of the classification was doubted by the House of Lords in *Etridge* (*supra* para 9.67). In the final analysis, however, whether the classification is retained or not is arguably unimportant. It is the factual inquiry that is crucial in any case involving an allegation of undue influence, whether or not the complainant could have availed herself of a presumption in her favour. In this regard, the High Court has generally been acutely aware of the need to take into account the individual circumstances of the particular case (see, eg, *The Bank of East Asia Ltd v Mody Sonal M* [2004] 4 SLR 113 and *Oversea-Chinese Banking Corp Ltd v Chng Sock Lee* [2001] 4 SLR 370). Nevertheless, it is hoped that there will soon be an opportunity to resolve the apparently divergent approaches as to the continued relevance of “manifest disadvantage” in undue influence cases.

Illegality

Restraint of trade

9.70 Through an excess of caution, it is not uncommon to have multiple contract terms attempting to address the same business concerns. However, in the appeal between *Stratech Systems Ltd v Nyam Chiu Shin* [2005] 2 SLR

579 (“*Stratech Systems*”), the Court of Appeal has provided hints that such excess of caution may, in certain contexts, rebound on the contracting parties.

9.71 The main issue in *Stratech Systems* was concerned with whether the first and second respondents, Nyam Chiu Shin (“Nyam”) and Wong Leh Hung (“Wong”), who had resigned as employees of the appellant company, Stratech Systems Ltd (“Stratech Systems”), and entered the employ of the third respondents, Guthrie Engineering (S) Pte Ltd (“Guthrie”), were in breach of their confidentiality obligations under their contracts of employment with the appellant company. Under those contracts, both Nyam and Wong were also subject to restraint of trade clauses, prohibiting them from entering the employ of entities such as Guthrie until at least nine months had lapsed from their leaving the employ of Stratech Systems. Stratech Systems’ claim that Nyam and Wong had breached their confidentiality obligations was dismissed by the High Court ([2004] SGHC 168), a ruling which was upheld by the Court of Appeal. What is of interest, however, is the Court of Appeal’s treatment of the restraint of trade clauses.

9.72 Stratech Systems did not dispute that the clauses in question were intended to be in restraint of trade. In ascertaining their enforceability, the Court of Appeal (at [43] and [44]) approved the analysis set out in *FSS Travel and Leisure Systems Ltd v Johnson* [1999] FSR 505 at 512–513, emphasising that the courts will *never* uphold a restraint of trade clause which is *merely* aimed at protecting an employer from competition by a former employee. Rather, to uphold such a clause, a legitimate interest must be identified which might, in a general sense, be regarded as “property” of the employer’s which it would be unjust to allow the employee to appropriate for his own purposes.

9.73 The Court of Appeal found (at [48]) that insufficient evidence had been tendered to demonstrate that Stratech Systems had any legitimate interest over and above protection of its “confidential information”. But, as to protection of its confidential information, given that Stratech Systems already had the benefit of the confidentiality clauses, the court reasoned that the *main* function of the restraint of trade clauses was simply to inhibit competition (at [49]). Accordingly, cl 9.4 of the respondents’ employment contracts would not be given any legal effect (at [50]).

9.74 Given this, cases such as *Advantest Corporate Office (Singapore) Pte Ltd v SL Link Co Ltd* (*supra* para 9.5) where parties are subject to both

obligations of confidentiality *and* restraints of trade, may require reconsideration to take into account the developments in *Stratech Systems*.

9.75 The tightly reasoned approach taken by the Court of Appeal in *Stratech Systems* may also be usefully contrasted with the rather more formalistic approach taken by Choo Han Teck J in the case of *Tullett Prebon (Singapore) Ltd v Chua Leong Chuan Simon* [2005] 4 SLR 344 (“*Tullett Prebon*”).

9.76 In *Tullett Prebon*, Choo J accepted (at [9]) the distinction drawn by Lord Reid in *Esso Petroleum Co Ltd v Harper’s Garage (Stourport) Ltd* [1968] AC 269 between clauses in restraint of trade and other contractual undertakings. Lord Reid had (at 294) noted:

Whenever a man agrees to do something over a period he thereby puts it wholly or partly out of his power to “exercise any trade or business he pleases” during that period. He may enter into a contract of service or may agree to give his exclusive services to another: then during the period of the contract he is not entitled to engage in other business activities. But no one has ever suggested that such contracts are in restraint of trade except in very unusual circumstances, such as those in *Young v. Timmins* [(1831) 1 Cr & J 331; 148 ER 1446], where the servant ... might have been given no work and received no remuneration for considerable periods and thus have been deprived of a livelihood ...

9.77 Strictly speaking, as the learned judge noted, the defendant employees in *Tullett Prebon* were not subject to restraint of trade clauses. Instead, their employment contracts simply precluded them from having any right to terminate their employment with notice, until at least two years’ employment with the first plaintiff had elapsed, and in Choo J’s opinion (at [9]):

When a term of contract is clearly expressed, it should be enforced wherever possible so that the parties to the contract, and the people who help draft them, might not despair to know that their efforts would ultimately be futile because no one cares, and that the courts would only order damages .

In consequence, Choo J granted the plaintiff employers’ applications for interim injunctions to issue against the defendant employees who had attempted to terminate their employment with the plaintiffs before the two-year employment period had lapsed.

9.78 Admittedly, the clauses in question in *Tullett Prebon* were not drafted as restraint of trade clauses. Also, unlike *Stratech Systems*, there was no

admission by the employers that they were intended to prevent competition from ex-employees. However, it cannot be denied that the effect of enforcing the same by way of injunctive relief was precisely that of restraining the defendant employees from entering into competition with the plaintiffs.

9.79 Had the clauses in question been framed explicitly as restraint of trade clauses, their operation would have been constrained by the apparent limitations introduced by *Stratech Systems*. Given the clearly anti-competitive effect of the clauses, it is indeed striking that equitable relief was granted on the terms sought by the plaintiffs, thereby allowing form to trump substance.

Moneylending transactions

9.80 Moneylending transactions falling within the ambit of the Moneylenders Act (Cap 188, 1985 Rev Ed) are illegal and void. In *City Hardware Pte Ltd v Kenrich Electronics Pte Ltd* [2005] 1 SLR 733, V K Rajah J usefully re-examined the *raison d'être* behind the Act.

9.81 In *City Hardware Pte Ltd v Kenrich Electronics Pte Ltd*, the plaintiff was in the business of selling and distributing sanitary fittings as well as other household goods and appliances. Through the efforts of the managing director of the defendant, the plaintiff was persuaded to enter into a trading relationship to acquire merchandise from Aloh Pte Ltd (“Aloh”). In turn, the plaintiff would supply such merchandise to the defendant at an agreed mark-up. In effect, this tripartite arrangement allowed the plaintiff to “sell” its credit facilities to the defendant for a fee, *ie*, the mark-up.

9.82 Rajah J observed that the Moneylenders Act prohibits the *business* and not simply the act of unlicensed moneylending (at [19]–[23], following *Lorrain Esme Osman v Elders Finance Asia Ltd* [1992] 1 SLR 369 and *Subramaniam Dhanapakiam v Ghaanthimathi* [1991] SLR 432). Second, although it is axiomatic that without “lending”, there can be no “moneylending”, the act of “lending” did not necessarily connote a direct giving to the purported borrower (at [24]).

9.83 What was core, however, was the “payment of money to or for someone on the condition that it will be repaid” (at [23], adopting the analysis of Clifford L Pannam, *The Law of Money Lenders in Australia and New Zealand* (The Law Book Company Ltd, 1965) at p 6). This remained a question of fact in every case (at [24]). (Indeed, though not expressly discussed in the judgment, one may recall the presumption that one is an illegal moneylender under s 3 of the Moneylenders Act does not operate unless there is a “lending” in consideration of a larger sum being “repaid”.)

9.84 In addressing these two threshold considerations, “the court ought not to be overzealous in analysing or deconstructing a transaction in order to infer and/or conclude that the object of the transaction was to lend money” (at [25]). If the formal documents do not evidence a loan but some other transaction, in the absence of evidence that such documents had been executed in the deliberate knowledge that they did not represent the actual agreement between the parties, the court should accept the formal documents on their face (at [26], adopting the analysis of Branson J in *Olds Discount Co, Ltd v John Playfair, Ltd* [1938] 3 All ER 275). Thus, “[i]f transactions are not loans in nature or in form, the law will be slow to infer or impute a relationship of moneylending” (at [28]).

9.85 Applying this to the facts before him, Rajah J noted that the arrangement was not in the nature of a loan. First, there was no evidence of Aloh having borrowed or been lent any money by the plaintiff, nor had any claim been made against Aloh. Nor were the transactions, “structured or intentionally disguised to evade the [Moneylenders Act]” (at [38]). Further, the size of the mark-up was modest (not exceeding 9% of the original price) and would represent a *reasonable* profit to the plaintiff (at [39]). Nor were they loans in form. These transactions were supported by regular documentation, on which the regular duty was paid, and were not structured to avoid and had no characteristics offensive to the Moneylenders Act.

9.86 Most significantly, the learned judge recognised (at [47]) that although the Moneylenders Act was designed to regulate the conduct of unlicensed moneylenders, its “pro-consumer protection ethos was never intended to impede legitimate commercial intercourse or to sterilise the flow of money. It [was] not meant to curtail the legitimate financial activity of commercial entities that are capable of making considered business decisions”. Further, it was clearly not the objective of the Moneylenders Act to “prevent or impede legitimate businesses from entering into legitimate arrangements for improving cash flow; nor is it the objective of the [Moneylenders Act] to constrict the flow of financial liquidity in commerce among smaller businesses” (at [48]).

Remedies

Damages in a three-party “black-hole” case

9.87 As was mentioned in last year’s annual review of contract cases, in *Chia Kok Leong v Prosperland Pte Ltd* [2005] 2 SLR 484, the Court of Appeal upheld the ground-breaking decision of Prakash J in *Prosperland Pte Ltd v*

Civic Construction Pte Ltd [2004] 4 SLR 129 (see (2004) 5 SAL Ann Rev 162 at paras 9.90–9.100). A full discussion of the implications of this decision is beyond the scope of this paper. For present purposes, it probably suffices to note that the Court of Appeal has accepted that arguments on either the “broad” or “narrow” grounds as set out by the House of Lords in *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 may be raised in an appropriate case under Singapore law.

Mitigation

9.88 The important case of *SM Integrated Transware Pte Ltd v Schenker Singapore (Pte) Ltd* (*supra* para 9.9) also poses interesting questions in relation to mitigation.

9.89 As mentioned above, although the defendant was found to have agreed to lease a warehouse from the plaintiff at \$43,000 per month for a period of 24 months, the defendant failed to take possession. The warehouse was left vacant for seven months before another tenant was found for it – but it could only be rented out for \$30,000 per month, leading the plaintiff to suffer a shortfall of \$13,000 in monthly rental income.

9.90 Prakash J allowed the plaintiff’s claims in relation to damages for: (a) loss of rental for the period from the time when the defendant should have taken up the lease until the time when the warehouse was eventually leased out to third parties; and (b) the difference in the rental income that would have been earned had the defendant taken up the lease and that which was actually earned from another party (although the learned judge also ordered a deduction in light of a saving in estate agent’s fees which would have been payable by the plaintiff had the lease been taken up and completed in full (at [116])).

9.91 All of this is consistent with the position taken by Warren L H Khoo J in *Tan Soo Leng David v Lim Thian Chai Charles* [1998] 2 SLR 923 that “contractual” remedies extending to recovery for expectation loss are available for breach of a lease agreement, even though as a matter of property law, no recovery beyond the date of termination or surrender would have been permitted.

9.92 Slightly more difficult, however, is Prakash J’s treatment of the final head of damages claimed by the plaintiff, *viz* the additional estate agent’s fees paid by the plaintiff to secure the replacement tenancy with the third parties. The replacement tenancy commenced seven months after the original lease

was to have been taken up, and would expire 36 months later. The replacement tenancy therefore extended for a period of 19 months beyond the time when the original lease would have terminated.

9.93 The defendant contended that as the agency fee paid in respect of the replacement tenancy related to the whole 36 months of that tenancy, the defendant should not be responsible for “that portion of the tenancy fee that was attributable to the portion of the replacement tenancy extending beyond [the end-date of the original lease]” (at [118]). Therefore, the defendant contended that its liability for the replacement agency fee should be pro-rated for 17 months, leaving the plaintiff to shoulder the balance.

9.94 It appears the learned judge was persuaded by this contention. At [119], the plaintiff’s rebuttal that there should be no deduction of the replacement agency fee as the whole of it was an expense reasonably incurred by it in taking steps to mitigate its loss was rejected by the court. Without making any finding as to the reasonableness of this expense (and, based on the facts disclosed in the judgment, there is little to suggest that it was obviously unreasonable), the learned judge stated her position (at [119]) as follows:

I cannot accept [the plaintiff’s contention as to the reasonable mitigatory steps] as [the plaintiff] is not entitled to recover the expense of obtaining a tenancy for a period after the lease to [the defendant] would have expired.

It would appear that the reason *why* the replacement agency fees were unreasonably incurred was because they included expenses which were attributable to a term of lease beyond that which the defendant would have been responsible, had there been no breach. But even if the question of mitigation is a question of fact and not of law (see *Aw Teck Sin v Yuan Ching Yee Gina* [1998] 2 SLR 919), should the reasonableness of the mitigatory expenditure be measured in this manner?

9.95 In *SM Integrated Transware Pte Ltd v Schenker Singapore (Pte) Ltd*, the plaintiff sought to recover expectation losses (the rental they would have earned from the defendants had there been no breach), and consequential losses (in the form of the agency fees incurred in order to mitigate). As *Banco de Portugal v Waterlow & Sons, Ltd* [1932] AC 452 reminds us, the courts ought to be slow to hold that a claimant will be disentitled to recover the cost of measures reasonably undertaken to minimise further loss, merely because the party in breach can suggest that other measures less burdensome to him might have been taken (a position expressly accepted and reiterated by the

Court of Appeal in *PT Master Mandiri v Yamazaki Construction (S) Pte Ltd* [2001] 1 SLR 540, at [16]).

9.96 Assuming the replacement agency fee totalling \$54,350 was calculated *pro rata* on the basis of a 36-month tenancy, the assertion that the defendant should only be responsible for the part of the agency fees attributable to that period of 17 months (beyond which the defendant's obligations under the original lease would have lapsed) is not, in substance, much different from an assertion that the plaintiff ought to have found a tenant who was willing to take a tenancy for 17 months, therefore reducing the defendant's liability as to the estate agent's fees for the replacement tenancy. That in effect suggests that the reasonableness of mitigatory steps was evaluated in this case by reference to the degree to which they brought the parties into conformity with their original contractual bargain. This would certainly be a departure from authorities such as *PT Master Mandiri v Yamazaki Construction (S) Pte Ltd*. It is hoped that the relationship between the two apparently distinct approaches will be fleshed out in the near future.

Account of sums due, damages for breach of contract and mitigation

9.97 In *Teh Guek Ngor Engelin née Tan v Chia Ee Lin Evelyn* [2005] 3 SLR 22, the Court of Appeal upheld the decision of Lai Kew Chai J in *Chia Ee Lin Evelyn v Teh Guek Ngor Engelin née Tan* [2004] 4 SLR 330. There is little in the appeal to arouse much excitement, as the ultimate decision turned on the findings of fact at trial. One point of interest, however, may lie in the manner in which the Court of Appeal dealt with the question of mitigation of damages on the part of the plaintiff, Ms Evelyn Chia, and whether her claim lay in seeking an account or in damages for breach.

9.98 The remedy of an account is available at law and in equity (although it may be that the remedy of an account at law is heavily circumscribed – see R P Meagher, J D Heydon, M J Leeming, *Meagher Gummow & Lehane's Equity: Doctrines and Remedies* (LexisNexis Butterworths, 4th Ed, 2002) at paras 25-005–25-015). The remedy of an account may also be asserted in relation to amounts *due and owing* by a defendant (as was the case in *McIntosh v Great Western Railway Company* (1850) 2 Mac & G 74; 42 ER 29), or in relation to *profits* the defendant may have made on account of particular wrongful conduct (*Meagher Gummow & Lehane*, at para 25-020, p 874).

9.99 At first instance, Lai J clearly noted at [2] that:

The plaintiff's claim is for an account of all sums *due* to her under the relevant written consultancy agreement and payment to her of *all sums found due*. Alternatively, the plaintiff claims damages arising out of the defendants' repudiatory breach of the last consultancy agreement ... [emphasis added].

At the end of the trial, judgment was entered for the plaintiff based on the bills which were disclosed in the trial to verify the amount of money owing from the defendants to the plaintiff. Leaving aside some further clarifications which Lai J wished to seek from the parties, the learned judge noted that these bills disclosed that the amount owing to the plaintiff was \$408,986.82 (at [65]).

9.100 Although it is nowhere clearly stated in Lai J's grounds of decision, it is arguable, at least, that the award was made on the primary ground of an account of sums *due* in light of the profit-sharing and expense-sharing arrangements set out in the plaintiff's consultancy agreement with the defendants' firm, and not on the *alternative* ground of damages. Nowhere in Lai J's judgment is there any discussion of remoteness or mitigation of loss, matters central to any assessment of damages. Their absence, however, would be perfectly unremarkable in an action for an account of sums due.

9.101 It is clear, however, that the Court of Appeal rejected the plaintiff's prayer for "an account of all sums due" from the defendants on the basis that it was, in effect, an application for the equitable remedy of an account of *profits* (see the Court of Appeal's judgment at [17]). Having determined this, the Court of Appeal made the uncontroversial observation that such a remedy is not generally available for cases of wrongful termination of contract (a point also taken in *obiter* in *Ng Bok Eng Holdings Pte Ltd v Wong Ser Wan* [2005] 4 SLR 561 at [56]–[57], approving Lord Nicholl of Birkenhead's rationalisation in *Attorney General v Blake* [2001] 1 AC 268 at 284–285, of the instances where a breach of contract necessitates an account of profits).

9.102 Those instances not being present on the facts, the Court of Appeal dispensed with further analysis of an account, going on to consider the merits of the plaintiff's claim in damages. However, in assessing the quantum of damages payable to the plaintiff, the Court of Appeal took the view that there was no need to take into consideration the sums earned by the plaintiff in the course of her employment with another firm following the termination of her consultancy with the defendants for the purposes of mitigation (at [24]), stating that it agreed with counsel for the plaintiff that:

[T]he profits earned by [the plaintiff] in the course of her employment with Rodyk & Davidson represented profits which she could have earned independently of the profits accruing from the existing files in Engelin Teh & Partners. It is not the law that damages will be reduced where the benefit received by the claimant is independent of any act of mitigation ... Such profits cannot be taken into account in respect of mitigation when assessing the amount of damages representing the profits due to [the plaintiff] for her wrongful dismissal.

9.103 Though the income from M/s Rodyk & Davidson could have been “independently” earned from the profits accruing on the existing M/s Engelin Teh & Partners files, it is not obvious that the plaintiff could have been simultaneously in the employ of both. If not for the defendant’s wrongful termination of the plaintiff’s consultancy contract, the plaintiff would herself have been in breach of that contract by dint of her employment by Rodyk & Davidson. If there was any express provision in the plaintiff’s consultancy contract with the defendants’ firm permitting her to do so, no mention of it was made in the judgment. In the absence of such provision, it is not easy to see how the plaintiff’s income from Rodyk & Davidson could have been earned if not for the wrongful termination of her consultancy contract with the defendants’ firm. Even if such profits could have been earned “independently of the profits accruing from the existing files” (at [24]), that is not the issue. In so far as one is concerned with mitigation of damages for breach of contract, the true issue is whether the benefits gained by the plaintiff as a result of mitigatory efforts amounted to compensating advantages gained consequent upon the defendants’ breach by having wrongfully terminated the plaintiff’s consultancy contract. Or, to put it in more traditional phrasing, no compensation ought to be given for that part of the plaintiff’s losses which she has already mitigated.

9.104 In the light of the above, it may be necessary to revisit the Court of Appeal’s analysis that the plaintiff’s primary prayer for an account of sums due (as appears to have been the basis of the decision in the court below), was, in effect, a prayer for an account of profits. If the plaintiff’s remedy lay in an account, the Court of Appeal’s reluctance to discuss the impact of mitigation on the judgment sum awarded by Lai J becomes perfectly explicable – there is no need to mitigate in relation to a judgment sum entered upon the taking of accounts for sums due between parties.

Damages for breach of contract and advance payments

9.105 The case of *Lim Kian Kiong v Tan Seng Teck* [2005] SGHC 104 raises awkward questions in relation to quantification of loss.

9.106 The case centred on a dispute over a contract to transfer a party's share of a partnership which ran an eating house business. The business occupied premises that were leased from the Housing and Development Board ("HDB"). An agreement was reached for the plaintiffs' share to be bought out for the price of \$600,000 by one Tan Tong Pheng and/or his nominees, subject to the approval of the HDB. If the approval was not granted, the agreement provided that the plaintiffs' share would be bought out by the defendants for \$600,000 as well. In either case, the deposit for the purchase would be paid for by the defendants, which, after setting off a debt owed to the defendants by the plaintiffs, amounted to \$90,900.

9.107 The HDB approval for the substitution of members in the partnership was obtained by way of a letter dated 20 November 2002. This approval was contingent on the execution of a novation agreement between the plaintiffs, defendants and the third parties (who were Tan Tong Pheng's nominees). All parties agreed that the novation agreement would be executed on 11 December 2002. Prior to and in anticipation of the HDB approval, the plaintiffs, defendants and third parties had executed and lodged the requisite forms to substitute the third parties as the new partners in the partnership in place of the plaintiffs in early September 2002. In turn, as the defendants and the third parties intended to run the business through a limited company, on or about 25 September 2002, the defendants and third parties also completed various formalities to dissolve the partnership with effect from 23 December 2002.

9.108 In breach of their contractual obligation, the defendants failed to execute the novation agreement on 11 December 2002. In consequence, the HDB withdrew its approval. The defendants also failed to perform their other obligations under the agreement with the plaintiffs. Consequently, proceedings were brought by the plaintiffs against the defendants for breach of contract.

9.109 In the court's judgment, specific performance was not an appropriate remedy as, in anticipation of the buy-out, the partnership had been dissolved with effect from 23 December 2002. It followed, therefore, that, "there was no point in compelling the defendants to buy the plaintiffs' share in the Partnership which would be valueless" (at [42]). However, in the opinion of the learned judge, the plaintiffs were entitled to substantial damages of \$600,000, since their share in the partnership had become valueless, *in addition to* the \$90,900 (at [43]).

9.110 The first question of interest prompted by the decision is this: Although it is true that the defendants were contractually obliged to execute the novation agreement in order to secure HDB approval for the substitution of partners, it is by no means clear that this caused the loss suffered by the plaintiffs, if by “loss” we are referring to the destruction of the value of the plaintiffs’ share in the partnership. On the facts, the reason for the destruction of the value arguably lay in the plaintiffs’ earlier action in taking all the steps needful to withdraw from the partnership and allowing the third parties to take their place. It may therefore be better to treat the plaintiffs’ claim as lying not in damage suffered as a result of the “loss of value” of their partnership share, but simply on the basis of an unpaid debt.

9.111 The second interesting point lies in the court’s treatment of the plaintiffs’ claim for the \$90,900. It is significant that the agreement describes it as a payment in the nature of a “deposit” (at [4]). But it is silent as to whether it is to be taken in part payment of the total purchase price, or if it is in the nature of “earnest money” to guarantee the performance of the contract. It is true that the defendants do not appear to have denied their liability to pay the plaintiffs this sum of money. But even so, that does not automatically mean that the defendants’ liability as to the \$600,000 should not have been discounted to take into account such part payment.

9.112 There is authority for the point that a claim for a sum due *but not paid* on a contract does not *preclude* a further claim for damages as a result of the breach of that contract (see *Dies v British and International Mining and Finance Corporation, Limited* [1939] 1 KB 724, read with *Hyundai Heavy Industries Co Ltd v Papadopoulos* [1980] 1 WLR 1129). However, short of a finding that the sum due is actually meant as “earnest money”, in the light of the principle in quantification of damages that the damages are to place the injured party in the position they would have been had there been no breach, it would seem to follow that in quantifying losses, account ought to be taken of any sums paid in advance as part satisfaction of the purchase price. To quantify damages without taking such sums into account would, arguably, give rise to over-compensation by placing the victim in a position *better* than they would have been had there been no breach at all.

9.113 Certainly, following *Mayson v Clouet* [1924] AC 980 (an appeal to the Privy Council from the Supreme Court of the Straits Settlements, Singapore), the question as to whether a deposit should be viewed as a part payment or as earnest money appears to be a matter of construction of the contract. In *Mayson v Clouet*, a clear distinction was made between payments as deposits (for which express provision was made for their forfeiture should

the contract be brought to a premature end), and payments as instalments towards the purchase price (for which no provision was made for forfeiture). There appears to have been no similar provision in the contract before the learned judge in *Lim Kian Kiong v Tan Seng Teck*. Nor do the grounds of decision disclose any finding that the payment of \$90,900 was to be construed as earnest money. It is therefore unclear why the *damages* (if they were damages at all) were assessed at \$600,000, without having taken into account the order for payment of the \$90,900.

Causation for loss and loss of amenity

9.114 *ABC Supermarket Pte Ltd v Kosma Holdings Pte Ltd* [2005] SGDC 193, [2005] SGHC 44 poses an interesting illustration as to how the question of causation might be affected by the characterisation of the losses claimed.

9.115 In this case, ABC Supermarket Pte Ltd (the appellant) operated a supermarket in the basement of Peninsula Plaza. The premises were rented from Kosma Holdings Pte Ltd (the respondent). Ultimately, the supermarket closed nine months after business commenced. The appellant claimed that this was due to the inadequate provision of air-conditioning by the respondent, in breach of the covenants under the lease for the premises. Proceedings were brought in the Subordinate Courts and interlocutory judgment was obtained by the appellant with damages to be assessed.

9.116 Although damages for loss of profit were awarded initially by the deputy registrar, on appeal before a district judge, the deputy registrar's assessment of damages was drastically reduced. The deputy registrar's assessment for lost profits was set aside and, instead, \$9,623.50 for rectification works undertaken by the appellant and nominal damages of \$500 were awarded by the district judge. The district judge held that the appellant had not proved that the inadequate provision of air-conditioning had caused the appellant's loss of profit. No study, projection or other expert evidence had been introduced to support the claim. Nor was there any evidence as to how the supermarket had operated at a profit before the air-conditioning problem surfaced. Consequently, the district judge found as a fact that the appellant had not shown that it would have made a profit from the supermarket had the air-conditioning been adequate.

9.117 On further appeal to a judge in chambers, Kan Ting Chiu J agreed with the district judge's analysis and findings that the appellant had not shown that it would have made a profit given adequate air-conditioning.

Indeed, Kan J pointed out that this finding of fact also precluded any possibility of a claim for a loss of a chance to make a profit since it followed that it had not been proved that there was any *real* (as opposed to *mere*) chance that the supermarket might have made a profit but for the provision of inadequate air-conditioning (at [33] and [34] of Kan J's judgment).

9.118 Kan J's judgment, however, then takes an interesting turn. Noting that the focus on causation for loss of *profit* was only part of the picture, Kan J pointed out that it was conceivable that the respondent's failure to provide adequate air-conditioning might well have made the appellant's losses *worse* than they would otherwise have been. "[I]f the respondent's default caused the appellant to suffer greater loss than it would have suffered if there were no default, the respondent should compensate the appellant for the additional losses" (at [35]). Then, Kan J observed (at [36]) that;

It is not possible to quantify with any degree of precision the additional losses that were caused by the defective air-conditioning. There is really no data to enable that to be done.

Nevertheless, Kan J awarded \$45,000 as compensation for these "additional losses" in place of the nominal damages of \$500, and in addition to rectification costs already awarded by the district judge.

9.119 If the award of the \$45,000 is taken as compensation for the appellant's pecuniary losses, the award is, perhaps, rather generous, given Kan J's candid acceptance that there was no evidence to enable any quantification exercise to be carried out. Re-characterising the damage suffered as "aggravation of loss" should not change the manner in which such losses have to be proved. Such a formulation is, after all, not significantly different from formulating the losses in terms of the reduction in business revenue, given the defective air-conditioning. Had it been characterised in such a manner, it is difficult to see how the learned judge could have assessed the appellant's "aggravated loss" as amounting to \$45,000 (or indeed, any sum at all) without any reliable evidence as to the projected revenue of the supermarket, given proper provision of air-conditioning, as compared to the actual revenue earned, given the poor state of the air-conditioning. Having rejected the appellant's quantification of its "loss of profit" on account of the lack of evidence on this very point, it is not easy to see why quantification based on "aggravation of loss" ought to be any more successful.

9.120 From the learned judge's grounds of decision, the basis for the award appears to be the not unreasonable assumption that "a comfortable supermarket would have attracted more customers than one with air-

conditioning problems, and if the supermarket had more customers it would suffer less loss although it was not a profitable venture” (at [35]). Perhaps one might rationalise the \$45,000 awarded as pertaining to the appellant’s non-pecuniary loss in the form of its *loss of amenity* as a result of the inadequate air-conditioning, disregarding the fact that the appellant was an artificial entity. If this case is, indeed, concerned with loss of amenity, it may signal that not inconsequential sums may be awarded even in the absence of any hard evidence as to the quantum of loss.

9.121 More obviously concerned with losses of amenity are the first instance decision of Belinda Ang Saw Ean J in *Tan Chin Seng v Raffles Town Club Pte Ltd (No 2)* [2005] 2 SLR 302 and the ensuing appeal to the Court of Appeal in *Raffles Town Club Pte Ltd v Tan Chin Seng* [2005] 4 SLR 351.

9.122 In these hearings, the Raffles Town Club having been found liable to its founder members for breach of an implied term that it would be operated as and remain a “premier” club (see *Tan Chin Seng v Raffles Town Club Pte Ltd (No 2)* [2003] 3 SLR 307), it followed that damages for that breach needed to be assessed. Before Ang J, the plaintiffs (the founder members) pursued two main heads of damage: (a) diminution in value of the club memberships (computed at \$15,925); and (b) loss of amenity, accessibility and enjoyment.

9.123 Although expert evidence was adduced as to the magnitude of the fall in the market value of membership in the club as a result of the defendant’s grant of club memberships in excess of 19,000 (as opposed to the 5,000 or so memberships more commonly expected of a “premier” club), Ang J was not satisfied that this was sufficient to discharge the plaintiffs’ burden of proof on the first head of damage. The learned judge therefore declined to make any award on this head. On the second head, however, Ang J accepted that since the contract was “for the provision of a premier club with first class facilities for the enjoyment of the members” (at [56]), due to the over-crowding of the club, the plaintiffs were deprived of the very thing they had contracted for. Nevertheless, agreeing with Lord Steyn’s position in *Farley v Skinner* [2002] 2 AC 732 that awards for loss of amenity should remain modest, Ang J quantified the loss of amenity for each founder member in the representative action at \$1,000.

9.124 An appeal was lodged by the defendant on the award for loss of amenity. As for the plaintiffs, they lodged a cross-appeal against Ang J’s refusal to grant them damages for the diminution in value of their memberships. On its analysis, in contrast to Ang J’s reasoning, such evidence

as was presented provided at least three ways to prove the extent of the fall in the market value of the club memberships as a result of the defendant's breach. Selecting one of these, the Court of Appeal assessed the plaintiffs' claim on the first head to be \$3,000. What is significant, however, is the decision made by the Court of Appeal *not* to make any award on the second head of claim for loss of amenity because there was "much overlap in the two heads of claim" (see the Court of Appeal's judgment at [45]).

9.125 At a conceptual level, it is arguable that the plaintiffs' *pecuniary* loss in the market value of the club memberships is distinct from their *non-pecuniary* loss in their enjoyment of the facilities of the club. Further, an award of damages for one does not *necessarily* preclude an award for the other since they are targeted at compensating the plaintiffs for damage to *different* interests secured under the contract. It is by no means far-fetched to generalise that many of the plaintiffs would have acquired club membership with one eye to making a profitable resale of their memberships, and the other on enjoying the club's facilities. Additional judicial guidance as to the manner and degree of overlap between a claim for loss of amenity and a claim for pecuniary loss, as well as the manner in which double recovery (if present) might be averted in the future, will be welcome.

Equitable relief for breach of contract

9.126 There is very little authority as to the manner in which the judicial discretion to grant a final mandatory injunction to remedy a breach of contract is to be exercised. In an unreported decision, the Court of Appeal may have made some inroads into this area.

9.127 The appeal of *Wisanggeni Lauw v Full Fledge Holdings Ltd* [2005] SGCA 21 centred on the question whether the appellant ("Lauw") was obliged by virtue of a contract evidenced in a letter to transfer certain shares in a Singapore-listed company to the respondent ("Full Fledge"). The Court of Appeal upheld the trial judge's finding (see *Full Fledge Holdings Ltd v Wisanggeni Lauw* [2004] SGHC 141) that Lauw was contractually bound to do so. Consequently, in failing to make the transfer, Lauw had breached the contract. Of note, however, is the Court of Appeal's treatment of an ancillary prayer by Full Fledge.

9.128 Under the agreement evidenced in the letter, Lauw undertook "to guarantee the minimum market value of [the shares in question] at \$0.17 cents ie. that the said shares ... shall have a market value of not less than \$0.17 cents at the end of 12 months from [28 June 2002]" ([2004] SGHC 141 at

[11]). Kan Ting Chiu J had rejected Full Fledge's prayer that Lauw be ordered to give this guarantee. It was unnecessary because "the guarantee was set out and delivered in the letter of 28 June itself" (see *Full Fledge Holdings Ltd v Wisanggeni Lauw (No 2)* [2004] SGHC 209 at [8]). Further, although damages might have been payable had the share price fallen below \$0.17 on 28 June 2003, "[t]here was no evidence of the share price *on that day*, and no claim was made for this loss" [emphasis added] ([2004] SGHC 209 at [9]).

9.129 On appeal, although the Court of Appeal acknowledged (at [37]) that the deadline of 28 June 2003 (the expiry date of the guarantee had Lauw performed the terms of the contract fully) had long passed, nevertheless, its view was that Lauw ought not be permitted to benefit by his own breach, thereby depriving Full Fledge of that which would have safeguarded its interest for no valid reason. In the opinion of the court, "it would only be *fair* if Lauw be required to give a similar guarantee for a similar length of time" [emphasis added] (at [37]). Lauw was thus ordered to provide Full Fledge a guarantee that the market price of the shares in question would not fall below \$0.17 per share at the expiry of one year *from the date of the Court of Appeal's judgment*.

9.130 Regardless as to whether the order was, in effect, an order for specific performance or a mandatory injunction, it is striking that the Court of Appeal appears to have granted an equitable remedy on the sole criterion of "fairness", without having considered restrictions on the grant of equitable relief such as whether equitable relief would be futile, or whether damages would have been an inadequate remedy. On the trial judge's construction of the guarantee, and in the absence of any other construction by the Court of Appeal, Lauw's breach would appear to pertain to a failure to provide a guarantee for the share price on 28 June 2003. Given that the shares were publicly traded, it would certainly have been possible to ascertain whether the failure to provide such a guarantee did in fact cause Full Fledge to suffer a loss, and the magnitude of such loss, if any. Taken at face value, the emphasis placed by the Court of Appeal on the fairness of the remedy may represent a weakening of the maxim that equity follows the law. If so, it is to be hoped that further guidance as to the manner in which this discretion will be exercised will soon be forthcoming. For further discussion of this case, see CH Tham, "Equitable Relief for Breach of Contract" [2006] Sing JLS (forthcoming).