9. CONTRACT LAW

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Introduction

9.1 As with past volumes, the task of selecting cases for review in this section was immense. Given the extremely large number of decisions which touched on contract law, it would not be feasible to comprehensively discuss all of them. Therefore, in general, decisions focusing on specialist areas of contract have not been discussed in this section as they will be better dealt with in the appropriate section elsewhere in this Annual Review. In consequence, the bulk of the cases discussed herein have been selected on the basis that they address contractual issues which are of general interest and application.

Formation

Intention to create legal relations

9.2 The trite principle that the intention to create a binding contract is determined objectively was repeatedly affirmed in numerous decisions (see, for instance, *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2005] 1 SLR 502, *Compaq Computer Asia Pte Ltd v Computer Interface (S) Pte Ltd* [2004] 3 SLR 316, *Chia Ee Lin Evelyn v Teh Guek Ngor Engelin* [2004] 4 SLR 330 (which has been affirmed on appeal – see *Teh Guek Ngor Engelin née Tan v Chia Ee Lin Evelyn* [2005] 3 SLR 22), and *Midlink Development Pte Ltd v The Stansfield Group Pte Ltd* [2004] 4 SLR 258). The *raison d'etre* for the objective approach, as the Court of Appeal observed in *Chwee Kin Keong v*

Digilandmall.com Pte Ltd at [30], is the need to promote commercial certainty.

9.3 Where a *signed document* is alleged to constitute or evidence a binding contract, the parties' objective intention in relation thereto is largely determined by the construction of that document. In this connection, the interpretative difficulties associated with the phrase "subject to contract" (and other similar expressions) are well known. The Court of Appeal had the occasion to consider the effect of such a phrase in *Compaq Computer Asia Pte Ltd v Computer Interface (S) Pte Ltd* (*supra* para 9.2). The appellant in this case had issued a Letter of Award ("LOA"), which was "subject to final terms and conditions being agreed", to the respondent company, with a view to appointing the latter as its subcontractor for a period of three years. The respondent commenced work after the issue of the LOA and continued to do so for a period of 18 months, whereupon the appellant sought to terminate the arrangement. The respondent claimed damages from the appellant for wrongful breach of contract and succeeded before the High Court (see [2003] SGHC 239) but the decision was reversed on appeal.

9.4 The Court of Appeal's decision rested primarily on two interpretative observations. First, the LOA lacked certainty in that the essential terms of the alleged contract were not sufficiently addressed (at [32]). Second and more importantly, the Court of Appeal took the view that the qualifying "subject to" phrase, properly construed and read together with the general text of the LOA, deprived the LOA of the qualities of completeness and finality that were characteristic of a concluded contract. Of the nature of such qualifying phrases, Chao Hick Tin JA observed (at [35]):

> The authorities are almost of one view that the expression "subject to contract" means that until a formal agreement is drawn and executed between the parties, there would be no binding contract between them.

9.5 Although Chao JA acknowledged (at [35]) that the issue was essentially one of construction, and that a binding contract could (notwithstanding any such qualification) arise in "a very strong and exceptional context", the present case was not of such exceptional character. Here, the "subject to" phrase in the LOA ought to be ascribed its plain meaning, *ie*, that the award was *conditional* upon the parties' agreement on final terms and conditions.

9.6 It is also significant to note that the Court of Appeal did not accept the contention that a binding contract ought to be found by reason only of the fact that the respondent had acted in reliance on the LOA (at [31]):

> While there are authorities which show that where the parties have acted upon the faith of a written document, the court would be inclined to assume that the document embodies a firm contract, eg *Sweet & Maxwell Ltd v Universal New Services Ltd* [1964] 2 QB 699, this would not apply where there is contrary intention.

Such "contrary intention" was present in this case as the text of the LOA appeared to have contemplated an "interim arrangement" pending the conclusion of the final agreement.

9.7 It may be observed that the Court of Appeal's reliance on a literal construction of the document has the obvious advantage of promoting certainty by ascribing a clear meaning to the family of "subject to" phrases. Correspondingly, contracting parties who succumb to the pressure of rendering goods or services prior to the conclusion of contracts ought to appreciate that they do so with the dice loaded against them.

9.8 The Court of Appeal's approach in *Compaq Computer Asia Pte Ltd v Computer Interface (S) Pte Ltd* may be contrasted with that of the High Court in *Mohamed Bassatne v Rifaat El Gohary* [2004] SGHC 63, where the parties' *post-agreement conduct* was found to be a relevant and important factor in determining whether an agreement was contractually binding. In this case, Lai Siu Chiu J found that a memorandum of understanding gave rise to binding contractual obligations because the plaintiffs and the defendants had at all material times conducted themselves in the belief that it was so binding. That they had so acted gave rise to an estoppel by convention (discussed at *infra* para 9.26), which precluded the defendants from pleading the absence of contractual intention, see also *infra* para 9.49 with regard to "*Privity of contract*". Similarly, a letter of intent for the lease of a property which contemplated the execution of an "official lease" (which was not eventually signed) constituted a binding tenancy as the parties had, by their conduct, acknowledged and accepted the existence of the same: *Khng Thian Huat v Riduan bin Yusof* [2005] 1 SLR 130. See also *Econ Corp Ltd v So Say Cheong Pte Ltd* [2004] SGHC 234.

Offer and acceptance

9.9 Clearly, no contract can arise where the purported acceptance is qualified or conditional: see *Stuttgart Auto Pte Ltd v Ng Shwu Yong* [2005] 1 SLR 92 and *Compaq Computer Asia Pte Ltd v Computer Interface (S) Pte Ltd* (*supra* para 9.2). Similarly, no inference of assent can be drawn from the exchange of draft agreements, if the said drafts contain substantial amendments to which the parties have yet to agree. That does not, however,

preclude the finding of a distinct oral contract, where the essential terms of such an oral contract are sufficiently certain, see *Excel Golf Pte Ltd v Allied Domecq Spirits and Wine (Singapore) Ltd (No 2)* [2004] SGHC 162 (see *infra* para 9.56 with regard to "*Discharge of the contract*").

9.10 The interesting question of whether a party's silence can constitute acceptance arose in *Midlink Development Pte Ltd v The Stansfield Group Pte Ltd* (*supra* para 9.2). The plaintiff's property had for several years been leased to the defendant and the contractual relationship was governed by written agreements until June 2002. Although the parties had commenced negotiations on the renewal of the lease prior to that date and had agreed on a reduced rent, no written agreement was executed due solely to the defendant's omission. However, the defendant continued to occupy the leased premises after June 2002, and made regular payments of the adjusted rent. The question arose whether the parties were bound by a two-year term lease in such circumstance. Notwithstanding the absence of a signed agreement, V K Rajah JC (as he then was) found, on the facts, that an oral contract had been formed, as the parties had agreed to all the important terms of the contract, including the term of two years. That being the case, the execution of the written lease was a mere formality and the failure to do so was inconsequential.

9.11 Although strictly unnecessary, Rajah JC responded to the defendant's contention that its silence, *ie,* the non-execution of the lease agreement, was inconsistent with and precluded any inference of assent or acceptance. Rajah JC acknowledged (at [50]) the intrinsically equivocal nature of silence:

> It is also hornbook law that silence *per se* is equivocal and does not amount to a clear representation. … Silence is a midwife that may ultimately deliver a contractual offspring that is stillborn or live. Silence and implicit acceptance are not invariably antagonistic concepts. Silence can signify affirmation at one end of the spectrum, disinterestedness or abandonment at the other end of the spectrum. It is a chameleon utterly coloured by its contextual environment.

It did not follow, however, that a party's silence was devoid of any inferential value, as the learned judge explained (at [50]–[51]):

> Silence will usually be equivocal in unilateral contracts or arrangements; in bilateral arrangements or negotiations on the other hand, there will usually never be *true* or *perfect* silence. In many such cases, while there may not be actual communication of acceptance, the parties' positive, negative or even

> neutral conduct can evince rejection, acceptance or even variation of an existing offer.
>
> To say that silence can *never* be unequivocal evidence of consent may be going too far: see *Cheshire, Fifoot & Furmston's Law of Contract: Second Singapore and Malaysia Edition* (1998) by Professor Andrew Phang Boon Leong at 112. It is always a question of fact whether silent inactivity after an offer is made is tantamount to acceptance.
>
> [emphasis in original]

9.12 Indeed, the learned judge was of the view (at [51]–[52]), citing relevant passages from Buckley LJ's judgment in *Spiro v Lintern* [1973] 1 WLR 1002 and G Bower & A Turner, *The Law Relating to Estoppel by Representation* (Butterworths, 3rd Ed, 1977), that there could be instances where a party is placed under a positive duty to speak, and his silence in such circumstance would be tantamount to a representation which operates to estop him from denying the existence of a state of facts.

9.13 Ultimately, in determining whether a party's assent could be inferred from its silence, the court must consider the totality of the evidence before it (at [52]):

> In the final analysis, the touchstone is whether, in the established matrix of circumstances, the conduct of the parties, objectively ascertained, supports the existence of a contract. Reduced to its rudiments, it can be said that this is essentially an exercise in intuition. Legal intentions, whether articulated or unarticulated, should not be viewed in isolation but should be filtered through their factual prism. Silence, depending on whether it is conscious or unconscious, may also from time to time entail altogether disparate legal consequences.

9.14 Applying the law to the facts, the learned judge concluded that the defendant's silence was far from equivocal and was consistent with other manifestations of assent, in particular the defendant's *conduct* in making regular payments of the adjusted rent. Further, Rajah JC referred to two bodies of authorities which were specifically applicable to tenancy cases. The first supported the proposition that a landlord and tenant relationship could be constituted by the tenant "remaining in possession and paying rent" (at [54]). This appeared to have direct application in the case at hand. The second was the doctrine of *Walsh v Lonsdale* (1882) 21 Ch D 9, *ie*, that "[e]quity looks on that as done which ought to be done. It will hold parties, who for valuable consideration have agreed to a lease, to their bargain" (at [56]). It remains to be observed that the application of the latter principle is

subject to the parties having *agreed* to a bargain, and hence may be of little assistance where the phenomenon of agreement is the very issue to be determined.

9.15 Finally, it is useful to note that Rajah JC cautioned (at [55]) against an excessively formalistic approach in the application of contract rules:

> [T]he sterile formality of a signature is not always necessary in law to breathe life into contractual undertakings. Incompleteness in form is not tantamount to legal inefficiency. `Subject to any specific statutory requirements, the law almost invariably allows the substance to take precedence over inadequacies in form.

Contract formation in cyberspace

9.16 Should the established contract principles apply to contracts concluded in cyberspace? For the first time in Singapore, this question was the subject of judicial attention in *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2004] 2 SLR 594 (see *infra* para 9.24 with regard to "*Consideration*", *infra* paras 9.65–9.72 under "*Mistake*" and *infra* paras 9.75–9.75 on "*Unconscionability*"). The facts of the case may be briefly stated. The defendant's company sold information technology products on a number of websites. Within the space of a few hours, the six plaintiffs – all friends – placed orders via the websites operated by the defendant for a total number of 1,606 commercial laser printers (ordinarily retailed at $3,854 each) at $66 each. The unusually low price of $66 was in fact a mistake which was promptly rectified upon discovery by the defendant. Upon receipt of each order, an automated email response entitled "Successful Purchase Confirmation from HP online" was generated and sent to the purchaser. The defendant declined to meet the orders on account of the error, but the plaintiffs insisted that the contracts, having been concluded, were binding. The defendant eventually prevailed in both the High Court as well as the Court of Appeal on the ground of unilateral mistake, but the discussion which follows immediately will focus on the formation issues considered by the High Court.

9.17 Addressing the question whether the existing contract principles applied to cyberspace contracts, V K Rajah JC observed (at [91]):

> There is no real conundrum as to whether contractual principles apply to Internet contracts. Basic principles of contract law continue to prevail in contracts made on the Internet. However, not all principles will or can apply in the same manner that they apply to traditional paper–based and oral contracts. It is important not to force into a Procrustean bed principles

> that have to be modified or discarded when considering novel aspects of the Internet.

9.18 Thus, the *starting presumption* is that the existing principles apply, but such a presumption will be displaced should a different rule be more appropriate having regard to the distinctive features of the Internet.

9.19 At a more specific level, Rajah JC considered the application of the existing law to cyber contracts in two particular aspects. The first relates to the legal effects of web advertisements, which Rajah JC regarded (at [94]) to be primarily "a matter of language and intention, objectively ascertained". It followed (*ibid*) that:

> As with any normal contract, Internet merchants have to be cautious how they present an advertisement, since this determines whether the advertisement will be construed as an invitation to treat or a unilateral contract. Loose language may result in inadvertently establishing contractual liability to a much wider range of purchasers than resources permit.

9.20 In the Internet medium, however, it is not unusual for advertisements to be integrated with catalogues of the relevant goods and services, as well as various other interactive features which enable the purchaser or consumer to conclude a contract online. In such a case, the common law "anomaly" (*ibid*), which generally regards shop and window displays as mere invitations to treat, becomes relevant. On balance, Rajah JC appeared (at [95]) to lean *against* the application of this rule to the cyberspace context:

> In an Internet sale, a prospective purchaser is not able to view the physical stock available. The web merchant, unless he qualifies his offer appropriately, by making it subject to the availability of stock or some other condition precedent, could be seen as making an offer to sell an infinite supply of goods. A prospective purchaser is entitled to rely on the terms of the web advertisement. The law may not imply a condition precedent as to the availability of stock simply to bail out an Internet merchant from a bad bargain, *a fortiori* in the sale of information and probably services, as the same constraints as to availability and supply may not usually apply to such sales. Theoretically the supply of information is limitless. It would be illogical to have different approaches for different product sales over the Internet. It is therefore incumbent on the web merchant to protect himself, as he has both the means to do so and knowledge relating to the availability of any product that is being marketed.

We would observe, however, that it is not necessarily the case that a term as regards the limited availability of stock could never be implied in Internet transactions, as much would depend on the type and nature of the transaction, goods, or service.

9.21 The second aspect related to the possible application of the postal acceptance rule to emails and Internet transactions. The learned judge considered the arguments on both sides but did not appear to find (at [99]) either set of arguments conclusive:

> Like the somewhat arbitrary selection of the postal rule for ordinary mail, in the ultimate analysis, a default rule should be implemented for certainty, while accepting that such a rule should be applied flexibly to minimise unjustness.

That said, Rajah JC did subsequently allude to the preference for the receipt rule, having particular regard to the fact that such a rule appeared to have been embodied in Art 24 of The Vienna Sales Convention, applied in Singapore pursuant to the Sale of Goods (United Nations Convention) Act (Cap 283A, 1996 Rev Ed).

9.22 Where Internet *transactions* were concerned, Rajah JC was of the view that the applicable rules were clearer and less controversial. Having regard to the instantaneous and interactive nature of these transactions, the recipient rule would appear to be the logical default rule (see [101]).

9.23 Finally, it ought to be mentioned that Rajah JC also found in this case that the intention to accept an offer was not undermined merely because such intention had been communicated by *automated* email responses. The test remained whether the communication evinced an unequivocal acceptance. The High Court's decision in this case has since been considered by the Court of Appeal (discussed in *infra* paras 9.67–9.72) but the formation issues were no longer in dispute at that stage. For a thorough discussion of these issues, see Andrew Phang, "Contract Formation and Mistake in Cyberspace – The Singapore Experience" (2005) 17 SAcLJ 361.

Consideration

9.24 In *Empire International Holdings Ltd v Mok Kwong Yue* [2004] 4 SLR 820, it was held that a continuing guarantee issued by the appellant to secure the existing *and future* liabilities owing by the appellant's company to the respondent was supported by consideration in so far as the guarantee included the respondent's promise to advance further funds. The

consideration was founded on the fact of the *promise* alone, and thus there was no want of consideration even if the promise did not eventually materialise. To contend otherwise would be to confuse the issue of consideration with that of performance. Similar remarks were also made in *Full Fledge Holdings Ltd v Wisanggeni Lauw* [2004] SGHC 141 and *Chwee Kin Keong v Digilandmall.com Pte Ltd* (*supra* para 9.16). In fact, in the latter decision, V K Rajah JC went further by calling for reform of the law in this area (at [139]):

> The modern approach in contract law requires very little to find the existence of consideration. Indeed, in difficult cases, the courts in several common law jurisdictions have gone to extraordinary lengths to conjure up consideration. (See for example the approach in *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1990] 1 All ER 512.) No modern authority was cited to me suggesting an intended *commercial transaction of this nature* could ever fail for want of consideration. Indeed, the time may have come for the common law to shed the pretence of searching for consideration to uphold commercial contracts. The marrow of contractual relationships should be the parties' intention to create a legal relationship. [emphasis in original]

9.25 When one accepts a *post-dated* cheque as payment for a debt, one may be regarded as having furnished consideration to the drawer of the cheque in promising to forbear from claiming the debt until the date of the post-dated cheque: *Sutanto Henny v Suriani Tani* [2004] SGHC 7.

Estoppel

9.26 In *Jia Min Building Construction Pte Ltd v Ann Lee Pte Ltd* [2004] 3 SLR 288 (see also *infra* para 9.33 with regard to "*The terms of the contract*"), V K Rajah JC found (at [27]), "a classic case of [promissory] estoppel" where the parties to a contract agreed to vary its terms and subsequently acted upon the said variations. Interestingly, the learned judge also considered the relationship between the doctrines of waiver and estoppel, and opined (at [28]) that, "[it] would be more convenient to classify situations, similar to that under [present] consideration, as being embraced under the doctrine of estoppel rather than the more amorphous concept of waiver".

9.27 The doctrine of estoppel by convention was considered by the Court of Appeal in *MAE Engineering Pte Ltd v Fire-Stop Marketing Services Pte Ltd* [2005] 1 SLR 379 (see also *infra* paras 9.29 and 9.38 with regard to "*The terms of the contract*" and "*The parol evidence rule*" respectively), but was found to be inapplicable on the facts as it was not established that the parties had

acted on a shared assumption. For a decision in which the doctrine was applied, see *Mohamed Bassatne v Rifaat El Gohary* [2004] SGHC 63 (*supra* para 9.7 with regard to "*Intention to create legal relations*" and *infra* paras 9.35 and 9.49 with regard to "*The terms of the contract*" and "*Privity of contract*" respectively).

9.28 The Court of Appeal clarified in *Yongnam Development Pte Ltd v Somerset Development Pte Ltd* [2004] SGCA 35 that a plea of estoppel by acquiescence, or proprietary estoppel, could not be sustained unless there was *direct contact* or *dealing* between the party relying on the plea and the party against whom it was pleaded; see also *Joshua Steven v Joshua Deborah Steven (No 2)* [2004] 4 SLR 403. The mere silence or failure of the latter to object to a particular state of facts, without such direct contact, was insufficient. It is useful to note that the Court of Appeal's analysis in this case appears to implicitly reject the broader approach adopted by the High Court below. In that decision (*Yongnam Development Pte Ltd v Springleaves Tower Ltd* [2004] 1 SLR 348), S Rajendren J applied (at [58]) the "more modern approach" of Oliver J in *Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] QB 133 at 147, which explained estoppel as:

> [A] much wider equitable jurisdiction to interfere in cases where the assertion of strict legal rights is found by the court to be unconscionable.

Oliver J's approach as cited above has generally been regarded as supporting the move towards the unification of all types of estoppels under the broad canopy of unconscionability. It may be that in adopting the traditional and narrower approach, the Court of Appeal has foreclosed, for the moment at least, such a development in Singapore.

The terms of the contract

General

9.29 In the Court of Appeal decision of *MAE Engineering Ltd v Fire-Stop Marketing Services Pte Ltd* (*supra* para 9.27 with regard to "*Estoppel*", and *infra* para 9.39 with regard to "*The parol evidence rule*"), Lai Siu Chiu J, delivering the judgment of the court, restated (at [17]) the well-established principles for the construction of contracts as follows (references omitted):

> The object of the construction exercise is to determine the mutual intention of the parties as expressed in the words of the document. The task of ascertaining the intention of the parties must be approached objectively; the question is not what one or the other of the parties meant or

> understood by the words used, but the meaning the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties at the time of the contract. The words used by the parties should be construed in their ordinary and natural meaning, unless the context requires otherwise.

And in this regard, the court observed (at [27]) that the perceived "commercial sense" of the court cannot be allowed to override the clear and unambiguous words of a contract. The Court of Appeal also affirmed (at [23]) the need to consider the *factual matrix* in which the agreement was made in the construction of the contract. The court observed (at [24]) that:

> [A]lthough evidence of prior negotiations is inadmissible as it does not represent any consensus between the parties, evidence of an antecedent agreement is an objective fact that the court should take into account as part of the "factual matrix" in which the parties made their contract …

9.30 Reference to the factual matrix was also made in the High Court decision of *Bayerische Hypo- und Vereinsbank AG v C K Tang Ltd* [2004] SGHC 254 (see also *infra* para 9.41 under "*Implied terms*"). MPH Rubin J reiterated (at [155]) the general principle (citing the decision of *Transnational Recycling Industries Pte Ltd v Semac Pte Ltd* [2003] SGHC 130) that while the intention of the parties is to be ascertained from the document itself, this does not preclude the court from looking at "*all the circumstances surrounding the making of the contract which would assist in determining how the language of the document would have been understood by a reasonable man*" [emphasis in original].

9.31 In *Jumabhoy Rafiq v Scotts Investments (Singapore) Pte Ltd* [2005] 1 SLR 45, the Court of Appeal cautioned against relying solely on the dictionary meanings of common words in construing the meaning of a particular word in a document. The court opined (at [17]) that:

> [I]t would not be good enough to point out that one of the meanings of a word is either this or that. Very often, a word will, according to the dictionary, have a spectrum of meanings. It is the context which will determine what is the correct meaning to give to a word in a document.

9.32 The High Court decision of *Somerset Investments Pte Ltd v Far East Technology International Ltd* [2004] 3 SLR 46 (see also *infra* para 9.37 under "*Collateral contracts*") reiterated the general principle that the obligations of the parties, including the existence of any condition precedent, is to be determined by reference to the language of the contract (in this case a guarantee).

9.33 In the context of construction contracts, V K Rajah JC in *Jia Min Building Construction Pte Ltd v Ann Lee Pte Ltd* (*supra* para 9.26) observed (at [29]) that:

> There appears to be misapprehension in some circles of the building industry and the legal profession that the court will be inclined to interpret construction contracts *sui generis* and/or that it will take a more benign approach in invoking and applying equitable principles to achieve a favourable result for sub-contractors or contractors (as the case may be). This is inaccurate. While the court will strive towards achieving a decision based on principle and laced with pragmatism, parties in construction contracts should not expect the court to rewrite or fill in lacunae in contracts to reach an equitable result. Parties who sign a contract are expected to honour it both in letter and spirit and should not be allowed to say that the terms of a contract, objectively interpreted, do not mirror their intentions.

9.34 The High Court in *Chen Con-Ling Tony v Quay Properties Pte Ltd* [2004] 2 SLR 181 was called upon to interpret "diplomatic clauses" in tenancy agreements (*ie,* clauses that allow a tenant to terminate the tenancy if the occupier no longer resides within the jurisdiction). The issue arose in the context of a contract to sell a property that was subject to tenancies. The diplomatic clause in question required the tenant to furnish the landlord-vendor with "sufficient documentary or other evidence to the landlord's satisfaction" that the occupier had been transferred or relocated to a different country. V K Rajah JC (as he then was) held (at [40]) that:

> Clauses of this nature, while worded subjectively, are usually construed objectively; the law will not countenance capricious behaviour unless the contractual provision is explicit.

However, given that the purchaser of the property had a concurrent legitimate interest in the property, his Honour was prepared to accept (*ibid*) that, "pending completion, equity would impose an obligation [on the landlord-vendor] that the evidence [furnished to him] should also be satisfactory, to the… purchaser, again in an *objective* sense" [emphasis in original]. Rajah JC found (at [41]) that the tenant's written confirmation that the employee-occupier was to be transferred to another country was, in the present circumstances, in accordance with the terms of the tenancy.

9.35 In *Oversea-Chinese Banking Corp Ltd v Justlogin Pte Ltd* [2004] 2 SLR 675, the Court of Appeal confirmed that a contractual obligation to take all reasonable steps, or use best endeavours to procure the doing of an act would be discharged by "doing everything reasonably in good faith with a

view to obtaining the required result within the time allowed" (citing *Ong Khim Heng Daniel v Leonie Court Pte Ltd* [2001] 1 SLR 445 with approval: at [21]).

9.36 For a case involving the effect of subsequent addenda to an agreement, see *Mohamed Bassatne v Rifaat El Gohary* (*supra* para 9.7 on "*Intention to create legal relations*" and *infra* para 9.49 on "*Privity of contract*").

Collateral contracts

9.37 In *Somerset Investments Pte Ltd v Far East Technology International Ltd* [2004] 3 SLR 46 (*supra* para 9.32), Tay Yong Kwang J held that a collateral agreement could not be found to exist on the basis of a presentation paper which was no more than a marketing tool and which was not intended to contain contractual undertakings. This affirms the general requirement that a statement purporting to be the contractual promise in a collateral contract must be promissory in nature or effect rather than representational (*per* Belinda Ang Saw Ean JC (as she then was) in the High Court decision of *Lemon Grass Pte Ltd v Peranakan Place Complex Pte Ltd* [2002] 4 SLR 439, noted in Andrew Phang, (2002) 3 SAL Annual Review 128 at para 9.12). Tay J also pointed out (at [28]) that, where a collateral contract is of importance to a party, it would aid that party's position if it was recorded in writing.

The parol evidence rule

9.38 The High Court decision of *Nop Wen Xuan Cultural Artifacts Pte Ltd v Leong Hwa Chan Si Temple* [2003] SGHC 300 (see para 9.47 *infra*, with regard to "*Privity of contract*") applied, *inter alia*, the parol evidence rule embodied within s 94(*a*) of the Evidence Act (Cap 97, 1997 Ed). As Lai Siu Chiu J put it (at [83]), "[t]here is no room for incorporating into the agreement, the implied terms alleged by the plaintiffs … particularly where some of them contradict the express terms of the agreements." Reference may also be made to the High Court decision of *Fraser Securities Pte Ltd v Seet Ai Kiang* [2004] SGHC 9, especially at [32].

9.39 The Court of Appeal in *MAE Engineering Ltd v Fire-Stop Marketing Services Pte Ltd* (see also *supra* paras 9.27 and 9.29) applied the parol evidence rule to exclude the introduction of extrinsic evidence which contradicted or varied the terms of the written agreement. See also *Engelin Teh Practice LLC v Wee Soon Kim Anthony* [2004] 1 SLR 605 at [60].

9.40 However, where the issue relates to the identification of the parties to a contract, the parol evidence rule does not apply. In *Smart Modular Technologies Sdn Bhd v Federal Express (Singapore) Pte Ltd* [2004] 3 SLR 473, Judith Prakash J stated (at [22]) as follows:

> Where the question is who the contracting parties are, the court must have regard to factual matters which are external to the language of the contract because the law recognises that in certain circumstances, primarily the situation in which at least one apparent party to a contract is in fact acting as an agent for an undisclosed principal, the actual parties to a contract may not be the parties named in the written document as the contracting parties. In such circumstances, the parol evidence rule has no application.

Implied terms

9.41 In the High Court decision of *Bayerische Hypo- und Vereinsbank AG v C K Tang Ltd* (*supra* para 9.30), MPH Rubin J held that where the contractual terms were clear and unambiguous, their natural meaning was to be ascribed to them and there would be no room for re-writing or implying terms into the contract. Quoting from *Associated Asian Securities Pte Ltd v Lee Kam Wah* [1993] 1 SLR 585, his Honour emphasised (at [178]) that:

> The fact that a term may put what appears to be a disproportionate or unfair burden upon one party is not regarded as a sufficient reason to interfere with its interpretation if it is in itself clear, because the parties who contracted on equal terms must be left free to apportion risks as they see fit.

9.42 The Court of Appeal, in *Romar Positioning Equipment Pte Ltd v Merriwa Nominees Pty Ltd* [2004] 4 SLR 574, implied a term into the parties' contract (in this case, a settlement agreement) "to give effect to the presumed intention of the contracting parties", and that intention "may be gathered from the express words of the contract and the facts and circumstances surrounding it" (at [27]). It was agreed that the appellant would pay the respondent, in three instalments, a certain sum in full and final settlement of all claims between them. The agreement provided, *inter alia*, that the first instalment would be paid "upon the signing of this agreement" (at [23]). The court referred to both the "business efficacy" and "officious bystander" tests and, apparently applying these tests in the alternative, held (at [29]) that, on the facts:

> It was … reasonable and necessary to imply a term (be it under the 'business efficacy' test or under the 'officious bystander' test) that the Deed, signed by the respondent, would be forwarded to the appellant before the appellant was required to make any payment under the Deed.

9.43 For the view that these tests are *not* distinct alternatives, see Phang, "Implied Terms, Business Efficacy and the Officious Bystander – A Modern History" [1998] JBL 1. This view was recently referred to with approval by Judith Prakash J in *Telestop Pte Ltd v Telecom Equipment Pte Ltd* [2004] SGHC 267. Referring to the Court of Appeal decision of *Hiap Hong & Co Pte Ltd v Hong Huat Development Co (Pte) Ltd* [2001] 2 SLR 458 in which the view that the two tests were distinct and separate was thought to be "probably" correct ([2001] 2 SLR 458 at [18]), her Honour observed (at [68]) as follows:

> Andrew Phang has, however, to my mind, persuasively argued on the basis of the historical development of the tests that they are not alternatives but complementary in as much as the "officious bystander" test is the practical mode by which the theoretical guideline encompassed within the "business efficacy" test is fulfilled [references omitted].

Prakash J also helpfully summarised the applicable principles laid down in *Hiap Hong & Co Pte Ltd v Hong Huat Development Co (Pte) Ltd* in the following manner (*ibid*):

> [T]he "business efficacy" test is a convenient means of repairing an obvious oversight, but … the principle should not be overstretched or used indiscriminately; and … the touchstone for the implication of terms is necessity and not merely reasonableness, but … a necessary term to be implied must always be equitable and reasonable. … [A] term would be implied if, from the language of the contract and the surrounding circumstances, an inference should be made that the parties must have intended the stipulation in question. Finally, the term to be implied must be capable of clear expression and it must not contradict any express term of the contract.

9.44 For a case concerning a *quantum meruit* claim by a company director for remuneration based on an implied contract by the company to pay reasonable remuneration, see *Jumabhoy Rafiq v Scotts Investments (Singapore) Pte Ltd* (*supra* para 9.31).

Exception clauses

9.45 In the shipping context, the Court of Appeal in *Sunlight Mercantile Pte Ltd v Ever Lucky Shipping Co Ltd* [2004] 1 SLR 171 reversing the decision in *Ever Lucky Shipping Co Ltd v Sunlight Mercantile Pte Ltd* [2003] SGHC 80, adopted a very strict approach *vis-à-vis* exception clauses (noted in the previous review: see Andrew Phang, "Contract Law" (2003) 4 SAL Ann Rev 127 at para 9.41). The Court of Appeal held that, as a shipowner had an

absolute obligation at common law to provide a seaworthy vessel at the commencement of the agreed voyage (at [12]), an exception clause that was intended to relieve a shipowner from the consequences of the unseaworthiness of the vessel would have to be "express, pertinent and apposite" (at [13]). The phrases "howsoever caused", "howsoever arising" or words of similar effect were insufficient for this purpose. The court declined to follow the English first instance decision of *The Imvros* [1999] 1 Lloyd's Rep 848.

9.46 As to the requirements and sufficiency of pleadings in which a party is seeking to rely on an exemption clause, see the Court of Appeal decision of *Amara Hotel Properties Pte Ltd v Sie Choon Poh* [2004] 3 SLR 157 (disagreeing with the High Court decision below, *Sie Choon Poh v Amara Hotel Properties Pte Ltd* [2003] 3 SLR 703, noted in the previous review: see (2003) 4 SAL Ann Rev 127 at para 9.43).

Privity of contract

9.47 The High Court, in *Nop Wen Xuan Cultural Artifacts Pte Ltd v Leong Hwa Chan Si Temple* [2003] SGHC 300 (*supra* para 9.38 with regard to "*The parol evidence rule*"), confirmed the basic principle that a company, although incorporated for the specific purpose of taking over the assets of a partnership as a going concern, is nonetheless a separate legal entity from the partnership. As such, in the absence of a formal assignment of a contract entered into by the partnership to the company, the company had no standing to sue on the contract.

9.48 Similarly in *Engelin Teh Practice LLC v Wee Soon Kim Anthony* (*supra* para 9.39), the High Court held that, in the absence of an assignment or novation, a law corporation to which the business of a law partnership had been transferred, could not enforce a written agreement with a client of the partnership, made prior to the partnership's dissolution.

9.49 In connection with a contract for the sale of property, V K Rajah JC opined in *Chen Con-Ling Tony v Quay Properties Pte Ltd* (*supra* para 9.34 with regard to "*The terms of the contract*") that a purchaser of property, although recognised as the equitable owner of the property pending completion, nevertheless had "no rights, pending completion, to enforce his equitable interest against third parties" (at [22]). His Honour observed (at [22]) that the Contracts (Rights of Third Parties) Act (Cap 53B, 2002 Rev Ed) "does not appear to have addressed this issue with any clarity. The

vendor remains the custodian of legal title and enforcement rights. He is considered to be a trustee".

9.50 In *Mohamed Bassatne v Rifaat El Gohary* (*supra* para 9.8), a memorandum of understanding (which was held to be a binding contract at [112]) referred to "the Bakri Group of Companies", and was signed on behalf of "the Bakri Group of Companies". A corporate group is not possessed of legal status, unlike the individual companies within the group. It was therefore necessary to determine the true contracting parties to the agreement. The High Court considered all relevant extrinsic evidence and held that the expression "the Bakri Group of Companies" did not mean all the companies which bear the Bakri name but on a proper consideration of the evidence was intended only to refer to one of the companies within the group, namely the second defendant (at [134]–[142]).

9.51 The important decision of *Prosperland Pte Ltd v Civic Construction Pte Ltd* [2004] 4 SLR 129 is dealt with below at paras 9.90 onwards under "*Damages in a three-party 'black-hole' case*".

Capacity

9.52 In *MCST Plan No 2297 v Seasons Park Ltd (No 2)* [2004] SGHC 160, the High Court held that s 116(1) of the Land Titles (Strata) Act (Cap 158, 1999 Rev Ed) empowered the management corporation of a building, a separate legal entity, to sue or be sued in respect of any right or liability vested in or imposed on the subsidiary proprietors of the subdivided lots of the building. As the section did not confer or create any cause of action, the management corporation may sue a defendant in contract on behalf of the subsidiary proprietors only where a cause of action in contract was available to the subsidiary proprietors (at [4]). However, as contractual rights are personal and "it does not follow that every subsidiary proprietor will sue just because he has a right to do so" (at [5]), it thus "behoves [the management corporation] to identify all the subsidiary proprietors on whose behalf it is suing *in contract*" (at [6], emphasis in original). Choo Han Teck J opined (at [7]) as follows:

> Where a cause of action is to be founded on contract every party bound by that contract must be identified, and thus every subsidiary proprietor who had a contract with the defendant had to expressly authorise the [management corporation] to sue on his behalf, whether in respect of common property or in respect of his individual unit if the [management corporation] was prepared to sue on his behalf in that regard.

Discharge of the contract

Discharge by breach (whether actual or anticipatory)

9.53 Unlike cases of discharge by frustration (see para 9.62 below), discharge by breach (whether actual or anticipatory) is not automatic. Where a contract has been breached in a manner which would permit it to be discharged, discharge will only occur if, first, the breach is *accepted* by the party seeking to have the contract discharged, and secondly, when that acceptance is *effectively communicated* to the party in breach. These requirements were usefully reiterated in the decision of Woo Bih Li J in the case of *Arokiasamy Joseph Clement Louis v Singapore Airlines Ltd* [2004] 2 SLR 233 (an appeal from the District Court) ("*Arokiasamy*").

9.54 In *Arokiasamy*, the appellant was charged with a criminal offence. Unable to raise bail, he was remanded pending trial and could not report for work. Critically, the appellant did not even attempt to inform his employer at that time, Singapore Airlines Ltd, of his plight. The appellant's absence from work was noted and his employment was terminated in reliance on s 13(2) of the Employment Act (Cap 71, 1996 Rev Ed). By that point in time, the appellant had been absent without leave in excess of two continuous days.

9.55 On the learned judge's analysis, these unfortunate facts fully satisfied the elements of s 13(2). The appellant had not only *breached* the terms of his employment contract, he was also *deemed* to have *repudiated* that contract. This, of course, did not result in automatic discharge of the contract – discharge only occurred upon *acceptance* of the breach followed by *effective communication* of that acceptance. On the facts, despatch of a termination letter to the last postal address which the appellant had on record with the respondents was held to be adequate.

9.56 Some doubt, however, may be expressed as to the learned judge's opinion that s 13(2) of the Employment Act deemed there to be *repudiation* of an employment contract. If the learned judge had in mind repudiation in the context of an *anticipatory* repudiatory breach of contract (in which the basis for the right to discharge follows from proof of an intention by one party to no longer be bound by the terms of the contract), doubts have been expressed as to whether s 13(2) of the Employment Act can have the effect of deeming there to be repudiatory intention – see Gary Chan, "Statutory Repudiation, Natural Justice and Section 13(2) of the Employment Act" (2004) 16 SAcLJ 447, especially paras 18–29.

9.57 It may be, however, that Woo J was referring to "repudiation" as shorthand for the situation where one party has committed an *actual* breach of a contract term which gives the innocent party the right to discharge the contract (*ie,* a breach of a condition or of an innominate term which results in damage to the innocent party so severe as to deprive him of substantially the whole of the benefit of the contract). A recent example of this broad usage may be found in the judgment of Lai Siu Chiu J in the case of *Excel Golf Pte Ltd v Allied Domecq Spirits and Wine (Singapore) Ltd (No 2)* (*supra* para 9.9 with regard to "*Offer and acceptance*"). One might then side-step the observations made by Chan (as mentioned above), although the latter part of Chan's analysis based on the application of natural justice principles might, nevertheless, still provide food for thought. Unfortunately, as leave to appeal from Woo J's decision has been refused by the Court of Appeal, resolution of the true effect of s 13(2) will have to await another occasion.

Form of repudiation

9.58 In the case of *Chiam Toon Hong v Ong Soo Yong* [2004] SGHC 138, Tan Lee Meng J applied *Morris v Baron & Co* [1918] AC 1, observing that even though the original contract might have to be in writing, that contract may yet be effectively repudiated in oral form, so long as the requisite intention to no longer perform one's obligations under that written contract is proved. On the facts of this case, as no such finding could be made, the application that a contract for the sale of a share in a jointly-owned property had been repudiated by the prospective purchasers failed.

Communication of repudiation

9.59 It appears well-accepted that *indirect* repudiation (where the repudiation is communicated via a disinterested source with some reasonable expectation of accurate reportage) is effective – see, *eg*, Lord Steyn's observations in *Vitol SA v Norelf Ltd* [1996] AC 800 at 811. Strikingly, this principle was applied in *Oakwell Engineering Ltd v Energy Power Systems Ltd* [2003] SGHC 241. In this case, Lai Kew Chai J accepted that the requisite repudiatory intention had been properly gleaned by the plaintiffs from perusal of the defendants' financial statements (filed and made publicly available in compliance with its status as a Singapore listed company) which disclosed a divestment of control of a subsidiary. Consequently, the defendants had rendered themselves incapable of fulfilling their contractual obligations to the plaintiffs to bring about certain events in relation to the subsidiary. Accordingly, they were in repudiatory breach of the contract (see also *infra* para 9.63 on "*Discharge by frustration*").

Discharge by agreement

9.60 Applying the *ratio decidendi* of *Chay Chong Hwa v Seah Mary* [1984–1985] SLR 183 (which was upheld on appeal to the Privy Council in [1986] SLR 48) to the construction and application of cl 5 of the Law Society of Singapore's Standard Conditions of Sale (which gives the vendor a right to rescind the contract for sale and purchase on non-performance of certain conditions), in *Chiam Toon Hong v Ong Soo Yong* (*supra* para 9.58), Tan Lee Meng J noted (at [28]) that:

> A vendor cannot in reliance on such condition arbitrarily, capriciously or unreasonably rescind the contract, and certainly he cannot do so acting in bad faith.

On the facts, since the reason for the defendant's inability to perform the condition in question was the plaintiff's own unreasonable refusal to cooperate with the defendant, it followed that the plaintiff's right of rescission pursuant to cl 5 of the Standard Conditions of Sale could not be exercised.

9.61 As for mutual *abandonment* of the contract (where through mutual inactivity, an agreement to discharge the contract might be *implied*), although Tan J apparently accepted that the principles set out in *Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal (The Hannah Blumenthal)* [1983] 1 AC 854 were applicable in Singapore, the learned judge found that the submission was not made out on the facts. Resolution of the problems in this area (a summary of which may be found in Andrew Phang, *Cheshire, Fifoot and Furmston's Law of Contract* (Butterworths Asia, 2nd Singapore and Malaysian Ed, 1998) at pp 925–926, as well as G H Treitel, *The Law of Contract* (Sweet & Maxwell, 11th Ed, 2003) at p 823) await another day.

Discharge by frustration

9.62 One technique to demonstrate that a supervening event has made further contractual performance *impossible*, as opposed to being merely *impracticable*, has been to consider the "commercial probability" of the supervening event – *ie,* whether the commercial risks undertaken by each party at the time of contract have been allocated to one or the other of the parties.

9.63 In *Oakwell Engineering Ltd v Energy Power Systems Ltd* (*supra* para 9.59), the fact that a contract to develop a power plant in India was

rendered economically unviable was held to be insufficient to frustrate the contract. Lai Kew Chai J observed (at [103]) that:

> Even if the defendants were right about the change in tariffs causing the Project to be unprofitable, of which I am not persuaded, the defendants took the risk which passed to it and which it assumed to take at the time of the Settlement Agreement.

In consequence, the defendant's submission failed and the plaintiff's claim for breach of contract was allowed.

Vitiating factors

Duress

9.64 A claim that certain deeds were executed under economic duress was rejected in *Citibank NA v Lim Soo Peng* [2004] SGHC 266 (see also para 9.77 *infra*, on "*Undue influence*"). Accepting that the use of commercial pressure did not constitute economic duress unless it amounted to a coercion of the complainant's will, Lai Siu Chiu J proceeded to apply (at [54]) the criteria for determining economic duress enunciated by the Court of Appeal in *Third World Development Ltd v Atang Latief* [1990] SLR 20, at [19], namely:

> (a) whether the defendant did or did not protest;
>
> (b) whether, at the time of coercion, the defendant had an alternative course open to him such as an adequate legal remedy;
>
> (c) whether the defendant was independently advised; and
>
> (d) whether after entering into the contract, the defendant took steps to avoid it.

On the facts, Lai J found that none of the above criteria had been made out.

Mistake

9.65 Undoubtedly, the most significant issue raised in the High Court decision of *Chwee Kin Keong v Digilandmall.com Pte Ltd* (*supra* para 9.16) was that relating to the law of mistake (see *supra* paras 9.16–9.22 with regard to "*Contract formation in cyberspace*", *supra* para 9.24 under "*Consideration*" and *infra* paras 9.75–9.75 under "*Unconscionability*"). Here, V K Rajah JC found that the contracts alleged by the plaintiffs were, on an objective approach, properly concluded. However, these contracts were vitiated by the

defendant's unilateral mistake. At common law, a unilateral mistake has the effect of vitiating a contract if it is a mistake as regards a *fundamental* term (at [107]) of the contract and the mistake is *known* to the non-mistaken party. Significantly, Rajah JC was of the view that this common law exception was not confined to cases involving actual knowledge, but extended to *deemed* or *constructive* knowledge as well (at [109]–[114]). The facts of the case fell squarely within the ambit of this exception, as the court found that the plaintiffs were "fully conscious" (at [142]), or at least had "a real belief" (at [140]) that the defendant had made an error in its price posting. In consequence, the contracts were void from the outset (at [149]).

9.66 Although the foregoing was sufficient to dispose of the matter, Rajah JC nonetheless proceeded to consider the plaintiffs' other arguments pertaining to the complex relationship between law and equity. The plaintiffs contended that the mistake was not of a sufficiently fundamental nature to render the contract void at common law. Alternatively, the plaintiffs urged the court to follow the decision in *Taylor v Johnson* (1983) 151 CLR 422, where the Australian High Court held that a unilateral mistake did not render a contract void at common law even if the twin requirements of fundamentality and knowledge were satisfied, but equity could intervene to set aside the contract in such circumstances. Whichever the situation, however, the plaintiffs argued that the defendant was precluded from seeking equity's intervention to rescind the contract since it had not pleaded any equitable defence. These arguments were rejected by Rajah JC for the following reasons:

(a) The defence of unilateral mistake would have succeeded in common law alone (at [150]), and thus the absence of any plea in equity was inconsequential.

(b) Following the English Court of Appeal's decision in *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2003] QB 679 ("the *Great Peace Shipping* case"), there ought *not* to be a distinct and more flexible equitable jurisdiction for vitiating contracts on the ground of mistake. Like the appeal judges in the *Great Peace Shipping* case, Rajah JC did not think that a distinct equitable jurisdiction could be founded on the authority of *Solle v Butcher* [1950] 1 KB 671, as this case was irreconcilable with the House of Lords' decision in *Bell v Lever Brothers Ltd* [1932] AC 161. The recognition of an independent jurisdiction in equity was also undesirable as it would result in the conflation of concepts and the

achievement of justice at "too high" (at [129]) a cost of uncertainty and confusion.

(c) It followed, *a fortiori*, that the Australian approach in *Taylor v Johnson* had to be rejected.

(d) Although Rajah JC saw merits in "rationalising the law of mistake under a single doctrine incorporating the best elements of common law and equity" (at [130]), he was nonetheless inclined towards the view that the common law should take precedence, and any rationalisation of the law in this regard, if needed, was best effected via statute.

For further analysis to the High Court decision, see Andrew Phang, "Contract Formation and Mistake in Cyberspace – The Singapore Experience" (*supra* para 9.23), Yeo Tiong Min, "Unilateral Mistake in Contract: Five Degrees of Fusion of Common Law and Equity" [2004] SJLS 227 and Lee Pey Woan "Unilateral Mistake in Law and Equity – *Solle v Butcher* Reinstated" (forthcoming, Journal of Contract Law).

9.67 On appeal, the Court of Appeal disagreed with Rajah JC's view that there was no equitable jurisdiction to vitiate contracts on account of unilateral mistakes: see *Chwee Kin Keong v Digilandmall.com Pte Ltd* (*supra* para 9.2). In a judgment delivered by Chao Hick Tin JA, the appellate court explained that at common law, a unilateral mistake was operative if it related to a fundamental term and was *actually known* to the non-mistaken party; constructive knowledge would *not* suffice for this purpose. The contract was void at law because there was no *consensus ad idem*, and in such a case, there was no room for equity to intervene. However, even if a unilateral mistake was inoperative at common law, it could nevertheless render a contract voidable in equity.

9.68 Having regard to the dynamic nature of equity, the Court of Appeal was clearly reluctant to attempt an exhaustive definition of the circumstances in which equitable intervention would be warranted. Nevertheless, some specific guidance may be gleaned from the court's observations:

(a) Equity's intervention would be justified in circumstances where it would be *unconscionable* for the non-mistaken party to insist on enforcing the contract. The Court of Appeal cited as an instance of such unconscionable conduct the conscious omission to disabuse a mistaken party of the latter's error (at [73] and [77]).

(b) Where the non-mistaken party only has *constructive knowledge* of the other's mistake, such knowledge is a relevant, but *not* sufficient, factor for invoking equity's intervention; an additional element of impropriety is required (at [80]). "[W]hether constructive notice should lead the court to intervene must necessarily depend on the presence of other factors which could invoke the conscience of the court, such as 'sharp practice' or 'unconscionable conduct'" (at [77]).

(c) Mere negligence on the part of the non-mistaken party, *ie*, failing to appreciate a mistake through the lack of care, is not in itself unconscionable conduct.

(d) Negligence on the part of the mistaken party (in causing the mistake) would, however, be relevant in deciding where equity lies (at [79]).

9.69 The Court of Appeal's contrasting view of the law did not, however, affect the substantive outcome of the case as it agreed with the High Court's findings that the plaintiffs had actual knowledge of the mistake, thus rendering the contracts void at common law.

9.70 Two other aspects of the Court of Appeal's analysis merit closer attention. The first focused on the distinction between actual and constructive notice. Chao JA emphasised that the identification of actual knowledge was in essence a *factual* enquiry. Absent express admission and incontrovertible evidence, however, such knowledge could only be established by way of inference drawn from circumstantial evidence. Thus, "[phrases] such as 'must have known' or 'could not reasonably have supposed' are really *evidential factors* or *reasoning processes* used by the court in finding that the non-mistaken party did, in fact, *know* of the error made by the mistaken party" (at [35], emphasis added). This reasoning process was distinct from that of establishing constructive knowledge. In the latter case, knowledge was *imposed* on a person in the *absence* of actual knowledge. In contrast, "Nelsonian knowledge", *ie*, wilful blindness or the shutting of one's eyes to the obvious, was, notwithstanding its apparent objective elements, an instance of actual knowledge (at [42]). The Court of Appeal accepted that the test for deciding whether a party ought to have made inquiry was found in Mance J's *dicta* in *OT Africa Line Ltd v Vickers Plc* [1996] 1 Lloyd's Rep 700 at 703, that there had to be a "real reason to suppose the existence of a mistake". While Chao JA acknowledged (at [44] and [83]) that the distinction between actual and constructive knowledge was a fine one and not given to simple

application in practice, it is nonetheless a distinction with which the courts are familiar. The learned judge warned against adopting the "fused" approach evident in Canadian cases because (at [46]):

> [I]t is vital not to conflate actual knowledge of the mistake by the non-mistaken party with deemed or constructive knowledge by that party for the reason that the consequences *vis-à-vis* innocent third parties are different. A contract void under common law is void *ab initio* and no third parties can acquire rights under it: see *Shogun Finance*. Where a contract is voidable under equity, the court in determining whether to grant relief would have regard to rights acquired *bona fide* by third parties.

9.71 The other significant aspect of the Court of Appeal's judgment relates to its response to the *Great Peace Shipping* case. Adopting a position contrary to that of Rajah JC, the Court of Appeal left no room for doubt that, on *both* technical and theoretical grounds, that case did not have the effect of excluding equity's jurisdiction in cases involving unilateral mistakes (at [74]):

> A simple way of distinguishing *Great Peace Shipping* from the present would be to say that it was a case on common mistake and, to that extent, what was discussed therein could not be applicable to a case involving unilateral mistake. However, we would go further than that. *We would be loath to hold that there is no equitable jurisdiction in the courts with regard to unilateral mistake just because it may be difficult to delineate the scope or extent of that jurisdiction. By its very nature, the manner in which equity should be applied must depend on each case and the dictates of justice.* Equity has intervened in many aspects of human dealings in contractual setting… As such, we see no logic in denying the existence of this jurisdiction in the area of unilateral mistakes. [emphasis added]

9.72 The Court of Appeal's conclusion is clearly underpinned by the belief that justice is better served (particularly in difficult cases involving innocent third parties) by the greater flexibility afforded by equity (at [77] and [82]). Although the very notion of flexibility may seem to militate against certainty, the fear of such uncertainty and any resultant upsurge in litigation was, in the Court of Appeal's view, more apparent than real (at [81]).

Misrepresentation

9.73 In *Koh Keow Neo v Chee Johnny* [2004] 3 SLR 385, Lai Siu Chiu J found on the facts that as there had been no false statements made by the defendants, there could be no actionable misrepresentation. Her Honour also observed that "[i]f negligent misrepresentation is not made out, fraudulent

misrepresentation cannot arise as it requires a higher standard of proof than the former" (at [88]).

9.74 In *Vita Health Laboratories Pte Ltd v Pang Seng Meng* [2004] 4 SLR 162, V K Rajah JC refused to award damages in lieu of rescission pursuant to s 2(2) of the Misrepresentation Act (Cap 390, 1994 Rev Ed) in the absence of evidence as to how this head of damages ought to be assessed (at [76]). His Honour also opined that where the plaintiffs had recovered their losses under contractual warranties, it would not be appropriate to mount a further claim for misrepresentation (at [77]).

Unconscionability

9.75 In *Chwee Kin Keong v Digilandmall.com Pte Ltd* (*supra* para 9.16 with regard to "*Contract formation in cyberspace*", *supra* para 9.24 under "*Consideration*" and *supra* paras 9.65–9.72 under "*Mistake*"), the suggestion to rationalise the law of mistake under the single rubric of unconscionability did not find favour with V K Rajah JC. Noting that such an approach had in fact been adopted in Canada to create a "broad and elastic jurisdiction to deal with commercially inappropriate behaviour" (at [119]), the learned judge advised against a similar development in Singapore for two reasons. First, such an approach appeared to have its source in *Solle v Butcher* (*supra* para 9.66), an authority which is especially beleaguered since the *Great Peace Shipping* case (*supra* para 9.66). Second, and more importantly, the learned judge was concerned that "widening the scope of mistake, unilateral or otherwise, under the rubric of equitable mistake will, with its malleability, only encourage uncertainty and litigation" (at [120]). (For a contrary view, see Andrew Phang, "Contract Formation and Mistake in Cyberspace – The Singapore Experience" (*supra* para 9.23).

9.76 Similarly, it would appear that the Court of Appeal's decision in the same case did not go so far as to endorse the doctrine of unconscionability as the central rubric of all cases of mistake and this could arguably be inferred from Chao JA's rejection of the "fused" approach in Canada (see para 9.70 above). However, it is clear that the Court of Appeal did incorporate the notion of unconscionability as (at the very least) one *rationale* for equity's intervention (see para 9.68 above). (For a helpful account of this narrow version of equity's jurisdiction for dealing with unconscionable conduct, see Yeo Tiong Min, "Unilateral Mistake in Contract: Five Degrees of Fusion of Common Law and Equity" [2004] SJLS 227 (*supra* para 9.66).

Undue influence

9.77 In *Citibank NA v Lim Soo Peng* [2004] SGHC 266 (*supra* para 9.64 with regard to "*Duress*"), Lai Siu Chiu J adopted the classification for cases of undue influence laid down by the English Court of Appeal in *Bank of Credit and Commerce International SA v Aboody* [1990] 1 QB 923 at 953 and which was adopted by Lord Browne-Wilkinson in *Barclays Bank Plc v O'Brien* [1994] 1 AC 180 at 189–190. In relation to class 2 cases of presumed undue influence, her Honour observed (at [44]) that "[t]here is no presumption at law that a relationship of fellow directors of a company means one director exercises influence over another director or his fellow director(s)". The defendant, described by her Honour as a "hands-on" managing director, must therefore prove affirmatively that his fellow director had exerted undue influence on him to enter into the impugned transaction with the plaintiff under class 1. In holding that the defendant had failed to so prove, Lai J took into account the fact that the defendant had independent legal representation. In this regard, her Honour observed (at [49]) that "once the [defendant] had legal representation, it did not behove the plaintiff at law to ensure that the [defendant] did receive independent legal advice. Neither was the plaintiff under a duty to ensure the [defendant] was separately advised from [his fellow director]". The defendant's alleged lack of literacy in the English language did not avail him, as her Honour held that, being a man of substantial business experience, he "only has himself to blame if he was foolish enough to co-sign [the document] without knowing or finding out the contents" (at [50] and [52]).

9.78 In cases where a surety seeks to avoid a transaction (whether this is a guarantee or a mortgage) against the creditor on the basis of undue influence, the crucial issue is whether the creditor had notice, actual or constructive, of the alleged wrongdoing. This issue was raised in Singapore before the High Court in the case of *The Bank of East Asia Ltd v Mody Sonal M* [2004] 4 SLR 113. Andrew Ang JC (as he then was) considered the House of Lords decision in *Royal Bank of Scotland Plc v Etridge (No 2)* [2002] 2 AC 773 ("*Etridge*") at length but held that the principles laid down therein were not applicable to the set of facts before him. His Honour observed (at [10]) that the principles in *Etridge* concerned factual situations in which the indebtedness of the husband or father (or a company in which he had an interest) was secured by the wife or daughter. The present case differed in that whereas the wife and daughter sureties held shares in the company, which indebtedness was being secured by their personal guarantees, the husband/father held no share in the company (at [11]). Ang JC observed (at [11]) that contrary to the assertions of the wife and daughter that "they had

nothing to gain but everything to lose, they, as shareholders of the Company, of course stood to gain if the Company were to use the facilities to advantage". For an in-depth discussion of this case, see Low Kee Yang, "Vulnerable Sureties, a Bank's Responsibility and the *O'Brien-Etridge* Principles" (2005) 17 SAcLJ 455.

Illegality

General

9.79 In *Siow Soon Kim v Lim Eng Beng* [2004] SGCA 4 ("*Siow Soon Kim*"), the respondent withdrew from a partnership with the appellants. The withdrawal was not amicable and the respondent brought an action against his erstwhile partners to claim for his share of the partnership assets. In their defence, the appellants asserted that some of these assets had been paid into certain bank accounts with the intention of defrauding the revenue authority and were accordingly tainted and irrecoverable. This submission had been rejected in the court below (see *Lim Eng Beng v Siow Soon Kim* [2003] SGHC 146) by MPH Rubin J on the basis that the respondent's claim was simply for his just entitlements upon withdrawal from the partnership. There was no need for him to rely on the illegality.

9.80 Rubin J's decision was affirmed by the Court of Appeal, noting (at [36]) that the appellants' argument had:

> ... wholly missed the essential nature of the action. The claim of the respondent was for his entitlement to the assets of the partnership upon his withdrawal from it as a partner. The business of the partnership was perfectly legitimate. The respondent was not suing on an agreement which was tainted with illegality. Neither was he suing for the refund of moneys paid under an illegal contract. His claim was not founded on the agreement made in 1992 to set aside the funds of the partnership in a separate account. This setting aside of funds of the partnership in a separate account was purely an internal financial arrangement.

And at [39]:

> The circumstances of the present case clearly fell within the purview of the decision of this court in *American Home Assurance Co v Hong Lam Marine Pte Ltd* [1999] 3 SLR 682 which held that the test to apply to determine whether the court should assist a plaintiff to enforce an agreement was whether the plaintiff was able to establish his cause of action independently of the illegality. On this test, the present respondent clearly satisfied it. The respondent was not asking the court to enforce an illegal arrangement but a

> wholly legitimate partnership agreement. This would suffice to dispose of the issue.

9.81 Obviously, this line of reasoning applies the proposition that "no court will lend its aid to a plaintiff who founds his cause of action upon an illegal transaction".

9.82 The principles set out in *Tinsley v Milligan* [1992] Ch 310 were also applied and accepted in *Top Ten Entertainment Pte Ltd v Lucky Red Investments Ltd* [2004] 4 SLR 559 ("*Top Ten Entertainment*"). However, in neither *Siow Soon Kim* nor *Top Ten Entertainment* was consideration taken of the powerful critique of *Tinsley v Milligan* in N Enonchong, "Title Claim and Illegal Transactions" (1995) 111 LQR 135. In similar vein, Prof Phang has noted in "Of Illegality and Presumptions – Australian Departures and Possible Approaches" (1996) 11 JCL 53 at 62 that:

> [T]he inescapable fact of the matter is that *even in* a claim based upon title or proprietary interest, the claimant will *have to* rely, at some point or other, on the illegal contract or transaction, if nothing else, to establish his title or proprietary interest in the subject-matter concerned [emphasis in original].

It is hoped that these questions will be addressed in an appropriate case.

Gaming contracts

9.83 The concept of public policy cannot be set in stone, least of which the public policy against the enforcement of gaming and wagering contracts. In *Star City Pty Ltd v Tan Hong Woon* [2002] 2 SLR 22 ("*Star City*") (previously noted at Andrew Phang, (2002) 3 SAL Annual Review 122 at paras 9.79–9.81), the Court of Appeal sought to provide some definition to the policy. However, note should also be taken of *Liao Eng Kiat v Burswood Nominees Ltd* [2004] 4 SLR 690 ("*Liao Eng Kiat*").

9.84 Like *Star City*, *Liao Eng Kiat* involved the recovery of sums which had been lent, and which were subsequently used as the wager in gambling contracts, this time in Perth, Western Australia. Unlike *Star City*, instead of bringing an action in Singapore on the alleged loan (which, in all likelihood, would have failed after being subjected to the same re-characterisation exercise in that case), the lenders successfully brought an action against the borrower in the District Courts of Western Australia on the loan. They then applied *ex parte* to the High Court for the Australian judgment to be registered under the Recognition and Enforcement of Commonwealth Judgments Act (Cap 264, 1985 Rev Ed) ("RECJA"). The respondent borrower

then sought to set aside the registration. He failed and his appeal to the High Court was dismissed (see *Burswood Nominees Ltd v Liao Eng Kiat* [2004] 2 SLR 436), thus prompting the present appeal.

9.85 The Court of Appeal dismissed the appeal, holding that the registration of the Australian judgment could not be set aside. The main issue centred on whether or not the relevant section of the Civil Law Act (Cap 43, 1999 Rev Ed) ("CLA") – previously s 5(2) but now renumbered as s 6(2) – and s 3(2)(*f*) of the RECJA precluded registration of the Australian judgment on grounds of public policy. On this, the Court of Appeal held (at [24]) that there was a *fundamental distinction* between the *standards* of public policy as applicable to these provisions:

> In our evaluation, s 5(2) of the CLA and s 3(2)(f) of the RECJA encapsulate *different standards* of the public policy defence. While s 5(2) of the CLA elucidates Singapore's *domestic* public policy on the enforcement of gambling debts, a rule of our public policy as it applies to registration of foreign judgments under the statute in question is clearly different. Section 3(2)(f) of the RECJA requires a *higher threshold of public policy* to be met in order for registration of a foreign judgment to be refused. As such, we could not countenance [the respondent's] attempt to get around s 3(2)(f) of the RECJA by arguing that s 5(2) of the CLA would have precluded this court from entertaining Burswood's cause of action.

Recognition of such differences in public policies could be found in English, American and Canadian authorities (see [26]–[32]), as well as analogous authorities involving the recognition of arbitral awards (at [33]–[39]). The Court of Appeal accepted that a higher threshold or standard of public policy was required before registration of a foreign judgment would be refused. This higher standard, however, had not been met in the present case. The Court of Appeal therefore concluded (at [46]) that:

> We do not think that there were any public policy grounds militating against registration of the Australian judgment which would offend a fundamental principle of justice or a deep-rooted tradition of Singapore. Neither did we have any evidence before us to indicate that the general community in Singapore would be offended by the registration of a foreign judgment on a gambling debt that was incurred in a licensed casino. If anything, we were of the opinion that the prevalent conception of good morals in the Singaporean community at large would be against Singaporeans who ran up gambling debts in overseas jurisdictions and sought to evade their responsibility for those debts when judgment had been issued against them.

9.86 Further, the Court of Appeal noted (at [47]) that application of s 3(1) of the RECJA (which had *not* been raised by either party to the appeal) would, in its view, lead to a similar conclusion:

> [Section] 3(1) of the RECJA gives the court the general discretion to order the registration of a foreign judgment if "in all the circumstances of the case [the court] thinks it is *just and convenient* that the judgment should be enforced in Singapore". In our assessment, [the appellant] had failed signally in his attempt to show that it was not just and convenient for us to register the Australian judgment [emphasis in original].

9.87 What is of wider import, though, are the court's final observations at [45]:

> As we recognised two years ago, gambling *per se* is not contrary to the public interest in Singapore. To date, the stand we took in *Star City* has been bolstered by the fact that Singapore's societal attitudes towards gambling have evolved even further, as evinced by the fact that the Government is giving serious consideration to the idea of building a casino on the island of Sentosa.

Crucially, this suggests that as the attitudes of Singapore's public evolve, so too must "public policy."

Restraint of trade

9.88 In the area of restraint of trade, no new ground was covered. The position that covenants in restraint of trade are *prima facie* void and unenforceable was reiterated by Tay Yong Kwang J in *Asiawerks Global Investment Group Pte Ltd v Ismail bin Syed Ahmad* [2004] 1 SLR 234 ("*Asiawerks*"). As such, the burden is on the party seeking to enforce the covenant to prove otherwise. Having done so, the party seeking to enforce the restrictive covenant must further satisfy the court that on its proper construction, the covenant in question applies to restrict the kind of activity undertaken or proposed to be undertaken by the covenantor. This, as *Asiawerks* demonstrates, will not be easy as the covenant is likely to be construed narrowly. Thus, in *Asiawerks*, the covenant against competing against a former employer in "business carried on by the company" was construed narrowly to refer only to actual businesses which the employers had already undertaken (see [37]).

Remedies

General

9.89 Three extremely significant cases pertaining to the remedy of damages for breach of contract were brought before the Supreme Court in 2004. The first of these is the High Court decision of Judith Prakash J in *Prosperland Pte Ltd v Civic Construction Pte Ltd* [2004] 4 SLR 129 (which was scheduled for appeal before the Court of Appeal on 24 January 2005). The second is another decision handed down by Prakash J: *Wee Poh Hueh Florence v Performance Motors Ltd* [2004] 2 SLR 58 (being an appeal from an assessment of damages by the Registrar). The last, and perhaps the most difficult, is the appeal of *Asia Hotel Investments Ltd v Starwood Asia Pacific Management Pte Ltd* [2005] 1 SLR 661.

Damages in a three-party "black-hole" case

9.90 In *Prosperland Pte Ltd v Civic Construction Pte Ltd* (*supra* para 9.89), Prosperland Pte Ltd ("Prosperland") was the developer of a condominium. Construction was completed in August 1993 and the Management Corporation for the project ("the MCST") was constituted as a body corporate in 1998. The MCST then became the proprietor of the common property of the condominium. Meanwhile, Prosperland had also successfully sold all of the residential units in the condominium to various subsidiary proprietors. The first defendant, Civic Construction Pte Ltd ("Civic"), was the main contractor for the development.

9.91 Unfortunately for all concerned, certain building defects became apparent over time: notably (a) tiles from the external façade were de-bonding from the building; and (b) there was damage to various walls made of glass brick. In consequence, Prosperland sought to bring a claim against Civic for breach of the building contract and/or negligence arising out of the defective construction of the condominium, as well as for breach of a document dated 6 August 1993 known as the "Joint Guarantee for Tile Adhesives" ("the guarantee").

9.92 Apart from a preliminary objection based on limitation (which was resolved in Prosperland's favour in relation to the de-bonded tiles but not in relation to the damage to the glass brick walls by application of s 24A(2)(*b*) of the Limitation Act (Cap 163, 1996 Rev Ed) to the facts of the case), Civic also contested whether Prosperland was the proper party to bring the suit

given that it had no proprietary interest in the condominium by the time proceedings were brought.

9.93 In relation to this, Judith Prakash J agreed (at [59]) that in general:

> [A] party is only entitled to recover substantial damages arising from a breach of contract if he himself has suffered that loss. Whilst there was for many years academic debate as to whether this principle existed and, if it did, whether it should be abolished, it was reaffirmed by a majority comprising three of the Law Lords who decided the case of *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518.

It was not disputed that Prosperland had not incurred any expense in rectifying the alleged defects in the condominium. Nor had it been sued by the MCST for the rectification costs. Furthermore, it was no longer the owner of the condominium. Consequently, Prosperland would seem to have suffered no loss and in principle, it would not be the proper plaintiff to bring this action.

9.94 Nevertheless, Prakash J dismissed Civic's submission on this point, following a careful and comprehensive summary of relevant English authorities: beginning with the rule in *Dunlop v Lambert* (1839) 6 Cl & Fin 600; 7 ER 824; its re-statement by Lord Diplock in *The Albazero* [1977] AC 774 at p 847; the subsequent extension of that rule to the case of building contracts by the House of Lords in *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85; and then its further development in *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 ("*Panatown*").

9.95 Having examined the various English authorities, Prakash J clearly favoured (at [64]) the broader approach of the minority in *Panatown*:

> The position in Singapore on the correct principle is still open. For myself, I prefer the reasoning and conclusions of Lord Millett and Lord Goff in the *Panatown* decision in support of Lord Griffiths' broad principle to that of the majority. It is not, in my view, consistent with logic or principle that a contractor under a building contract, who is fully aware that his acts or defaults can have long-term consequences that only manifest themselves well after the employer has divested himself of his interest in the building project (as all anticipate he will), should be able to avoid his responsibility to fulfil the contractual specifications and to deliver to the employer the performance that the latter has paid for and that the contractor has assured the employer he will be able to undertake and deliver. Applying the broad principle, Prosperland is able to recover substantial damages from Civic and the architect (always assuming it proves its case on the facts) as it had the

> right to full and proper performance of the respective contracts that it had made with these parties and the value of that performance is eminently capable of measurement by the cost of the rectification works that need to be done.

9.96 Notably, the learned judge's analysis of the "broad ground" discarded the glosses applied by the majority in *Panatown* – see the speeches of Lord Clyde and Lord Jauncey of Tullichettle (at 958–960 and 998 respectively) and Lord Browne-Wilkinson (at 1002) in *Panatown*. For Prakash J, recovery on this ground should be allowed even if there had been *no expenditure* by the promisee-developers to rectify the defective building works, nor any undertaking or obligation to account for such recovery to the third-party owners.

9.97 Given, however, that this was the first opportunity for examination of this area of the law, Prakash J also considered how the narrow-ground exception might apply to the facts. The defendants had submitted that the "no direct remedy" requirement of the narrow ground could not be satisfied in Singapore given the Court of Appeal decisions in *RSP Architects Planners & Engineers v Ocean Front Pte Ltd* [1996] 1 SLR 113 and *RSP Architects Planners & Engineers v MCST Plan No 1075* [1999] 2 SLR 449 and the effect of s 33(2) of the Land Titles (Strata) Act (Cap 158, 1999 Rev Ed) which empowered a management corporation of a strata title development (like that under consideration) to directly bring an action in tort. This submission was rejected by Prakash J.

9.98 Prakash J pointed out (at [64]) that such an action by the MCST would be distinct from the kind of recovery sought by Prosperland. First, the MCST's cause of action would be in the tort of negligence whereas Prosperland's action was in contract, and not all contractual breaches entail negligence. Secondly, the tort cause of action could be met by defences that might not be available to a party seeking to defend himself against a contractual claim. Reliance on the possibility of a tort claim could, in her Honour's opinion, result in the defendants escaping from their liability to provide compensation for the losses caused by their breach.

9.99 This usefully clarifies the application of the narrow-ground exception, and indicates that even where there *is* a "direct cause of action" for the third party against the promisor-in-breach (*eg* in the tort of negligence), the narrow-ground exception is still available so long as such cause of action is sufficiently distinct from the contract claim brought by the promisee. In particular, Prakash J noted that the nature of the obligations in question, as

well as the defences which might be brought, would differ. Therefore, on the facts of *Prosperland Pte Ltd v Civic Construction Pte Ltd*, the presence of the potential claim in the tort of negligence did not preclude the operation of the narrow-ground exception.

9.100 These observations have since been affirmed by the Court of Appeal, dismissing an appeal by the second and third defendants from Prakash J's decision – see *Chia Kok Leong v Prosperland Pte Ltd* [2005] 2 SLR 484.

Deductions from damages for use

9.101 Although emanating from a Registrar's Appeal, the outcome in *Wee Poh Hueh Florence v Performance Motors Ltd* (*supra* para 9.89) raises interesting questions. In this case, the plaintiff purchased a top-of-the-line BMW 728iA from the defendants in November 1997. It performed up to expectations for about a year and a half, but from May 1999 onwards, it manifested serious problems with overheating and loss of coolant at increasingly frequent intervals. For much of 2001, the vehicle remained at the defendants' workshops and in February 2002, the defendants concluded that it could not be satisfactorily repaired and returned the car to the plaintiff.

9.102 In May 2002, the plaintiff successfully sued the defendants for breach of warranty of quality. However, as she had affirmed the contract and had the use of the car for a substantial period, she was not entitled to reject the car. Nor could she obtain a full refund. Instead, interlocutory judgment was entered for damages to be assessed before the Registrar. This occurred in July 2003. Both parties appealed against the Registrar's assessment, the issues on appeal being, *inter alia*: (a) whether damages should have been assessed at the date when the vehicle was first delivered to the plaintiff; and (b) whether the plaintiff's damages should be quantified on the basis of her *use* of the car, or its market value.

9.103 On the first issue, Prakash J reiterated (at [15]) that:

> The *prima facie* date for assessment of the damages is the date of delivery. If that date is to be displaced because of the failure to discover the defect until later, then the *prima facie* date of assessment is the date of discovery of the defect. In either case, the party that wishes to change the date from the *prima facie* date which the law specifies must bear the burden of showing why the *prima facie* date is not applicable.

On the facts, Prakash J observed that the defendant had failed to discharge the burden of showing why neither of these two points in time were

inapplicable. The defendant was the authorised agent of the manufacturer of the vehicle and had the vehicle in its hands for substantial periods of time even after it was initially delivered to the plaintiff. It therefore had (or should have had) the expertise to determine the seriousness of the defect at the earliest possible time.

9.104 As Prakash J noted (at [18]), the rationale for assessment at the time of *discovery of the breach* was to *postpone* the time at which mitigatory steps would have had to be taken (since it would be illogical to demand that a plaintiff mitigate losses of which he was as yet unaware). However, where as in the present case, such protection was not needed, there was no bar to having damages assessed at the time of actual breach, even if the injured party (the plaintiff) had been ignorant of such breach. In this case, therefore, the appropriate time for assessment of damages was the time of the breach and not the time of its discovery.

9.105 Moving on to the next issue, Prakash J applied s 53(3) of the Sale of Goods Act (Cap 393, 1999 Rev Ed). The appropriate measure of the plaintiff's loss as at the time of breach (being the date of delivery since the car was never of the requisite contractual quality) was the difference between its value had it been of satisfactory quality and its actual value, given its defective status. This was held to be the difference between the price actually paid by the plaintiff and the scrap value of the car, given the evidence that there was no market for a car as defective as the one which had been delivered to the plaintiff.

9.106 The learned judge then took the position (at [20]) that:

> [A]n allowance has to be given for the fact that for a substantial period of time the car appeared to be exactly what it was supposed to be and Ms Wee used it and enjoyed it during this period as if it was a sound BMW 7 series car. I think that to totally disregard such use and enjoyment for the purpose of quantifying her damages would be to overcompensate Ms Wee for the breach of contract.

Certainly, Prakash J is not alone in having made such a deduction. In *Charterhouse Credit Co Ltd v Tolly* [1963] 2 QB 683 (which was not cited to Prakash J), the English Court of Appeal also made a similar deduction in relation to a counterclaim brought on a hire-purchase contract for a vehicle by the hirer against the hire-purchase company as the vehicle was completely unroadworthy.

9.107 Both cases suggest that market value and use have to be considered in determining the quantum of damages to avoid over-compensating the plaintiff. Both cases are similar in that the respective contracts of hire-purchase (in the case of *Charterhouse Credit Co Ltd v Tolly*) and outright purchase (in the case of *Wee Poh Hueh Florence v Performance Motors Ltd*) were *affirmed*, despite the respective vehicles having been supplied in breach of contract. It would seem to follow that both Mr Tolly and Ms Wee were perfectly entitled to use their vehicles. This conclusion seems particularly irresistible in Ms Wee's case as the vehicle was always hers to use, if not for its defects. (In Mr Tolly's case, the car was eventually repossessed by the hire-purchase company when he defaulted on the monthly payments – as such, it might be possible to view the deduction made in relation to his counterclaim as a rough estimate of depreciation in the value of the vehicle caused by wear and tear arising from its use during the initial period of hire). It also seems to follow that such use and enjoyment do not amount to compensating advantages arising *as a result* of the breach. If they were, a deduction would be justified so as to avoid over-compensation (see Andrew Burrows, *Remedies for Torts and Breach of Contract* (Oxford University Press, 3rd Ed, 2004) at p 156). The basis for deductions for use in cases like *Wee Poh Hueh Florence v Performance Motors Ltd* might therefore merit further examination.

Causation for loss resulting from breach of contract

9.108 In general, a "common-sense" approach is used by the courts when faced with the question as to whether the breach of contract by one party can be said to have been the *cause* of the loss(es) suffered by the other party. Clear examples of this approach in decisions handed down in 2004 may be found in *Salcon Ltd v United Cement Pte Ltd* [2004] 4 SLR 353 and *Sinogreat International Trading Ltd v Hin Leong Trading (Pte) Ltd* [2004] 1 SLR 393. Nevertheless, differences of opinion may still arise, as was the case in *Asia Hotel Investments Ltd v Starwood Asia Pacific Management Pte Ltd* (*supra* para 9.89) ("*Asia Hotel*").

Standard of proof of causation for loss of a chance

9.109 A sharp division of opinion as to the question of causation for the loss of a chance was revealed in *Asia Hotel* (on appeal from *Asia Hotel Investments Ltd v Starwood Asia Pacific Management Pte Ltd* [2003] SGHC 289).

9.110 The appellant, Asia Hotel Investments Ltd, was in the business of renovating, re-branding, repositioning and securing professional

management for hotels and golf courses in South-East Asia. The second respondent, Starwood Hotels & Resorts Worldwide Inc, was the parent company of the first respondent, Starwood Asia Pacific Management Pte Ltd. The respondents owned and operated various international hotel chains, such as St Regis, Westin, Sheraton and Four Points. To reduce the complexity of the proceedings, at the commencement of the trial, the second respondent agreed to honour any damages awarded against the first respondent. It was therefore unnecessary to distinguish between the two.

9.111 During the last quarter of 2001, the appellant was interested in taking over and converting the four-star Grand Pacific Hotel ("Grand Pacific") in central Bangkok. Grand Pacific was then owned by PS Development Ltd ("PSD"). PSD, in turn, had two shareholders, the minority shareholder being one Pongphan (who had a right of first refusal over the PSD stake held by the majority, and who was also the chairman of PSD's board of directors). The evidence suggested that Pongphan was unlikely to exercise this right as PSD was in substantial financial difficulty.

9.112 In November 2001, the appellant, through a nominee, entered into a memorandum of understanding ("MOU") to acquire the majority stake in PSD for US$7.5m. Under this MOU, the appellant had until 14 December 2001 to enter into a contract to buy over the majority stake and pay a deposit of US$500,000. To this end, the appellant began to look for an international professional manager for the re-branded hotel.

9.113 The respondents were keen to be the operator of the hotel and offered its five-star "Westin" brand. On 4 December 2001, the respondents signed a non-circumvention agreement with the appellant under which it undertook not to "solicit any source introduced by the other party" or enter into any agreement with such a source for a period of 12 months from the date of execution, *ie*, until 4 December 2002 ("the N-C Agreement"). However, the MOU lapsed on 14 December 2001 without the appellant having managed to put in place the financial and other arrangements necessary for the purchase of the majority stake. No extension was granted.

9.114 A rival group consisting of members of the Narula family became interested in the project shortly thereafter, and on 5 February 2002, they executed a memorandum of understanding to acquire the majority PSD stake ("the second MOU"). On 22 March 2002, an agreement for the purchase of the majority stake in PSD was executed, and the transaction was completed on 22 May 2002 with the assistance of a loan to the Narula family from DBS Thai Danu Bank.

9.115 Although the appellant was aware of the steps taken by the Narula family to purchase the majority stake in PSD, the appellant chose to stay on the sidelines in reliance on its one-year N-C Agreement with the respondents (since the involvement of a reputable operator was an integral part of any financing for the acquisition of the hotel). Nevertheless, commencing on 15 February 2002 and at various points in time thereafter, the respondents showed a clear interest in co-operating with the Narulas. Ultimately, despite repeated reminders of their obligations to the appellant, the respondents (through an affiliated company) executed a management contract for the Grand Pacific with the shareholders of PSD (being the Narula family and Pongphan). The respondents also extended a US$5m loan to the Narula family to assist in the renovation of the Grand Pacific to the standards appropriate to the five-star Westin brand name.

9.116 At first instance, Tan Lee Meng J found that the respondents had acted in breach of their obligation under the N-C Agreement not to deal with any "source" introduced by the appellant ("source" was expressly defined to include the owners of the Grand Pacific). The bone of contention, however, was whether the appellant's losses as a result of its inability to acquire control of the Grand Pacific, were caused by the respondents' breach of the N-C Agreement.

9.117 Given that there was no guarantee that the owners of the majority PSD stake would have agreed to sell the stake to the appellant, at trial, the appellant elected to frame its damages solely in terms of the *loss of a chance* to acquire the majority stake. However, Tan J found that on the facts, the respondents had not caused the loss of any such chance. The learned trial judge arrived at this finding on two bases. Firstly, he found that the appellant had not established that the Narulas could *not* have completed their deal with the vendors without the involvement and financial assistance from the respondents (at [42]). Secondly, and in the alternative, the trial judge focused on the failure of the appellant to make any headway on its *own* part (*eg* in arranging for the relevant financing, in coming up with sums for the purposes of paying the deposit requested by the vendors, and the actual engagement of an operator for the hotel), and as a result, the appellant was, "not in any position to beat the Narulas in the race for the Lai Sun shares" (at [61]). Further, in Tan J's view, the appellant's case had been "badly handicapped by the lack of independent and knowledgeable witnesses to support [its] many assertions, which if not established, totally undermined [its] case. [Its] only witness ... convinced me through his evasiveness, contradictions, unsubstantiated claims and generally unsatisfactory evidence that Asia Hotel had no real or measurable chance of securing the Lai Sun

shares if Starwood had not breached the non-circumvention agreement" (at [62]). Consequently, as causation had not been proved, Tan J awarded $10 as nominal damages to the appellant, who promptly lodged an appeal wherein Tan J's judgment was overturned, albeit by a 2-1 majority.

9.118 In the opinion of Chao Hick Tin JA (delivering the judgment of the majority in the Court of Appeal), this case fell within the third category of cases identified by Stuart-Smith LJ in the English Court of Appeal case of *Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 WLR 1602 ("*Allied Maples*"). This category concerned cases where the plaintiff's loss would depend on the hypothetical action of a third party, either independently or in addition to the plaintiff's own action. In so far as proof of the third party's actions was concerned, it was enough for the plaintiff to prove that there was a "substantial chance rather than a speculative one" (at 1611 in *Allied Maples*). It was not necessary for the plaintiff to prove, on a balance of probabilities, that the third party would have acted in such a manner as to confer the plaintiff the benefit in question (at [136]). It was also not necessary for such a plaintiff to show on a balance of probabilities that the chance would have come to fruition (at [133]).

9.119 Although it was not made absolutely clear, it appears that the judges in the majority accepted (at [136]) that in so far as there was a question as to how the plaintiff *himself* would have acted (if not for the defendants' breach of contract), this would need to be proved on a balance of probabilities in keeping with Stuart-Smith LJ's analysis in *Allied Maples*. Unfortunately, obscurity over this point may have contributed to the strongly-worded dissent from Yong Pung How CJ.

9.120 Given that the appellant had already failed twice to obtain financing from the time it initiated discussions with the vendors of the majority stake until the time when the Narulas acquired that stake, that it had also failed to obtain funds for the deposit initially requested by the vendors of the majority stake, and Yong CJ's own finding (at [68]–[70] based on the testimony of the appellant's only witness) that the appellant had *withdrawn* from the transaction, *ie*, the appellant was no longer interested in the acquisition of the majority stake by the time it was acquired by the Narulas, Yong CJ could not conclude (at [70]) that, *on a balance of probabilities*, the appellant could or would have taken the necessary steps to "tie up the rest of the pieces if the Narulas had failed".

9.121 The majority, however, appears to have taken a distinctly different view of the evidence. Delivering the judgment of the majority, Chao JA emphasised (at [120]) that:

> If the Narulas had not succeeded in the purchase, the appellant would have had *a chance* to acquire the stake. As indicated before, there is no evidence of any other interested investor. The appellant had repeatedly warned Starwood that it was in danger of breaching the N-C Agreement. These warnings would have reminded Starwood of the appellant's continued interest in the Lai Sun stake. There would have been no basis for Starwood to think that, after January 2002, the appellant did not have any further interest in the hotel [emphasis added].

9.122 Further in the judgment, Chao JA reiterated (at [138]) that the appellant had:

> [A]t all material times, maintained its intention to acquire the stake. Having secured Starwood for a year, it deliberately adopted the strategy of watching how the Narulas would wrap up a deal on its own.

9.123 For the majority, then, there was *objective* evidence that: (a) the respondents had been "tied up" for a year under the N-C Agreement; and (b) there was no other rival for the stake other than the Narulas. In contrast to the Chief Justice, the majority also found that the appellant had *never* given up on the chance that it might acquire the stake. Accordingly (at [141]), it was impossible for the majority to see:

> how it could be said that if the Narulas had failed to wrap things up, the appellant could not have had a real chance of tying up the pieces together when it had up to 4 December 2002 to do that. It was not necessary for the appellant to show, on a balance of probabilities, that it would succeed in clinching the deal if the Narulas had failed.

9.124 Despite its initial failure to secure financing before the Narulas "beat them to it," the appellant was still interested in the acquisition and, notwithstanding its failure to do so initially, *could* have proceeded in the months *ahead* to obtain the requisite financing (before its lock-up with the respondents in the N-C Agreement expired). Thus (at [130]), it was the majority's considered opinion that:

> [O]*n the evidence*, Starwood's breach had *caused* the appellant to lose a real chance of acquiring the Lai Sun stake and in turn the Grand Pacific. We are not saying that the appellant would certainly have acquired the stake. The appellant would have to find a banker who would offer loans on terms which it and Pongphan could accept. The appellant and Pongphan would

> also have to agree on the question of control of PSD because taking over the Lai Sun stake would give the appellant a majority shareholding in PSD. Furthermore, the appellant would have to finalise the management contract with Starwood, including the question of the renovation loan. But these were matters which any investor in the Lai Sun stake would, in any event, have to put in place. Lai Sun wanted to get out and if the Narula offer had not gone through, it would have been prepared to consider a further offer from the appellant. ... All said, the appellant would have had a chance, certainly not a speculative chance, considering that there is no evidence of a third potential investor waiting in the wings and having an interest in the stake [emphasis added].

Nevertheless, the majority's judgment did not explicitly set out *how* they reached the conclusion that the *evidence* before them had established the causation point in the appellant's favour. This can only be gleaned with some close reading.

9.125 The majority observed (at [124]) that:

> [T]he objective facts show that the Narulas needed Starwood as the operator of the hotel and also needed Starwood's renovation. Thus, Starwood's acts helped the Narulas to acquire the Lai Sun stake, and in turn the Grand Pacific. The *evidential burden* of disproving that thus shifted to Starwood who had to show that the Narulas could have proceeded with the acquisition without the help of Starwood. [emphasis added]

Thus, in the judgment of the majority (at [127]), "[w]ith respect, the approach taken by the [trial] judge showed that he failed to appreciate that the evidential burden to prove otherwise fell on Starwood". Nor was there any suggestion that the *standard* by which the evidential burden as to proof of causation was to be discharged was anything other than the usual standard of proof – *ie*, on a balance of probabilities. Indeed, at [136], in summarising the chain of events leading to the English Court of Appeal decision in *Allied Maples*, Chao JA expressly noted that Turner J (the first instance judge in those proceedings) had, "found that *on a balance of probabilities* there was a real and not a mere speculative chance that the plaintiffs would have successfully re-negotiated with the sellers [thereby avoiding the loss which eventually occurred]" [emphasis added]. Chao JA then noted (*ibid*) that on appeal:

> ... Stuart-Smith LJ said that all that was needed to be proved by the plaintiffs *on a balance of probabilities* was that if they had been given the right advice, they would have sought to negotiate further to obtain protection. [emphasis added].

It is in this context that Chao JA goes on to refer to the third category of cases described in *Allied Maples*. It is therefore clear that in the majority's opinion, cases falling within the third category as identified by Stuart-Smith LJ were no different from the other two categories, so far as the standard of proof for causation of loss was concerned. It is inconceivable, therefore, that in deciding the issue of *causation* (of the loss of the chance to acquire the Grand Pacific), the majority had in mind any standard of proof other than the balance of probabilities. Indeed, this is perfectly consistent with the approach of the Chief Justice who had observed (at [62]) that:

> [I]n the *Allied Maples* case ... the chance was *contingent* on the hypothetical acts of the plaintiff in negotiating with the vendor or third party. In such circumstances, the law has demanded that the plaintiff proves *that* [*ie* that the plaintiff would have commenced such negotiations] on a balance of probabilities. [emphasis in original]

Both majority and minority would therefore seem to be in agreement as to the standard of proof required for a plaintiff to discharge the evidential burden that his loss of a chance had been *caused* by the defendant's wrongful action (or, for that matter, omission). This is also consistent with the approach taken in instances where the wrongful action or omission arises in tort – see, *eg*, *Gregg v Scott* [2005] 2 AC 176. However, for a different view, see David Lee, "Proving Causation in a Claim for Loss of Chance in Contract" (2005) 17 SAcLJ 426, which attempts to elevate the differences of opinion between the majority and the minority from one of fact to one of law (see, *eg*, paras 16 and 41–56), and which takes the view that the majority judges did *not* apply the "higher threshold" of "balance of probabilities" to determine the question of causation (see paras 46 and 54).

9.126 Notwithstanding the Chief Justice's insistence (at [63]) that, "the law demands a high threshold from the plaintiff when he comes forth to prove that he would have done certain hypothetical acts which would have put him on course to secure that chance", the majority's analysis illustrates that the "balance of probabilities" standard of proof is precisely that – it requires a *balancing* of the evidence tendered by *both* parties. As Denning J (as he then was) observed in *Miller v Minister of Pensions* [1947] 2 All ER 372 at 373, the civil standard of proof, *ie,* proof on a balance of probabilities:

> must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: "We think it more probable than not", the burden is discharged, but, if the probabilities are *equal*, it is not. [emphasis added]

As noted in David Lee's article (at para 70):

> Where the plaintiff has to accomplish a number of tasks in order to put itself on track to obtain that chance, ... the plaintiff need not be required to prove that each and every task would have resulted in success on a balance of probabilities. Translated into the context of *Asia Hotel*, it means that the plaintiff need not be required to show that it would have obtained the financial arrangements from the banks *and* that Mr Pongphan would have waived the right of first refusal in its favour, both on a balance of probabilities. What is required is an overall evaluation of the facts. ... [I]f [Asia Hotel's president] had been more forthcoming in one of the other requirements, *eg* in his negotiations with the banks *per se*, that might have made it easier for a trial judge to come to the conclusion that Asia Hotel had proved causation on a balance of probabilities because it had shown that its hypothetical conduct would have put it on track to secure the benefit.

It is hard to disagree with the first part of this succinct summary of what is required of a plaintiff to establish the requisite causation for his loss of a chance. However, care should be taken not to overlook the need to *weigh* the evidence tendered on behalf of the plaintiff with any countervailing evidence by the defendant. Given its assessment of the lack of any countervailing evidence (at [125], [126] and [128]), in the eyes of the majority in *Asia Hotel*, even on a balance of probabilities, the plaintiff had proved the point.

9.127 Despite the difficulties, the decision of the Court of Appeal in *Asia Hotel* is extremely welcome, in particular, the dissenting judgment of the Chief Justice who has set out a clear and useful framework to approach "loss of a chance" cases. However, the robust view taken by his Honour (at [63]) as to the possible conflation of issues by his colleagues in the majority, and how the majority had bent over backwards to "create a case for the appellant when it had absolutely no case to begin with," may be seen as a response to the oblique fashion in which the majority dealt with the critical issue as to proof of causation. Read very closely, it does not appear that the positions of the majority or the minority as to the relevant legal principles are significantly different. However, given the very *different* inferences from the evidence made by the majority, the difference in opinion as to whether the issue as to causation had been proved by the appellant had to follow as a matter of course. Ultimately, it appears that the outcome in *Asia Hotel* may have been dictated by a difference of opinion as to the *weight* of the evidence and not the law.

Novus actus interveniens

9.128 The facts of *Salcon Ltd v United Cement Pte Ltd* (*supra* para 9.108) gave rise to an interesting problem of liability for damage which was rendered notional by a subsequent *novus actus interveniens*. In this case, the appellant was engaged by the respondent to construct a cement silo. In breach of contract, the silo was constructed defectively. This was in part due to negligence on the part of the professional engineer who had been responsible for the design of the silo.

9.129 Following a site inspection conducted by the Building Control Division, the engineer responsible for the design advised in his evaluation report that the silo should not be loaded beyond 70% of its capacity. Meanwhile, the respondent had engaged a third party to make good the defects to the silo. In order to assess the stresses in the silo, the third party caused the silo to be loaded to 97% of its capacity. This caused a large crack to appear and the silo collapsed completely. Repairs were therefore no longer feasible and the silo had to be completely rebuilt.

9.130 The dispute proceeded for arbitration wherein the appellant and the engineer were found jointly and severally liable for negligence and for breach of contract. However, it was also found that the actions of the third party in causing the defective silo to be loaded beyond 70% capacity (as recommended by the engineer) was a *novus actus interveniens* which broke the chain of causation.

9.131 The issue before the Court of Appeal was whether the respondent was entitled to claim for notional losses which the respondent would have suffered, *if not* for the collapse. In particular, the arbitrator awarded the respondent damages for (a) *consequential losses* as a result of the defective construction and design of the silo; and (b) losses due to diminution in the value of the silo measured by the depreciated replacement cost to reinstate the silo.

9.132 On appeal, the claim for consequential losses was dismissed. Since a *novus actus interveniens* had necessitated the complete reconstruction of the silo itself, reconstruction would necessarily incorporate any repairs which might have been required hitherto, but which could no longer be effected. In essence, such losses had been subsumed within the reconstruction of the silo which had been caused by the *novus actus interveniens* of the third party. Since the chain of causation had been broken, the appellant could not be

liable for the consequential loss flowing from the repairs which were now only notional as it was no longer possible to carry them out.

9.133 As for the other award of damages for diminution of value of the silo as a result of the defects in construction and design, although the Court of Appeal accepted the principle in *Payton v Brooks* [1974] RTR 169 that in principle, where full repairs would not prevent a diminution in market value, there was no reason to deny recovery for such diminution over and above the cost of repair, that principle was not applicable to this case simply because, "what UCL [the respondent] eventually had was not a repaired silo with a lower value due to defects but a totally new silo that had to be built because of the *novus actus interveniens*" (at [30]).