9. CONTRACT LAW

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Introduction

9.1 As expected, the number of Singapore cases during the year under review impacting the law of contract is enormous. As I have mentioned in previous reviews, this is due to the fact that the law of contract permeates virtually all areas of the law of obligations – and, on occasion, beyond as well. I will therefore adopt the approach which has been adopted during previous years: which is to focus, in the main, on general principles. There have – as we shall see – been a few cases that are of especial significance. Not surprisingly, given the fact that the foundation of Singapore law is English law, there are one or two significant English decisions as well – which will be referred to, albeit briefly.

9.2 Given the enormous number of cases, I will – as in the past – only consider decisions that have had an impact on the general principles of contract law. Decisions which are somewhat beyond the mainstream of these general principles will not be considered. These lastmentioned decisions pertain, in the main, to more specialised areas of law. These include those relating to:

(a) agency (see *eg*, *Banque Nationale de Paris v Tan Nancy* [2002] 1 SLR 29 (focusing on the concepts of both actual as well as apparent authority); *Rapiscan Asia Pte Ltd v Global Container Freight Pte Ltd* [2002] 2 SLR 325 (also referred to *infra*, with regard to shipping and *infra*, paras 9.24, 9.28 and 9.91, with regard to '*Implied terms*', '*Exception clauses*' and '*Remedies*' respectively); *Tapematic SpA v Wirana Pte Ltd* [2002] 4 SLR 953 (also referred to *infra*, at para 9.46 with regard to '*Misrepresentation*'); and *Trigen Industries Ltd v Sinko Technologies Pte Ltd* [2003] 1 SLR 183 (also referred to *infra*, at paras 9.5 and 9.85, with regard to '*The objective approach*' and '*Damages*' respectively));

(b) arbitration (see *eg*, *PT Garuda Indonesia v Birgen Air* [2002] 1 SLR 393 (also referred to *infra*, with regard to the conflict of laws); *Dermajaya Properties Sdn Bhd v Premium Properties Sdn Bhd* [2002] 2 SLR 164; *Mae Engineering Ltd v Dragages Singapore Pte Ltd* [2002] 3 SLR 45 (also discussed *infra*, para 9.42, with regard to '*Discharge by performance and breach*'); *Asia-Pacific Ventures II Ltd v PT Intimutiara Gasindo* [2002] 3 SLR 326 (also referred to *infra*, with

regard to the conflict of laws); *WSG Nimbus Pte Ltd v Board of Control for Cricket in Sri Lanka* [2002] 3 SLR 603 (see also at 637 for a succinct analysis of the general policy underlying the International Arbitration Act (Cap 143A, 1995 Ed)); and *Koh Brothers Building and Civil Engineering Contractor Pte Ltd v Scotts Development (Saraca) Pte Ltd* [2002] 4 SLR 748; and on arbitration generally, see *supra*, Chapter 3);

(c) conflict of laws (see *eg*, *PT Garuda Indonesia v Birgen Air* [2002] 1 SLR 393 (also referred to *supra*, with regard to arbitration); *Star City Pty Ltd v Tan Hong Woon* [2002] 2 SLR 22 (considered in more detail *infra*, at paras 9.79 to 9.81, under '*Illegality*'); *Hong Pian Tee v Les Placements Germain Gauthier Inc* [2002] 2 SLR 81 (also referred to at paras 9.51 and 9.82, *infra*, with regard to '*Misrepresentation*' and '*Illegality*' respectively); *The Neptra Premier* [2002] 2 SLR 124 (also referred to *infra*, with regard to shipping and *infra*, para 9.76, with regard to '*Illegality*'); *Yugiantoro v Budiono Widodo* [2002] 2 SLR 275; *Yuninshing v Mondong Edward* [2002] 2 SLR 506 (also referred to *infra*, at paras 9.74 and 9.76, in relation to '*Illegality*'); *Asia-Pacific Ventures II Ltd v PT Intimutiara Gasindo* [2002] 3 SLR 326 (also referred to *supra*, with regard to arbitration); *Baridhi Shipping Lines Ltd v Sea Consortium Pte Ltd* [2002] 3 SLR 587; *Bayerische Landesbank Girozentrale v Kong Kok Keong* [2002] 4 SLR 283; *Praptono Honggopati Tjitrohupojo v His Royal Highness Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj* [2002] 4 SLR 667; and *Wu Shun Foods Co Ltd v Ken Ken Food Manufacturing Pte Ltd* [2002] 4 SLR 877 (also referred to *infra*, under civil procedure and *infra*, para 9.82, with regard to '*Illegality*'); and on conflict of laws generally, see *supra*, Chapter 8);

(d) insurance (see *eg*, *Hartford Insurance Co (Singapore) Ltd v Chiu Teng Construction Pte Ltd* [2002] 1 SLR 278 and *Overseas Union Insurance Ltd v Home and Overseas Insurance Co Ltd (No 2)* [2002] 4 SLR 104 (also referred to *infra*, at paras 9.7 and 9.33, in relation to '*Offer and acceptance*' and '*Privity of contract*' respectively; see also at [91], where a clear and express term with regard to which party bears the burden of proof with regard to any specific matter must be given effect to and this constitutes an important practical point which has therefore been noted in the briefest of fashions here); and on insurance generally, see *infra*, Chapter 15);

(e) banking (see *eg*, *Bok Chee Seng Construction Pte Ltd v Development Bank of Singapore Ltd* [2002] 2 SLR 61; *Beam Technology (Mfg) Pte Ltd v Standard Chartered Bank* [2002] 2 SLR 155; *PSA Corp Ltd v Korea Exchange Bank* [2002] 3 SLR 37 (also referred to *infra*, with regard to civil procedure; and note the interesting suggestion for

reform at [29] to [31]); *PT Adaro Indonesia v Rabobank* [2002] 3 SLR 258; and *Oversea-Chinese Banking Corp Ltd v Measurex Corp Bhd* [2002] 4 SLR 578 (also referred to *infra*, with regard to civil procedure); and on banking generally, see *supra*, Chapter 4);

(f) shipping (see *eg*, *The Antares V* [2002] 1 SLR 443 (also referred to *infra*, with regard to civil procedure); *The Neptra Premier* [2002] 2 SLR 124 (also referred to *supra*, with regard to conflict of laws and *infra*, para 9.76, with regard to '*Illegality*'); *The Feng Hang* [2002] 2 SLR 205 (also referred to at *infra*, para 9.85, with regard to '*Damages*'); *Rapiscan Asia Pte Ltd v Global Container Freight Pte Ltd* [2002] 2 SLR 325 (also referred to *supra*, with regard to agency and *infra*, paras 9.24, 9.28 and 9.91, with regard to '*Implied terms*', '*Exception clauses*' and '*Remedies*' respectively); *Voss Peer v APL Co Pte Ltd* [2002] 3 SLR 176; *The Patraikos 2* [2002] 4 SLR 232 (also referred to at *infra*, para 9.30, with regard to '*Exception clauses*'); *APL Co Pte Ltd v Voss Peer* [2002] 4 SLR 481 (which considered the status of a 'straight bill of lading'); and *Faith Maritime Co Ltd v Feoso (Singapore) Pte Ltd* [2002] 4 SLR 716; and on shipping generally, see *supra*, Chapter 2);

(g) employment (see *eg*, *Lee Keng Hiong v Ramlan bin Haron* [2002] 2 SLR 52 (dealing with liability under the Workmen's Compensation Act (Cap 354, 1998 Ed) as well as the relevance of the distinction between an employee and an independent contractor); *Joseph Clement Louis Arokiasamy v Singapore Airlines Ltd* [2002] 4 SLR 794 (which also dealt with administrative law (as to which see *supra*, Chapter 1), s 14 of the Employment Act (Cap 91, 1996 Ed) and is also considered *infra* at para 9.93, in relation to '*Equitable remedies*'); and *Chua Ah Beng v Commissioner for Labour* [2002] 4 SLR 854 (which considered the important issue of linkage between the common law and the Workmen's Compensation Act (Cap 354, 1998 Ed)); and

(h) civil procedure (see *eg*, *The Antares V* [2002] 1 SLR 443 (also referred to supra, with regard to shipping); *Tan Chiang Brother's Marble (S) Pte Ltd v Permasteelisa Pacific Holdings Ltd* [2002] 2 SLR 225; *Lam Soon Oil and Soap Manufacturing Sdn Bhd v Whang Tar Choung* [2002] 2 SLR 395; *PSA Corp Ltd v Korea Exchange Bank* [2002] 3 SLR 37 (also referred to *supra*, with regard to banking); *Barang Barang Pte Ltd v Boey Ng San* [2002] 3 SLR 158; *Drolia Mineral Industries Pte Ltd v Natural Resources Pte Ltd* [2002] 3 SLR 163; *CSR South East Asia Pte Ltd v Sunrise Insulation Pte Ltd* [2002] 3 SLR 281 (and on the issue centring on whether time is of the essence, see *infra*, para 9.38); *Info-communications Development Authority of Singapore v Singapore Telecommunications Ltd* [2002]

3 SLR 289 (on related proceedings in the law relating to offer and acceptance, consideration as well as mistake, see *infra*, paras 9.5, 9.16 and 9.61–9.66 respectively); *Tan Chin Seng v Raffles Town Club Pte Ltd* [2002] 3 SLR 345, reversing (in part) the High Court's decision reported at [2002] 3 SLR 403 (and on related proceedings relating to '*Misrepresentation*', see *infra*, para 9.48); *Ooi Ching Ling Shirley v Just Gems Inc* [2002] 3 SLR 538; *Lau Liat Meng & Co v Lum Kai Keng* [2002] 4 SLR 400 (see also, *infra*, at para 9.19, with regard to '*The terms of the contract*'); *Oversea-Chinese Banking Corp Ltd v Measurex Corp Bhd* [2002] 4 SLR 578 (also referred to *supra*, with regard to banking); and *Wu Shun Foods Co Ltd v Ken Ken Food Manufacturing Pte Ltd* [2002] 4 SLR 877 (also referred to *supra*, under conflict of laws and *infra*, para 9.82, with regard to '*Illegality*'); and on civil procedure generally, see Chapter 6).

9.3 Although the primary focus is on general principles, the context will be sketched in, wherever relevant. It should also be noted that all references to cases are – in the absence of any indication to the contrary – to *Singapore* cases.

9.4 Before proceeding to examine the various decisions, a couple of recent – and very helpful – texts might be noted: RA Buckley's *Illegality and Public Policy* (2002) and John Cartwright's *Misrepresentation* (2002).

Formation of contract

The objective approach

9.5 Not surprisingly, for literally a third year in a row, we find judicial endorsement of the objective test in the ascertainment of contractual intention. Although dealing with the issue of construction or interpretation instead of formation, the Singapore High Court decision of *United Lifestyle Holdings Pte Ltd v Oakwell Engineering Ltd* [2002] 2 SLR 308 endorsed the importance of this general principle which applies equally to both formation and interpretation alike. Lee Seiu Kin JC (as he then was) emphasised, in particular, the crucial importance of the context (including the surrounding circumstances) of the case. Reference may also be made to the (also) Singapore High Court decisions of *Trigen Industries Ltd v Sinko Technologies Pte Ltd* [2003] 1 SLR 183, especially at [39] (this decision is also referred to in the '*Introduction*', *supra*, para 9.2, in relation to agency and *infra*, para 9.85, with regard to '*Damages*') as well as *Attorney-General v Tye Kheng (Pte) Ltd* [2002] 4 SLR 785 (also referred to, *infra*, para 9.100, under '*Limitation of actions*'). And in the (also) Singapore High Court decision of *Tan Chin Seng v Raffles Town Club Pte Ltd* (Suit 1441/2001, unreported judgment dated

22.11.2002; also considered at *infra*, paras 9.24 and 9.48, under the topics of '*Implied terms*' and '*Misrepresentation*' respectively), the objective test was endorsed in order to ascertain whether or not the statements in the promotional literature concerned had in fact become terms of the contract (see [59] and [61]).

The underlying rationale of the sanctity of contract (in the absence of any vitiating factors) was emphasised by Lai Kew Chai J in the Singapore High Court decision of *Info-communications Development Authority of Singapore v Singapore Telecommunications Ltd (No 2)* [2002] 3 SLR 488 (and see the quotation at, *infra*, para 9.66; this decision is in fact also considered *infra*, at paras 9.16 and 9.61–9.66, under '*Consideration*' and '*Mistake*' respectively).

Offer and acceptance

9.6 The process of ascertaining whether a binding contract has been formed is often a very factual one, entailing a close examination of the relevant facts. This is illustrated by the Singapore High Court decision of *Adani Wilmar Ltd v Cooperatieve Centrale Raiffeisen-Boerenleenbank BA ('Rabobank Nederland')* [2002] 4 SLR 217 (also considered *infra*, at paras 9.45 and 9.52, with respect to '*Discharge by frustration*' and '*Mistake*' respectively). And one might add that in the interpretation of the facts, much commonsense – an often underrated quality – is also necessary: see *eg*, the Singapore High Court decision of *Winjoy Investment Pte Ltd v Goh Boon Huat* [2002] 2 SLR 347 (also considered at *infra*, paras 9.85, 9.86 and 9.89, in relation to '*Damages*').

It is also clear that in order for a valid contract to be formed, the terms of the contemplated contract must be certain and complete: see *eg*, the Singapore Court of Appeal decision of *Ooi Ching Ling Shirley v Just Gems Inc (No 2)* [2003] 1 SLR 14 at [27] (also considered *infra*, at paras 9.21, 9.36, 9.41 and 9.97, with regard to '*The parol evidence rule*', '*Capacity to contract*', '*Discharge by performance and breach*' and '*Quasi-contract and total failure of consideration*', respectively).

9.7 The Singapore High Court decision of *Overseas Union Insurance Ltd v Home and Overseas Insurance Co Ltd (No 2)* [2002] 4 SLR 104 (also referred to *supra*, at para 9.2 and *infra*, at para 9.33, in relation to the '*Introduction*' and '*Privity of contract*' respectively) reaffirms (at [61]) the simple – yet absolutely important – principle that a contract cannot come into being by way of unilateral imposition by one of the interested parties: there must, in other words, be agreement by *both* parties before a legally binding contract can come into being.

9.8 In the Singapore High Court decision of *Teo Teo Lee v Ong Swee Lan* [2002] 4 SLR 344 (see also *infra*, para 9.39, under '*Discharge by performance and breach*'), MPH Rubin J held that there had already been a concluded contract via an earlier memorandum and that the formal document which came later merely regularised what was already a binding legal agreement. The learned judge also held (at [61]) that:

> '[T]he inclusion of the phrase "subject to the tenancy agreement" [in the memorandum just mentioned] … was … merely an expression of a desire by the parties to draw up a formal document to incorporate the terms agreed.'

The learned judge also observed – on a more general level (at [43]) – that the general principle to be applied in this regard is 'that it is invariably a question of construction whether the execution of a further contract is a condition or a term of the bargain or a mere expression of the parties' desire as to how the transaction already agreed should in fact proceed to completion'. It should also be mentioned that Rubin J did also review the relevant case law in a comprehensive fashion.

9.9 The case mentioned in the preceding paragraph may be contrasted with another Singapore High Court decision, *Cendekia Candranegara Tjiang v Yin Kum Choy* [2002] 4 SLR 48 (see also *infra*, para 9.90, under '*Damages*'), where, in fact, MPH Rubin J held that a construction of the Memorandum of Understanding ('MOU') entered into between the parties revealed that it did *not* result in a binding agreement. In the words of the learned judge, '[a] careful sweep of the MOU unmistakably showed that it was not meant to be a final document and that it required a great deal more to make it certain and final' (see [24]; see also especially [33], [45], [47], [48], [49] and [50]).

9.10 And a similar result to that which obtained in the case discussed in the preceding paragraph may be found in the Singapore High Court decision of *L K Ang Construction Pte Ltd v Chubb Singapore Pte Ltd* [2003] 1 SLR 635 (also considered *infra*, at para 9.86, under '*Damages*'), where it was held that no binding contract had been formed and that the signing of a formal contract was not in fact a formality. Kan Ting Chiu J also rejected the argument that 'the parties to a building contract may be more concerned with the execution of the contracted works than the contract document, and are apt to delay or overlook the execution of the contract' (see [40]). The learned judge was of the view that '[e]ven if that were so, the rules do not have to be applied differently' (see *ibid*). Indeed, a little earlier on in his judgment, Kan J reiterated the basic principle and approach to the effect that 'it is necessary in each case to consider all the circumstances to decide if an agreement has come into being without the formal document' (see [38]; see also *per* Rubin J in the *Teo Teo Lee* case, discussed *supra*, at para 9.8).

9.11 Although the offeror is perfectly entitled to set a cut-off date for its offer, the offer concerned will still be open for acceptance if the offeror conducts itself in such a manner as to make it clear to the offeror that it is in fact extending the deadline. This was indeed found to be the case in the Singapore High Court decision of *Panwell Pte Ltd v Indian Bank (No 2)* [2002] 4 SLR 963 (also considered *infra*, at para 9.17, in relation to '*Consideration*').

Collateral contracts

9.12 The Singapore High Court decision of *Lemon Grass Pte Ltd v Peranakan Place Complex Pte Ltd* [2002] 4 SLR 439 (also considered *infra*, at paras 9.18 and 9.22, in relation to '*Consideration*' and '*The parol evidence rule*' respectively) contains valuable guidance on the important topic of collateral contracts, which is a very useful device for the court, particularly when no other contractual doctrine is available to do justice in the case at hand. Belinda Ang JC (as she then was) made some valuable *general* observations with regard to the nature of collateral contracts. She observed (at [116] to [119]) that:

> 'A collateral contract is an agreement distinct from the main contract. A court must therefore find all the usual legal requirements of a contract having been fulfilled with respect to the collateral agreement before it can be enforced.
>
> What this means is that the statement purporting to be the contractual promise in such a collateral contract must be promissory in nature or effect rather than representational … The plaintiffs must establish the agreement of the parties to its terms. Thus, to succeed in a claim founded on a collateral contract, the plaintiffs have to prove certainty of the terms.
>
> It is for the party seeking to rely upon the collateral contract who has to bear the burden of establishing that both parties intended to create a legally binding contract …
>
> They must also establish consideration, which in the case of a collateral contract is easy to prove. All that is required is the promisee (the plaintiffs) entering or promising to enter into a principal contract with the promisor (the defendants) …'

In so far as the application of the general principles quoted above were concerned, the learned judge held that, on the facts of the present case as pleaded by the plaintiffs, no collateral contract came into existence as there was no clear agreement made *subsequent to* the main contract – a necessary and, indeed, logical prerequisite (see especially at [108]). Further, there was no evidence adduced to demonstrate that the promise alleged was contractual in character (see [121]). There was also vagueness with regard to the content of the alleged collateral contract (see [123]). Ang JC also held that even if the existence of a collateral contract could be proven, evidence of such a contract

would be inadmissible – a point we turn to at para 9.22, *infra* (with regard to '*The parol evidence rule*').

Consideration

9.13 In the Singapore District Court decision of *Wong Ser Wan v Ng Cheong Ling* (DC Suit 600011/2001 and Divorce Petition 2545/1999, unreported judgment dated 29.4.2002; also considered *infra*, at paras 9.47 and 9.70, with regard to '*Misrepresentation*' and '*Undue influence*' respectively), District Judge Koh Juat Jong referred to both the concepts of 'consideration in fact' and 'consideration in law' (see generally at [89] to [101]), although the learned judge found that since a deed was involved, no consideration was, in any event, necessary in law. Nevertheless, this reference to both the above concepts of consideration brings immediately to mind the controversial English Court of Appeal decision of *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1. The *Williams* case has actually engendered a great many difficulties. By adopting the broad view to the effect that mere 'practical' benefit or detriment will suffice (*ie*, 'consideration in fact', as opposed to the more stringent requirement of 'legal' benefit or detriment, *ie*, 'consideration in law'), the *Williams* case has, in substance, all but undermined the doctrine of consideration, thus strengthening the case for its abolition (see Phang, 'Consideration at the Crossroads' (1991) 107 LQR 21). Constraints of space preclude a further analysis of the very deep ramifications generated by the *Williams* case and the reader is referred to the copious literature on the topic (see *eg*, Carter, Phang and Poole, 'Reactions to *Williams v Roffey*' (1995) 8 JCL 248, and the literature cited therein).

9.14 In the Singapore High Court decision of *Wang CongQin Bobby v Ong Heng Huat* [2002] 3 SLR 210 (also considered *infra*, at paras 9.37 and 9.78, under '*Capacity to contract*' and '*Illegality*' respectively), Lai Siu Chiu J, citing from *Chitty on Contracts* (28th Ed, 1999), reaffirmed (at [48]) the well-established principle that in order for the requirement of consideration to be satisfied, there needs to be proven – on the part of the promisee – only *either* a benefit *or* a detriment (to the promisor). In many situations, there will of course be – simultaneously – *both* a benefit *and* a detriment. *However*, as we have just seen, this is *not* mandatory and that proving either a benefit or a detriment will suffice.

9.15 In so far as *promissory* estoppel is concerned, in the Singapore High Court decision of *Lai Yew Seng Pte Ltd v Pilecon Engineering Bhd* [2002] 3 SLR 425, Choo Han Teck JC (as he then was) observed (at [5]) that:

> 'This principle was developed from the English case of *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130 … to prevent

> injustice in certain instances of gratuitous promises and the issue in such cases concerns the lack of consideration for a contract.'

However, the learned judge was of the view (at [5]) that the relevant issue in the instant case was not that of consideration but, rather, of privity of contract (and see *infra*, para 9.31; see also *infra*, paras 9.36 and 9.92, with regard to '*Capacity to contract*' and '*Damages*' respectively).

And in the recent English Court of Appeal decision of *Baird Textiles Holdings Ltd v Marks & Spencer plc* [2002] 1 All ER (Comm) 737, Sir Andrew Morritt VC did refer to the Australian High Court decision of *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, which (radically perhaps) allowed promissory estoppel to be utilised as a sword. Morritt VC, whilst not completely closing the door to allowing estoppel to function as a cause of action in and of itself, was clearly reluctant to adopt a more positive stance – citing the absence of precedent as well as the need for sufficient certainty (which he did not find on the facts) (see *ibid* at 750). The learned judge did, however, acknowledge that the House of Lords might adopt a different (and more liberal) approach in the future (see *ibid* at 750–751). Judge and Mance LJJ were also of a similar view: emphasising both the point from precedent as well as (*per* Mance LJ) the desirability of distinguishing amongst the various categories of estoppel (see *ibid* at 753–754 as well as 760–761 and 763 respectively).

9.16 The Singapore High Court decision of *Info-communications Development Authority of Singapore v Singapore Telecommunications Ltd (No 2)* [2002] 3 SLR 488 (also considered *supra*, at para 9.5, under '*The objective approach*' and *infra*, at paras 9.61 to 9.66, under '*Mistake*') reaffirms the general – and commonsensical – proposition to the effect that there can be no operative estoppel 'in the absence of identifying specific representations which would lead to the beginnings of an estoppel' (see *per* Lai Kew Chai J at [139]).

9.17 The doctrine of estoppel by *convention* is not one that is commonly invoked across the common law world. However, in the Singapore High Court decision of *Panwell Pte Ltd v Indian Bank (No 2)* [2002] 4 SLR 963 (also considered *supra*, at para 9.11, in relation to '*Offer and acceptance*'), this particular doctrine was in fact applied on the facts (see especially [61] to [63]). The doctrine was also raised in the Singapore Court of Appeal in *Management Corporation Strata Title No 473 v De Beers Jewellery Pte Ltd* [2002] 2 SLR 1 (see also *infra*, paras 9.53–9.60 and 9.98–9.99, under '*Mistake*' and '*Limitation of actions*' respectively). However, in this case, the doctrine was held to be inapplicable on the facts (see [43] to [44]). It ought to be mentioned that the apparently less than enthusiastic response (see also, in this regard, [60]) displayed by the court towards this particular doctrine ought to be *confined* to

the *restitutionary* context only. The court also considered the relationship between *promissory* estoppel and that of change of position, which is discussed very briefly below (see *infra*, para 9.60).

9.18 The species of estoppel considered in the Singapore High Court decision of *Lemon Grass Pte Ltd v Peranakan Place Complex Pte Ltd* [2002] 4 SLR 439 (also considered *supra*, at para 9.12, in relation to '*Collateral contracts*' and *infra*, at para 9.22, in relation to '*The parol evidence rule*') pertained, in fact, to the doctrine of *proprietary* estoppel. However, the argument based on this particular doctrine failed *in limine* as it was held that there had been no representations made in the first instance (see [135] as well as *supra*, para 9.16).

The terms of the contract

General

9.19 In the Singapore High Court decision of *Lau Liat Meng & Co v Lum Kai Keng* [2002] 4 SLR 400 (also referred to under agency in the '*Introduction*' at para 9.2, *supra*), Choo Han Teck JC (as he then was) observed (with regard to the general legal position between a solicitor and his or her client in so far as costs are concerned) thus (at [11]):

> 'A lawyer owes a duty to his client to draw up his bill clearly and accurately, and with such attention to detail as he would do in undertaking any work on behalf of his client. A client is entitled to engage a lawyer within his means, and therefore, must not be led to believe that the fees he or she was paying were only a fraction of the actual fees incurred. If he had realised that the fees were more than he could afford he should be entitled to seek alternative assistance.'

And in the (also) Singapore High Court decision of *Ong & Co Pte Ltd v Lai Siew Ping Vivien* [2003] 1 SLR 1, Tan Lee Meng J observed (at [10]) that:

> '[T]here is no rule that a dealer cannot be required to indemnify a stockbroking firm for losses arising from the handling of his or her own client's transactions or for the unauthorised handling of the transactions of institutional clients. As such, dealers have been held liable to indemnify their employers in many cases'.

The parol evidence rule

9.20 In the Singapore Court of Appeal decision of *Tan Hock Keng v L & M Group Investments Ltd* [2002] 2 SLR 213, the court dealt with application of s 94(f) of the Evidence Act (Cap 97, 1997 Ed), which provides an *exception* to the general parol evidence rule as embodied in the main part of s 94 and which reads as follows:

> '(f) any fact may be proved which shows in what manner the language of a document is related to existing facts.'

Section 94(f) will only come into play when there is some latent ambiguity in the contractual document itself. On the facts of the present case, the court held (at [18]) that the clause concerned was 'really quite obscure', hence bringing into play s 94(f), with extrinsic evidence being 'admissible to assist in the determination of the true construction of [the clause concerned]' (see [23]).

9.21 The decision considered in the preceding paragraph was also referred to in the Singapore High Court decision of *United Lifestyle Holdings Pte Ltd v Oakwell Engineering Ltd* [2002] 2 SLR 308 (which was also referred to in para 9.5, *supra*, under '*The objective approach*'); Lee Seiu Kin JC (as he then was) specifically referred (at [6]) to the application of s 94(f) of the Evidence Act, with the result that 'where a contractual term is not clear, [the provision] applies and extrinsic evidence is admissible to assist in the determination of the true construction'. The learned judge then proceeded immediately to observe thus (at [7]):

> 'Those authorities hold that evidence may be admitted of the factual background known to the parties at the time of contracting, including the genesis and purpose of the transaction, but not of the negotiations or intentions of the parties. In the present case, the relevant context and background include not only the facts of the transaction but also the legislative and administrative background.'

The authorities referred to in the above quotation include both the *Tan Hock Keng* case *and* the leading common law authorities relating to the admissibility of evidence of the context and factual background (including the oft-cited House of Lords decision of *Prenn v Simmonds* [1971] 1 WLR 1381 and *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989; see also *supra*, para 9.5); and compare the recent Singapore Court of Appeal decision of *Ooi Ching Ling Shirley v Just Gems Inc (No 2)* [2003] 1 SLR 14 at [27] (also considered *supra*, at para 9.6, with regard to '*Offer and acceptance*' and *infra*, at paras 9.36, 9.41 and 9.97, with regard to '*Capacity to contract*', '*Discharge by performance and breach*' and '*Quasi-contract and total failure of consideration*', respectively)) – thus suggesting that s 94(f) of the Evidence Act embodies, in substance, the common law position.

9.22 The Singapore High Court decision of *Lemon Grass Pte Ltd v Peranakan Place Complex Pte Ltd* [2002] 4 SLR 439 (also considered at *supra*, paras 9.12 and 9.18, in relation to '*Collateral contracts*' and '*Consideration*' respectively) not only reaffirmed the parol evidence rule as embodied within ss 93 and 94 of the Evidence Act (see [114]) but also dealt with the exception of the collateral contract as embodied within s 94(b) of the Act. It will be

recalled that Belinda Ang JC (as she then was) had already held against the existence of a collateral contract. However, the learned judge proceeded to hold that, even if the existence of a collateral contract could otherwise be proven, evidence of such a contract was inadmissible under s 94(b) of the Evidence Act. Whilst s 94(b) did indeed embody an exception to the parol evidence rule by way of a collateral contract, evidence of such a collateral contract on matters that were *inconsistent or in conflict with* the main agreement were *not* – based on the literal language of the provision itself – admissible; in this regard, Ang JC followed the Singapore Court of Appeal decision of *Latham v Credit Suisse First Boston* [2000] 2 SLR 693 (which was discussed by the present writer in (2000) 1 SAL Ann Rev 95 at 101–102).

Implied terms

9.23 The Singapore High Court decision of *Flairis Technology Corp Ltd v Gan Huan Kee* (Suit 723/2002, unreported judgment dated 29.5.2002; also considered *infra*, at paras 9.41 and 9.84, with respect to '*Discharge by performance and breach*' and '*Restraint of trade*' respectively) reaffirmed the commonsensical as well as logical rule to the effect that where express terms comprehensively covered the contracting parties' respective rights and liabilities, there was no room for the imposition of an implied term (see [81]).

9.24 A term was implied in the Singapore High Court decision of *Rapiscan Asia Pte Ltd v Global Container Freight Pte Ltd* [2002] 2 SLR 325 (see [9], and also referred to *supra*, under the '*Introduction*', with regard to shipping and *infra*, paras 9.28 and 9.91, with regard to '*Exception clauses*' and '*Remedies*' respectively), although it is by no means clear which category that term fell under (*viz*, whether under 'terms implied in fact' or 'terms implied in law', as to which see generally Phang, *Cheshire, Fifoot and Furmston's Law of Contract – Second Singapore and Malaysian Edition* (1998) at pp 268–271).

In the Singapore High Court decision of *Tan Chin Seng v Raffles Town Club Pte Ltd* (Suit No 1441/2001, HC, unreported judgment dated 22.11.2002; also considered *supra*, at para 9.5, under '*The objective approach*' and *infra*, at para 9.48, under '*Misrepresentation*'), a term was implied 'in fact', utilising the business efficacy test (see [62]).

Exception clauses

9.25 The very recent decision by Judith Prakash J in the Singapore High Court decision of *Press Automation Technology Pte Ltd v Trans-Link Exhibition Forwarding Pte Ltd* [2003] 1 SLR 712 is a very significant one in so far as the topic of exception clauses is concerned. One issue pertained to that of common law incorporation. On a general level, the learned judge gave an

excellent overview of the local case law on incorporation. More specifically – and following the established English position embodied in the leading case of *L'Estrange v F Graucob, Ltd* [1934] 2 KB 394 – Prakash J held that once a contracting party *signs* a document incorporating the relevant exception clause, he or she is bound by the clause in the absence of fraud or misrepresentation on the part of the other contracting party. The learned judge refused (at [40]) to follow the Ontario Court of Appeal decision of *Tilden Rent-A-Car Co v Clendenning* (1978) 83 DLR (3d) 400, where it was held (by the majority) that notwithstanding the presence of a signature, there might still not be the necessary incorporation where (in the absence of a commercial context where parties are reasonably assumed to be *ad idem*) the fact situation is such that the party relying on the exception clause knows or ought to have known that the other party's signature does not represent his actual intention in a situation where the exception clause itself is particularly onerous; in such a situation, reasonable notice must still be given of the exception clause. Prakash J was of the view (see *ibid*) that:

> 'Contracting parties must have a care for their own legal positions by ascertaining what terms are to be part of a contract before signing it. If they do not do so, they will be bound by those terms except to the extent that the [Unfair Contract Terms Act (Cap 396, 1994 Ed)] offers them relief.'

9.26 It is suggested that Prakash J's approach in the preceding paragraph may be further buttressed by the fact that literacy levels – in the Singapore context at least – are very high. More importantly, perhaps, the learned judge's approach avoids conflating what are two quite separate and independent modes of (possible) incorporation of exception clauses. It could, however, be argued that adopting the approach of the majority in the *Tilden* case is fairer. But, if that is so, then the concept of a signature loses almost total force as a possible mode of incorporation, save (perhaps) in a purely commercial context. It might be further argued that the rule established with regard to signatures is by no means a blanket one, thus smacking of dogmatism and unfairness. It has already been mentioned that where there is either fraud or misrepresentation, there will be no incorporation in law. There is also merit in the argument referred to above regarding the presence of the Unfair Contract Terms Act: if, indeed, the exception clause concerned is particularly onerous, then there is at least a greater likelihood that it would not pass muster under the test of reasonableness under the Act itself. Finally, there is also at least some merit in the argument that if a contracting party signs a document containing an exception clause without bothering to read it, then it may be *less* persuasive to argue – on grounds of *fairness* – that the clause concerned ought not to be incorporated (and compare the analogy with the established rule under the doctrine of *non est factum* to the effect that a party will not be able to avail himself or herself of the doctrine if he or she

has been *negligent* in signing the document in question (see *eg*, Phang, *Cheshire, Fifoot and Furmston's Law of Contract – Second Singapore and Malaysian Edition* (1998) at pp 435–436).

9.27 Another important issue in the *Press Automation Technology* case is the requirement or test of reasonableness under the Unfair Contract Terms Act (Cap 396, 1994 Ed) ('UCTA'). Prakash J emphasised the point (embodied in s 11(5)) that 'the onus of proving that any particular restrictive clause in a contract is reasonable lies on the party so asserting' (see [44]) *and* the rule (embodied in s 11(1)) that 'the time for determining the reasonableness of the term is the time when the contract is made and not the time when it is breached nor the time when the issue arises in court' (see *ibid*). The learned judge also considered (at [45]) the Singapore High Court decision of *Kenwell & Co Pte Ltd v Southern Ocean Shipbuilding Co Pte Ltd* [1999] 1 SLR 214 (see, further, Phang, 'Developments in the Law of Contract' in Kenneth Tan (ed), *Developments in Singapore Law between 1996 and 2000* (2001), pp 299–385 at pp 330–331), and summarised it (at [47]) as 'clear authority for the principle that even if a party knowingly enters a contract with a restrictive condition he will still be able to seek the protection of UCTA. That principle emanates from the language of UCTA itself as the statute was passed to allow parties to contracts to be relieved of the burden of unfair contractual terms provided the contracts concerned fall within the legislation'. The learned judge also considered the reasonableness of the clauses concerned by reference to *both international as well as local custom/practice*. Of specific interest too is her consideration of the factor of *insurance* (see generally [65] to [67]) as well as another important factor, *viz*, *equality of bargaining power* (see especially [78]).

9.28 In the Singapore High Court decision of *Rapiscan Asia Pte Ltd v Global Container Freight Pte Ltd* [2002] 2 SLR 325 (also referred to *supra*, under the '*Introduction*', with regard to shipping as well as *supra*, para 9.24, with regard to '*Implied terms*' and *infra*, para 9.91, with regard to '*Remedies*'), the court reviewed a number of points with regard to exception clauses. For example, it referred (at [41]) to the *contra proferentem* rule. It also considered – in some detail – the principles laid down in the leading Privy Council decision of *Canada Steamship Lines Ltd v The King* [1952] AC 192, which pertained to the construction (at common law) of exception clauses attempting to limit or exclude liability for negligence (see generally [44] to [59], where reference was also made to the Singapore Court of Appeal decision in *Marina Centre Holdings Pte Ltd v Pars Carpet Gallery Pte Ltd* [1997] 3 SLR 625, which was referred to in Phang, *Cheshire, Fifoot and Furmston's Law of Contract – Second Singapore and Malaysian Edition* (1998) at p 301, note 337; see also Carter, '"Commercial" Construction and the *Canada SS* Rules' (1995) 9 JCL 69). Finally, the court also reiterated the more

liberal approach that would be accorded to limitation clauses – as opposed to clauses which sought to exempt the defendant's liability altogether. S Rajendran J observed (at [61]) thus:

> 'The question whether the same strict approach adopted by the courts towards exemption clauses should be applied to contracts containing limitation of liability clauses was considered by the House of Lords in *Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd* [1983] 1 All ER 101 … All five Law Lords who sat in that case unanimously agreed that the approach towards limitation of liability clauses should not follow the approach taken in respect of exemption of liability clauses. The rationale for this distinction as stated by Lord Wilberforce was:
>
> > "Clauses of limitation are not regarded by the courts with the same hostility as clauses of exclusion; this is because they must be related to other contractual terms, in particular to the risks to which the defending party may be exposed, the remuneration which he receives and possibly also the opportunity of the other party to insure."'

9.29 Exception clauses are also present in the more specific context of international conventions: see *eg*, the Singapore Court of Appeal decision of *Clarke Beryl Claire v SilkAir (Singapore) Pte Ltd* [2002] 3 SLR 1 (affirming the decision of the High Court reported at [2002] 3 SLR 100), which concerned (especially) the Singapore Carriage by Air Act (Cap 32A, 1989 Ed) Sch 2 art 25 and Sch 1 art 25 (embodying the relevant articles under the (unamended) Warsaw Convention and the (amended) Warsaw (Hague) Convention respectively). Another case – turning on the interpretation of Sch 1 art 22(2)(b) of the Carriage by Air Act – is the Singapore High Court decision of *Philips Hong Kong Ltd v China Airlines Ltd* [2002] 1 SLR 57.

9.30 Reference may also be made, in the context of (*inter alia*) the attempted reliance by the defendants on art IV of the Hague Rules (as embodied in art IV of the Schedule to the Singapore Carriage of Goods by Sea Act (Cap 33, 1998 Ed)), to the Singapore High Court decision of *The Patraikos 2* [2002] 4 SLR 232 (art IV was, incidentally, held to be inapplicable on the facts of this case).

Privity of contract

9.31 In the Singapore High Court decision of *Lai Yew Seng Pte Ltd v Pilecon Engineering Bhd* [2002] 3 SLR 425 (also considered *supra*, at para 9.15, under '*Consideration*' and *infra*, at paras 9.36 and 9.92, under '*Capacity to contract*' and '*Damages*' respectively), Choo Han Teck JC (as he then was) was of the view that there was no issue of consideration as such (which he found to be present on the facts of the case at hand) but was of the view (at [5]) that '[t]he defence is more properly characterised as one of absence of privity of contract and not a want of consideration'. There is in fact an ongoing

controversy as to whether or not the doctrines of consideration and privity are simply two sides of the same coin (see *eg*, Furmston, *Cheshire, Fifoot and Furmston's Law of Contract* (14th Ed, 2001) at pp 86–88). The present case adopts the approach – which appears to be the more popular one – to the effect that the doctrines of consideration and privity are separate and distinct doctrines.

9.32 The English Contracts (Rights of Third Parties) Act 1999 was in fact considered – as part of *English* law – in the Singapore High Court decision of *Swiss Singapore Overseas Enterprise Pte Ltd v Navalmar UK Ltd* [2003] 1 SLR 587 (also mentioned at para 9.76, *infra*, with regard to '*Illegality*'). The Singapore Parliament has, of course, since enacted a *local* version of the 1999 English Act (*viz*, the Contracts (Rights of Third Parties) Act 2001 (Act 39 of 2001; now Cap 53B, 2002 Ed)) – which was briefly noted in the previous review (see (2001) 2 SAL Ann Rev 118 at para 9.28).

9.33 The Singapore High Court decision of *Overseas Union Insurance Ltd v Home and Overseas Insurance Co Ltd* [2002] 4 SLR 104 (also referred to *supra*, at paras 9.2 and 9.7, with regard to the '*Introduction*' and '*Offer and acceptance*' respectively) confirms (at [61]) the well-established general rule that no burden of a contract can be imposed unilaterally on a third party.

Capacity to contract

9.34 In the Singapore High Court decision of *Tan Teck Khong v Tan Pian Meng* [2002] 4 SLR 616 (see also *infra*, para 9.69 under '*Undue influence*'), it was held that the donor was mentally unfit to manage her personal affairs. This case concerned mental capacity with regard to the making of a will but is instructive in the context of the law of contract inasmuch as it illustrates the meticulous detail (particularly with regard to the medical evidence) that the court has to examine before it can arrive at a final decision. In the context of contract law, it must of course (in addition) be proven not only that the party concerned was incapable of understanding what he or she was doing but also that the other party knew – or ought to have known – of this condition (and see *eg*, the Singapore High Court decision of *Che Som bte Yip v Maha Pte Ltd* [1989] SLR 721).

9.35 For general principles with regard to the granting of an option to purchase property, see the Singapore High Court decision of *Fong Yoke San v Chan Lee Pa* [2003] 1 SLR 739, which is discussed in more detail at *infra*, para 9.40 (under '*Discharge by performance and breach*').

9.36 In the Singapore High Court decision of *Lai Yew Seng Pte Ltd v Pilecon Engineering Bhd* [2002] 3 SLR 425 (also considered at *supra*, paras 9.15

and 9.31, under '*Consideration*' and '*Privity of contract*' respectively, and *infra*, para 9.92, under '*Damages*'), Choo Han Teck JC (as he then was) observed (at [3]), as follows:

> 'It is, of course, elementary law that a private limited company is a distinct and separate entity from its shareholders … Thus, a contract with one is not, by itself alone, a contract with the other. And on its own, the metamorphosis of the partners of the firm into a limited liability corporate entity does not transfer their rights and obligations from the old form to the new body.'

In the present case, however, even if there had been no assignment of the contract concerned, the learned judge found that there had, on the facts, nevertheless been a contractual relationship between the parties.

Reference may also be made to the Singapore Court of Appeal decision of *Ooi Ching Ling Shirley v Just Gems Inc (No 2)* [2003] 1 SLR 14, especially at [54] (also considered *supra*, at paras 9.6 and 9.21, with regard to '*Offer and acceptance*' and '*The parol evidence rule*', respectively, as well as *infra*, at paras 9.41 and 9.97, with regard to '*Discharge by performance and breach*' and '*Quasi-contract and total failure of consideration*', respectively).

9.37 And in the the Singapore High Court decision of *Wang CongQin Bobby v Ong Heng Huat* [2002] 3 SLR 210 (also considered at *supra*, para 9.14, under '*Consideration*' as well as *infra*, para 9.78, under '*Illegality*'), it was held that even if it could be proved that the transaction in question was *ultra vires* the articles of association of the company concerned (which was not the case here owing to a paucity of evidence), the company had nevertheless rectified any potential difficulty by passing a special resolution at an extraordinary general meeting.

Discharge of the contract

Discharge by performance and breach

9.38 The Singapore High Court decision of *CSR South East Asia Pte Ltd v Sunrise Insulation Pte Ltd* [2002] 3 SLR 281 (also referred to *supra*, in the '*Introduction*' at para 9.2), which concerned a settlement agreement, provides, *inter alia* (at [12]), an excellent illustration that where the term(s) of the contract concerned 'imports a clear implication that time is indeed of the essence' and the terms also provide expressly for the consequences that would follow, then the failure to perform in a timely fashion will trigger the said consequences (another case law illustration may be found in the (also) Singapore High Court decision of *Ong Leong Chuan v Ong Heng Chuan* [2002] 4 SLR 98). This is a timely reminder that, although one cannot foresee every possible eventuality, where there are clear concerns, the best approach –

on a practical level – is to take care of such concerns by way of express provision in the terms of the contract itself. The present writer would venture to suggest that, notwithstanding the obvious nature of such a proposition on a *general* level, it becomes an obvious point in many *specific* cases only after the fact. Unfortunately, however, actual legal difficulties often arise for immediate resolution and without the benefit of any hindsight whatsoever.

9.39 It should also be mentioned that the Singapore High Court decision of *Teo Teo Lee v Ong Swee Lan* [2002] 4 SLR 344 (also considered *supra*, at para 9.8, in relation to '*Offer and acceptance*') confirmed the well-established principles as to when time would be considered of the essence. MPH Rubin J, citing the Singapore Court of Appeal decision of *Tian Teck Construction Pte Ltd v Exklusiv Auto Pte Ltd* [1992] 2 SLR 390, observed thus (at [30]):

> 'It was held in that case that time would not be considered to be of the essence unless: (1) the parties expressly stipulate that conditions as to time must be strictly complied with; or (2) the nature of the subject matter of the contract or the surrounding circumstances showed that time should be considered to be of the essence; or (3) a party who had been subject to unreasonable delay, gave notice to the party in default, making time of the essence.'

Reference may also be made to the Singapore High Court decision of *National Skin Centre (Singapore) Pte Ltd v Eutech Cybernetics Pte Ltd* [2002] 1 SLR 241, which also involved, *inter alia*, the doctrine of estoppel. This decision was in fact dealt with in the previous review when the case had, of course, been unreported and the reader is referred to (2001) 2 SAL Ann Rev 118 at para 9.35). It should, however, also be noted that the contract concerned contained 'a rather curious mechanism by which [the defendant] can resuscitate the contract notwithstanding that it has been terminated' (see [67]).

9.40 In the Singapore High Court decision of *Fong Yoke San v Chan Lee Pa* [2003] 1 SLR 739, Woo Bih Li JC (as he then was) observed (at [24]) that 'the existence of a valid contract should not be confused with its performance'; and in the specific context of the granting of an option to purchase property, 'it is not necessary for a person granting the option to be the full legal owner of the property in question at the time the option is granted or when the option is exercised, before the option can be said to be binding on him' (see *ibid*). The learned judge proceeded to observe (at [25] to [27]) thus:

> 'For example, if A, the owner of a property, grants an option to purchase to B and before B exercises the option, B grants an option to purchase to C, there is a binding obligation on B *vis-à-vis* C even though B is not the legal owner of the property.
>
> In addition, even if B does not have a legally enforceable right against A at the time B grants an option to purchase to C, there is still a binding

> obligation on B *vis-à-vis* C. Therefore, if, for example, A is the mother of B and A tells B that she will give or sell a property in Singapore to him when she returns to Singapore in four weeks' time, B does not need to wait for A to return to Singapore, although it would be prudent for him to do so in case something happens to A or A changes her mind.
>
> On the other hand, in some cases, it may be obvious after an option is granted that the person granting the option will not be able to complete the sale in any event. For example, the person granting the option is not the owner of the property and has no contractual or other relationship with the owner which will cause the owner to complete the sale. In such a case, there might be an anticipatory breach of contract by the person granting the option, but the point is that there is a binding obligation on him which entitles the other contracting party to sue him if he defaults.'

9.41 Where the *plaintiffs* had themselves terminated the contract, it would be inappropriate for them to subsequently allege a cause of action in breach by the defendants: see the Singapore High Court decision of *Flairis Technology Corp Ltd v Gan Huan Kee* (Suit 723/2002, unreported judgment dated 29.5.2002; also considered *supra*, at para 9.23 and *infra*, at para 9.84, with respect to '*Implied terms*' and '*Restraint of trade*' respectively) at [78] to [79]. It follows, *a fortiori*, that where the plaintiff was itself in breach of contract, the defendants can launch a successful claim against it: see *eg*, the Singapore High Court decision of *Ng Poh Guan v Chan Ai Leng* [2002] 2 SLR 377 (also referred to *infra*, at para 9.91, under '*Damages*'). More generally, the entire inquiry constitutes a process where – in the main – the facts of the particular case are of signal importance (see *eg*, the Singapore Court of Appeal decision of *Ooi Ching Ling Shirley v Just Gems Inc (No 2)* [2003] 1 SLR 14 (also considered *supra*, at paras 9.6, 9.21 and 9.36, with regard to '*Offer and acceptance*', '*The parol evidence rule*' and '*Capacity to contract*', respectively, as well as *infra*, at para 9.97, with regard to '*Quasi-contract and total failure of consideration*')).

9.42 It is also well-established that contractual obligations cannot be unilaterally varied by a party to the contract – a point that was confirmed in the Singapore High Court decision of *Mae Engineering Ltd v Dragages Singapore Pte Ltd* [2002] 3 SLR 45 at [30] (this case is also referred to above at para 9.2, under the '*Introduction*', in relation to arbitration).

9.43 Although the issue of breach was not directly in issue, it is significant that the Singapore High Court, in *United Lifestyle Holdings Pte Ltd v Oakwell Engineering Ltd* [2002] 2 SLR 308, referred (at [29]) to Lord Reid's observation in *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235 at 251, as follows:

> 'The fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result the more unlikely it is that the parties can have intended it, and if

> they do intend it the more necessary it is that they shall make that intention abundantly clear.'

Although it cannot be assumed – conclusively at least – that the reference to the above observation is an endorsement of the '*Hongkong Fir* approach' (see *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26) over the 'condition-warranty approach', such a reference does highlight one of the principal advantages of the former approach – which is to ensure that there is a *fair* outcome. And, for a more substantive elaboration of the possible conflict between both the aforementioned approaches as well as a suggested 'hybrid approach', see generally Phang, *Cheshire, Fifoot and Furmston's Law of Contract – Second Singapore and Malaysian Edition* (1998) at pp 286–289.

9.44 The controversial House of Lords decision of *White and Carter (Councils) Ltd v McGregor* [1962] AC 413 is not often considered by the English courts and, *a fortiori*, the Singapore courts, although one notable exception in the local context is the Singapore High Court decision of *MP-Bilt Pte Ltd v Oey Widarto* [1999] 3 SLR 592. A joint article deals comprehensively with the various issues engendered by the *White and Carter* case, and the interested reader is referred to it: see Carter, Phang and Phang, 'Performance Following Repudiation: Legal and Economic Interests' (1999) 15 JCL 97. In the recent District Court decision of *Bannirchelvam v Parimalam d/o Jyah Raman* (DC Suit 70/2002, unreported judgment dated 10.9.2002), District Judge Foo Tuat Yien did in fact consider briefly the *White and Carter* case. The learned judge held that the case could be distinguished from the fact situation she was considering inasmuch as, in the instant case, '[t]here was nothing in substance left for [the plaintiff] to perform to entitle him to claim the remaining instalments' (see [21]). In the instant case, the plaintiff, an advocate and solicitor, had – the court found – effectively sold his firm to the defendant (although title would remain with him (the plaintiff) until the defendant had paid the last instalment agreed upon). The *White and Carter* type of case concerns, of course, a situation where the plaintiff insists – against the wishes of the defendant who is in anticipatory breach of contract – on continuing with his or her performance of the contract in order to be entitled to claim the contractual sum agreed upon. However, it should also be noted that the learned judge also held (at [23]) that the exception enunciated by Lord Reid in the *White and Carter* case would, in any event, have applied to have prevented the plaintiff from continuing his performance as he had 'no legitimate interest, financial or otherwise, in performing the contract rather than claiming damages' (see *per* Lord Reid at 431) – especially given the fact that the defendant was adamant that he would not continue with the arrangement and the fact that the legal ownership continued to remain with the plaintiff.

Discharge by frustration

9.45 In the Singapore High Court decision of *Adani Wilmar Ltd v Cooperatieve Centrale Raiffeisen-Boerenleenbank BA ('Rabobank Nederland')* [2002] 4 SLR 217 (also considered *supra*, at paras 9.6 and 9.52, under '*Offer and acceptance*' and '*Mistake*' respectively), Kan Ting Chiu J observed (at [44]) that:

> 'A contract is said to be frustrated when something renders it physically or commercially impossible to be fulfilled, or transforms the obligation to perform into a radically different obligation.'

Vitiating factors

Misrepresentation

9.46 In order for there to be an operative misrepresentation, it is both logical as well as commonsensical that a representation must be proven in the first instance: see *eg*, the Singapore High Court decision of *Tapematic SpA v Wirana Pte Ltd* [2002] 4 SLR 953, especially at [58].

9.47 In the Singapore High Court decision of *Rahmatullah s/o Oli Mohamed v Rohayaton bte Rohani* (Suit 600/2001, unreported judgment dated 20.9.2002; see also *infra*, para 9.94, under '*Equitable remedies*'), Lai Siu Chiu J observed (at [73]) thus in relation to the basic elements of an actionable misrepresentation:

> 'It is trite law that for a misrepresentation to be actionable, the following conditions must be satisfied:
>
> (i) a representation was made by one party;
>
> (ii) the representation was acted on by an innocent party;
>
> (iii) the innocent party suffered detriment as a result.'

And in the Singapore District Court decision of *Wong Ser Wan v Ng Cheong Ling* (DC Suit 600011/2001 and Divorce Petition 2545/1999, unreported judgment dated 29.4.2002; also considered *supra* at para 9.13 and *infra* at para 9.70, with regard to '*Consideration*' and '*Undue influence*' respectively), District Judge Koh Juat Jong observed (at [78]) thus:

> 'A representation is a statement of fact made by one party to the contract (the representor) to the other (the representee) which, while not forming a term of the contract, is yet one of the reasons that induces the representee to enter into the contract. A misrepresentation is simply a representation that is untrue. In other words, misrepresentation is an untrue statement of fact made by one party to another causing that other party to enter into a contract.'

9.48 In the Singapore High Court decision of *Tan Chin Seng v Raffles Town Club Pte Ltd* (Suit 1441/2001, unreported judgment dated 22.11.2002; also considered *supra*, at paras 9.5 and 9.24, under '*The objective approach*' and '*Implied terms*' respectively), the court revisited the basic definition of a misrepresentation (see [22] as well as the preceding paragraph). It also reaffirmed the well-established rule to the effect that there would be no actionable misrepresentation where there was no statement of past or present *fact* but, rather, merely a statement of intention or opinion (see [24]). The court did hold, however, that where the representation concerned was made without the representor having any intention of complying with that representation, then there could be an actionable misrepresentation (see [25]); but this was not the situation on the facts of the present case. It has indeed been well-established that where the representor did not hold what would otherwise be a mere statement of opinion in good faith, there would be a misrepresentation of a fact – the fact being the representor's *state of mind* (and see the oft-cited observations of Bowen LJ in the English Court of Appeal decision of *Edgington v Fitzmaurice* (1885) 29 Ch D 459 at 483). The court in the present case also held that s 2(1) of the Misrepresentation Act (Cap 390, 1994 Ed) did not change the common law in this particular respect (see especially [31]). It is submitted that this particular holding is indeed supported by the language of s 2(1) itself, which clearly embodies a need to take into account the state of mind of the representor, although the onus of proof is somewhat different from that existing with respect to the proof of a negligent misstatement at common law (as to which see the seminal House of Lords decision of *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465).

The court also considered whether the representations in the promotional materials had become part of the contract itself, thus raising a possible alternative action for breach of contract (as to which see generally, *supra*, paras 9.41 to 9.43). As already noted, the test to be applied in ascertaining the intention of the parties is an objective one (see *supra*, para 9.5). The court held, *inter alia*, that the representations to the effect that the defendant would be a premier club with first-class facilities formed part of the contract (see especially [59] to [61]); however, on the facts, it was held that there had been no breach of this particular contractual undertaking (see generally [65] to [73]).

9.49 The recent House of Lords decision of *Standard Chartered Bank v Pakistan National Shipping Corpn (Nos 2 and 4)* [2002] 3 WLR 1547 held that the defendant could not apply for the reduction of damages under the UK Law Reform (Contributory Negligence) Act 1945 in an action against it for *fraudulent* misrepresentation. Central to the decision was the general rule (laid down most notably in the decision of *Edgington v Fitzmaurice* (*supra*) to

the effect that so long as the fraudulent misrepresentation was one of the reasons for the plaintiff entering into the contract in question, that was sufficient to establish liability. In other words, other reasons would be immaterial and, hence, if such reasons included one centring on contributory negligence, then it ought logically to follow that the defendant concerned should not (from the perspective of remedies) be able to argue for a reduction in damages as a result of such negligence.

9.50 The Singapore High Court decision of *Lim Hun Ching v Lim Ah Choon* [2002] 4 SLR 315 concerned an instance of alleged misdescription by the vendor with regard to the gross floor area (GFA) of the property sold. The plaintiff purchasers in fact applied, under s 4 of the Conveyancing and Law of Property Act (Cap 61, 1994 Ed), for an abatement in the sale price on the ground of the alleged misdescription. The court held in favour of the defendant as there was no clear consensus, in the first instance, as to what definition of the GFA was to be adopted. Indeed, as Lee Seiu Kin JC observed (at [11]), 'this definition [of GFA] is not a static one and has varied over the years to reflect changes in policy as well as to accommodate feedback from building professionals'. Further, '[o]ver the last ten years there have been a number of … URA circulars clarifying or changing the definition of GFA' (see [13]). And, in a similar vein, Lee JC proceeded later on in his judgment to observe (at [15]) that the URA's definition of GFA 'is a fluid one and changes with time'. Indeed, '[t]he protagonists have no idea of the URA definition of GFA' (see [20]). In the circumstances, it was held that there had been no misdescription of the property by the defendant vendor. It was held that even if there were a misdescription, cl 10 of the option (which the learned judge held (at [34]) to be 'not qualified at all and covers all misdescriptions') would have absolved the defendant from any liability, the clause itself being couched as follows:

> 'The property is believed to be and shall be taken as correctly described and any incorrect statement error or omission shall not annul the sale or entitle you to be discharged from your purchase nor shall either party claim or be allowed any compensation in respect thereof.'

9.51 And in the Singapore Court of Appeal decision of *Hong Pian Tee v Les Placements Germain Gauthier Inc* [2002] 2 SLR 81 (also considered *supra*, at para 9.2, in the '*Introduction*' in relation to the conflict of laws and *infra*, at para 9.82 with regard to '*Illegality*'), Chao Hick Tin JA, delivering the judgment of the court, held (at [30]) that 'where an allegation of fraud had been considered and adjudicated upon by a competent foreign court, the foreign judgment may be challenged on the ground of fraud only where fresh evidence has come to light which reasonable diligence on the part of the defendant would not have uncovered and the fresh evidence would have been likely to make a difference in the eventual result of the case'.

Mistake

GENERAL

9.52 The doctrine of mistake in its various forms ought – as is the case with the other vitiating factors – to be one of last resort. As Kan Ting Chiu J pertinently observed in the Singapore High Court decision of *Adani Wilmar Ltd v Cooperatieve Centrale Raiffeisen-Boerenleenbank BA ('Rabobank Nederland')* [2002] 4 SLR 217 at [52]:

> 'Contracts are robust creatures, they do not fall to just any mistake. Only mistakes which lie at the root of the contract would have that effect.'

This decision is also considered *supra*, at paras 9.6 and 9.45, with respect to '*Offer and acceptance*' and '*Discharge by frustration*' respectively.

9.53 A very significant decision in the sphere of mistake is that of the Singapore Court of Appeal in *Management Corporation Strata Title No 473 v De Beers Jewellery Pte Ltd* [2002] 2 SLR 1 (see also *supra*, para 9.17, under '*Consideration*' and *infra*, paras 9.98–9.99, under '*Limitation of actions*'). In essence, the court affirmed the decision of Judith Prakash J at first instance – itself an extremely important decision (and discussed in the previous review at (2001) 2 SAL Ann Rev 118 at paras 9.48–9.49). The Court of Appeal affirmed the decision at first instance to the effect that payments under a mistake of law – hitherto unrecoverable under the local law – could indeed be recovered. The local position followed – no surprisingly – the *then English* position which, however, has since been changed by the seminal House of Lords decision of *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349. Indeed, the decision in the *Kleinwort Benson* case provided the primary impetus for the reconsideration of the rule in the local context. The old English rule was in fact criticised heavily (see also [21]) before being finally abrogated in the *Kleinwort Benson* case. In the present case, the Court of Appeal, having accepted that the rule ought to be changed, considered the *means* by which the law should be changed. Although the Law Reform Committee of the Singapore Academy of Law (hereafter referred to as the 'SAL LRC') recommended (as did the English Law Commission) that the rule be abrogated via *legislation* (see the SAL LRC's *Paper on Reforms to the Law of Restitution on Mistakes of Law* (2001), available online at http://www.lawnet.com.sg), the court was of the view that a judicial abrogation of the rule would suffice. It responded to two possible issues which the SAL LRC thought could be addressed better by way of legislation.

9.54 The first pertained to whether or not a change in the law should have retrospective effect, with the SAL LRC being of the view that there should

indeed be retrospective effect, albeit via legislative means. Yong Pung How CJ, who delivered the judgment of the court, observed, however, (at [23]) that:

> '[A] judicial abrogation of the law could achieve the same if this court followed *Kleinwort Benson* … in holding that a payment made under a mistake of law could be recovered even it had been made under a completed transaction …'

9.55 The second issue pertained to 'whether limitation periods should be introduced in respect of claims founded on a mistake of law, and if so, how long they should be' (see [24]). Yong CJ was of the view (at [24]) that no legislative intervention was in fact needed as the relevant provision – s 29 of the Limitation Act (Cap 163, 1996 Ed) – 'does not specify "mistake" as either one of fact or one of law, hence it can apply equally to both'. Hence, although the SAL LRC had recommended that s 29 of the Limitation Act be amended in order to clarify that it would apply to mistakes of *law* as well, such a recommendation was not 'absolutely necessary' (see *ibid*). Yong CJ also observed (see *ibid*) that s 29 'was intended to apply only to situations covered by the Limitation Act. As there was no need to extend the scope of recovery under a mistake of law further than that under a mistake of fact, there was no need to amend s 29'.

9.56 In the event, and applying the law to the facts of the present case, Yong CJ held that the defendant could succeed in its counterclaim based on a mistake of law.

It should be noted that the *De Beers* case, whilst undoubtedly relevant to the law of contract, is really directly within the sphere of the law of restitution. To this end, the court also dealt with defences that were peculiar to the latter area. These included the defence of change of position (see generally [35] to [37]), which was held not to be applicable on the facts. The court also very briefly considered the defence of honest receipt, but rejected the entire defence in principle (see [42]).

9.57 Even more interestingly and significantly, the court in the *De Beers* case went *even further* and reviewed other issues (relating to possible defences) not raised in the case itself in order 'to delineate – however imprecisely – the scope of the new rule. In particular, this would give Parliament an indication of the courts' stand on this area of law, should it later wish to pass relevant legislation': see *per* Yong CJ at [46].

9.58 One such possible defence related to *a payment made under a closed transaction*. The court was of the view that such a defence ought to be permitted. One reason given in support of this view was that 'not allowing recovery would defeat the policy behind the relevant law (about which one or both parties were mistaken)' (see [48]). Another reason given was that

'allowing recovery when transactions are still open, but not when they are closed, will lead to capricious results' for '[i]t may simply be a question of luck whether the mistake of law is, or could have been, discovered before or after the transaction is concluded' (see *ibid*).

9.59 Another possible defence pertained to *payment made under a settled view of the law*. Here, the court endorsed the approach of the *minority* in the *Kleinwort Benson* case, which had held that such payment ought to operate as a defence – an approach also endorsed by the SAL LRC (see generally [49] to [51]). The court also advocated (at [51]) that the following recommendations of the SAL LRC in their *Report* ought to be adopted:

> '(1) "Settled law" means:
>
> (a) there is binding judicial authority on the specific point; and
>
> (b) if there is no such authority, a lawyer who was reasonably experienced in the relevant field would have advised the payer to make the payment.
>
> (2) A change in the settled law can only be brought about by judicial decision.'

9.60 The court also considered the doctrine of promissory estoppel, citing the leading work by Goff and Jones, *The Law of Restitution*, to the effect that 'the defence of promissory estoppel cannot exist comfortably with that of change of position' (see [52]). The court concluded thus (see *ibid*):

> 'Given that change of position has been specifically recognised as a defence in *Kleinwort Benson* …, it is unlikely that promissory estoppel will be accepted as a defence to a restitutionary claim.'

A similarly negative approach was taken with regard to the doctrine of estoppel by *convention* (see especially [43] and [60], as well as *supra*, para 9.17). Finally, in addition to the possible defences already discussed above, the court recognised the possible application of the defences centring on the settlement of an honest claim (see [40] and [60]), compromise (see [41] and [60]), as well as the passing on of the burden of payment *vis-à-vis* non-private law claims (see [53] and [60]).

9.61 There was yet another decision which pertained to the doctrine of mistake of law – that of the Singapore High Court in *Info-communications Development Authority of Singapore v Singapore Telecommunications Ltd (No 2)* [2002] 3 SLR 488 (also considered *supra*, at paras 9.5 and 9.16, under '*The objective approach*' and '*Consideration*' respectively). The plaintiffs in this case had brought a claim against the defendants for part of a total compensation package paid by its predecessor to the defendant, arguing that the said sum of money had been paid out under a mistake of law. The court

held in favour of the defendant and, in the process, examined a number of issues that ought – if only briefly – to be noted in the present review.

9.62 First, Lai Kew Chai J laid down the three elements required to be established before the principle of unjust enrichment could come into play (see [70]):

> '(1) that the defendant has obtained an enrichment or gain;
>
> (2) that there is an "unjust" factor indicating that the enrichment is unjustified and ought to be reversed; and
>
> (3) that the gain was made at the plaintiff's expense.'

The learned judge held that elements (1) and (3) above were not in fact supported on the facts (see [72]).

9.63 Secondly, Lai J clarified (at [81]) a distinction that is not often clear in the minds of both lawyers and law students alike, as follows:

> 'A mistake which operates in the formation of a pre-existing transaction pursuant to a statutory procedure has to be clearly distinguished from a mistake as to the payment itself (in other words, a mistaken payment). This is a cardinal distinction for the purposes of defining and establishing restitutionary recovery on the basis of an operative mistake …'

The learned judge proceeded, a little later on in his judgment, to elaborate (at [87]) thus:

> 'The law of restitution is only concerned with mistaken payment, not a mistake in the formation of the transaction by reference to which a payment is later made.'

This was not, however, to imply that a contract could not be set aside for mistake at either common law or in equity. In the words of Lai J (at [88]):

> '[Mistake under the law of restitution] is to be contrasted with a mistake made in the formation of a legal obligation, which leads to payment being made. With this category of mistake, it is first necessary to set aside the transaction in question either through seeking a declaration that the contract is void, or, alternatively, that it should be rescinded or set aside in equity.'

The learned judge's summary of the legal position with regard to mistake in the *formation* of contracts is embodied in the traditional categories of mistake considered in the traditional contract textbooks – *viz*, common mistake, mutual mistake, unilateral mistake (including mistaken identity), and the doctrine of *non est factum*. *However*, in the present case, the plaintiff's argument based on mistake did *not* turn on any of these categories of *contractual* mistake but, rather, lay in the doctrine of *restitution*. And, in so far

as the argument in this lastmentioned context was concerned, it was held that there had been no mistaken payment on the facts. Indeed, Lai J proceeded to hold (at [97]; emphasis in the original text) that '[i]n the law of restitution, a mistake (whether of law or fact) *as to the future* cannot ground recovery'. In other words 'mispredictions' as to the future could *not* constitute mistakes that would result in a restitutionary remedy; as the learned judge put it (at [100]):

> '[T]he "voluntariness" of one party assuming a risk of a future determination should not form the basis of recovery for a mistake. This accords with the larger proposition in restitution *that a risk-taking payer will be precluded from recovering his money*.' [emphasis added]

On assumption of risk generally, see [125] to [135] of the case. In so far as the application of the principle just stated to the facts at hand were concerned, Lai J observed thus (at [102]):

> 'Applying the above principles, I am of the view that [the plaintiff's predecessor's] erroneous assumption that [the defendant] was going to have to pay tax on the compensation sum at some future time, does not constitute a relevant or operative mistake in restitution.'

9.64 Thirdly, Lai J reiterated the abrogation of the mistake of law rule, summarising the various developments concerned (see generally [105] to [107]). And in the context of the more specific issue as to whether or not there had been a settled legal position (which would have operated as a defence (see also *supra*, para 9.59)), the learned judge held that there had in fact been no settled legal position on the facts (see generally [107] to [113]). Lai J also held that there had been a valid compromise, which also operated as a defence to the plaintiff's claim in the present case (see generally [114] to [124] (see also *supra*, para 9.60)). In his view (at [120]) '[a] compromise is little more than a species of contract', although '[w]hat distinguishes it from other contracts is the requirement of a dispute or differences between the parties which are eventually settled' (see also [123] and [124]). Being a species of contract, compromises would, of course, 'like any other agreement' also be 'subject to vitiating factors (for example on the basis of mutual mistake of a fundamental assumption of fact) if [they are] to be set aside' (see [123]).

9.65 The learned judge also considered estoppel as well as the change of position defence. The doctrine of estoppel was inapplicable in the absence of a specific representation to begin with (see [139] as well as *supra*, para 9.16). In so far as the defence of change of position was concerned (see also *supra*, para 9.60), Lai J laid down (at [140]) the four elements necessary to the said defence, as follows:

> '(1) the payee has changed his position;
>
> (2) the change is *bona fide*;

> (3) it would be inequitable to require him to make restitution or to make restitution in full; and
>
> (4) there must be a causal link between the receipt of the overpayment and the payee's change of position.'

And the learned judge also observed (at [141]; emphasis added) that '[i]t is clear that for such a defence to succeed, the change of position must occur after the receipt of the payment, which is *not* the case here'.

9.66 Lai J's final observations (at [148]) also bear quotation in full, as follows:

> 'There is no question of appropriating any taxpayer's money as a gift to [the defendant] which gave up a claim four times the compensation paid. To allow [the plaintiff] to reclaim on the alleged ground of mistake of law would not only insert uncertainty into the finality inherent in the statutory procedure for the payment of compensation for modification of a telecommunications licence but in all the circumstances it would be wholly unjust and contrary to fair play to order [the defendant] to return a part of the compensation for which [the defendant] gave more than adequate consideration. *The sanctity of a concluded contract and the integrity of a receipt under it must be upheld: as is the common parlance in the world of business "a deal is a deal". In my view it must be sealed and held to be inviolate.*' [emphasis added]

COMMON MISTAKE

9.67 Towards the end of the year under review, the English Court of Appeal delivered a judgment so startling and radical that it has to be dealt with here in more than a cursory fashion. Indeed, in *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2003] QB 679, the court held that its previous decision in *Solle v Butcher* [1950] 1 KB 671 was inconsistent with the House of Lords decision in *Bell v Lever Brothers, Ltd* [1932] AC 161, and ought therefore not to be followed. There is, as a result, no longer any doctrine of common mistake in *equity* – for the present moment at least. There are, however, many unanswered questions from the perspectives of technical detail as well as wider considerations of fairness, justice and flexibility. The *Great Peace Shipping* case could well be appealed to the House of Lords and, if so, it is hoped that the House will restore the necessary flexibility by reinstating the equitable doctrine first enunciated in *Solle v Butcher*. I have dealt with this particular case in more detail in a forthcoming piece entitled 'Controversy in Common Mistake' [2003] The Conveyancer and Property Lawyer 247.

RECTIFICATION

9.68 For a recent decision on rectification, reference may be made to the Singapore High Court decision of *Industrial & Commercial Bank Ltd v PD International Pte Ltd* [2003] 1 SLR 382.

Undue influence

9.69 It was held, in the Singapore High Court decision of *Tan Teck Khong v Tan Pian Meng* [2002] 4 SLR 616 (also considered *supra*, at para 9.34, under '*Capacity to contract*'), that 'even if [the donor] had had the mental capacity to execute the first will and the documents to transfer the business to [the defendant, and one of the donor's sons], she was so enfeebled that she was vulnerable to undue influence from any of her sons, especially [the defendant] who had been assisting her the most in the business' (see [210]); the learned judge, Woo Bih Li JC (as he then was) then proceeded to observe thus (see *ibid*):

> 'It was not disputed that [the defendant] had the capacity to influence [the donor] in respect of her first will and the transfer of the business to him. I find that he did exercise influence on her and that the exercise brought about the execution of her first will and the transfer of the business to him. The real issue, however, was whether the influence he had exercised was undue. I find that it was.'

Although this particular case did not involve a contractual transaction as such, it is still very instructive in illustrating the very factual nature of the inquiry and (here) the meticulous (in particular, medical) detail and evidence that had to be assessed by the court itself (compare also *supra*, para 9.34). The learned judge also cited and applied the Singapore High Court decision of *Pelican Engineering Pte Ltd v Lim Wee Chuan* [2001] 1 SLR 105 (which was discussed in some detail in (2001) 2 SAL Ann Rev 118 at paras 9.66–9.71).

9.70 The Singapore District Court decision of *Wong Ser Wan v Ng Cheong Ling* (DC Suit 600011/2001 and Divorce Petition 2545/1999, unreported judgment dated 29.4.2002) (also considered *supra*, at paras 9.13 and 9.47, with regard to '*Consideration*' and '*Misrepresentation*' respectively), might be usefully noted for a number of interesting points. First, District Judge Koh Juat Jong referred (at [58]) to the exercise of influence being undue inasmuch as 'it was illegitimate pressure'. This does in fact support the argument made by the present writer elsewhere to the effect that there is a close linkage between (in particular, Class 1 or actual) undue influence on the one hand and economic duress on the other (it being generally accepted that the latter doctrine is premised on the rationale of *illegitimate pressure*): see Phang, 'Undue Influence – Methodology, Sources and Linkages' [1995] JBL 552 especially at 565–566. Further support for this point from linkage is to be

found in the learned judge's reference (at [74]) to the concept of the *overborne will* – which is, in fact, the *other* possible rationale underlying the doctrine of economic duress. Secondly, District Judge Koh also reaffirmed (at [60]) the well-established rule to the effect that no presumption of undue influence would be raised by the mere relationship of husband and wife alone.

Unconscionability

9.71 We have already seen, in a previous review, that unconscionability is an established exception in the context of on-demand performance bonds (see (2001) 2 SAL Ann Rev 118 at para 9.74). This differs from the English position and has been reaffirmed in a number of cases during the year under review: see *eg*, *Samwoh Asphalt Premix Pte Ltd v Sum Cheong Piling Pte Ltd* [2002] 1 SLR 1; *McConnell Dowell Constructors (Aust) Pty Ltd v Sembcorp Engineers and Constructors Pte Ltd* [2002] 1 SLR 199; *Seng Hock Heng Contractor Pte Ltd v Hup Seng Bee Construction Pte Ltd* [2002] 4 SLR 612; *Hiap Tian Soon Construction Pte Ltd v Hola Development Pte Ltd* [2003] 1 SLR 667; and *Anwar Siraj v Teo Hee Lai Building Construction Pte Ltd* [2003] 1 SLR 394. And in the *Samwoh Asphalt Premix* case, *supra*, L P Thean JA, who delivered the judgment of the court, observed (at [11]) that, in determining whether a party had acted unconscionably in calling on the performance guarantee, 'it is necessary to examine all the relevant facts and circumstances of the case including the facts leading up to the demand for payment under the performance guarantee'.

9.72 In the year under review, however, there was a *Malaysian* decision which raised – once again – the interesting as well as extremely important issue as to whether or not *a broader doctrine of unconscionability ought to be endorsed by the courts*. In the Malaysian Court of Appeal decision of *American International Assurance Co Ltd v Koh Yen Bee* [2002] 4 MLJ 301, Abdul Hamid Mohamad JCA considered the doctrine of inequality of bargaining power. The learned judge was of the view (at 319) that the doctrine ought to be viewed with some doubts not only because the doctrine was not included within the provisions of the (Malaysian) Contracts Act 1950 but also because of the 'restrictive wording' of s 3(1) of the (Malaysian) Civil Law Act 1956. Most importantly, perhaps, the learned judge observed (see *ibid*) that 'the fact that the court by introducing such principles is in effect "legislating" on substantive law with retrospective effect' and that the adoption of such a doctrine might lead to *uncertainty* in the law. The court also referred to a decision of the same court in *Saad bin Marwi v Chan Hwan Hua* [2001] 2 AMR 2010, where the doctrine of inequality of bargaining power was apparently endorsed and, whilst casting doubts on the doctrine, did appear at least to endorse the decision that was handed down on the facts of that case itself (see *ibid*).

9.73 It is submitted that the doubts mentioned in the preceding paragraph with regard to the doctrine of inequality of bargaining power are persuasive. Indeed, a close perusal of the Malaysian Court of Appeal decision of *Saad bin Marwi v Chan Hwan Hua* (*supra*) (a very interesting case which merits more detailed commentary that is, unfortunately, beyond the scope of the present review) will reveal that the focus was not on mere inequality of bargaining power as such but, rather, on the doctrine of unconscionability which necessarily connotes some *wrongdoing* on the part of the party against whom the doctrine just mentioned has been invoked. Looked at in this light, the *Saad bin Marwi* case is relatively strong support in favour of a broader doctrine of unconscionability and there is nothing in the later decision of the *American International Assurance Co* case that militates against such support. However, in so far as the *Singapore* position is concerned, the situation is still very much an open one, although, based on the existing case law as such, there does not appear to be very substantive support in favour of a broader doctrine of unconscionability despite vigorous arguments by the present writer to the contrary (see *eg*, Phang, 'Undue Influence – Methodology, Sources and Linkages' [1995] JBL 552).

Illegality

GENERAL

9.74 It is crystal clear that an illegal contract is void and unenforceable – a point reaffirmed once again by the Singapore High Court decision of *Irawan Darsono v Ong Soon Kiat* [2002] 4 SLR 84 (also referred to *infra*, at para 9.85, under '*Damages*'). Kan Ting Chiu J referred (at [14]) to a passage from *Chitty on Contracts*, where a distinction is drawn between contracts illegal as formed and illegal as performed (compare with the (also) Singapore High Court decision of *Yuninshing v Mondong Edward* [2002] 2 SLR 506 at [30] (also referred to *supra*, at para 9.2, under the '*Introduction*', in relation to the conflict of laws as well as *infra*, para 9.76)). However, such a distinction, whilst very well-established, has been argued by the present writer to be rather unhelpful in the final analysis (see Phang, 'Vitiating Factors in Contract Law – The Interaction of Theory and Practice' (1998) 10 SAcLJ 1 at 64–66).

It is equally crystal clear that where the statutory provision(s) concerned *expressly* prohibit the making of a contract, the finding of illegality automatically follows with the draconian effects referred to above ensuing as a matter of law: see *eg*, the Singapore High Court decision of *Sinnathamby Rajespathy v Lim Chong Seng* [2002] 4 SLR 375 (which concerned, *inter alia*, s 49A of the Housing and Development Act (Cap 129, 1997 Ed).

9.75 The draconian effects of illegality are also illustrated in the Singapore High Court decision of *Ken Glass Design Associate Pte Ltd v Wind-Power Construction Pte Ltd* [2003] 1 SLR 34, where no remedies whatsoever were allowed by the court in the context of a bogus joint venture proposal. However, in the (also) Singapore High Court decision of *Chye Lian Huat Sawmill Co v Hean Nerng Industrial Pte Ltd* (Suit 1360/2001, unreported judgment dated 11.12.2002), it was held (at [12]) that the institution whose rule had been contravened had actually 'elected to give all [the parties] concerned time to unscramble' and that no taint of illegality would therefore be imputed on the transaction concerned. Lai Kew Chai J also observed (at [13]) that:

> 'The sanctity of a contract freely entered into should not be invalidated without good legal reason. Where the doctrine of public policy is invoked, there is a need to be circumspect for under its guise courts may rush in where angels fear to tread. There are a number of reported cases where public policy has shown to be an unruly horse.'

9.76 It is equally clear, however, that where there has been no contravention of the law in the first instance, no issue of illegality can logically arise: see *eg*, the Singapore High Court decision of *The Neptra Premier* [2002] 2 SLR 124 (also referred to *supra*, at para 9.2, with regard to both conflict of laws and shipping; see also the Singapore High Court decisions of, first, *Swiss Singapore Overseas Enterprise Pte Ltd v Navalmar UK Ltd* [2003] 1 SLR 587, also mentioned at para 9.32, *supra*, with regard to '*Privity of contract*') and, secondly – but in relation to the alleged contravention of *foreign* law – *Yuninshing v Mondong Edward* [2002] 2 SLR 506 (also referred to *supra*, at para 9.2, under the '*Introduction*', in relation to the conflict of laws as well as *supra*, para 9.74)). However, Kan Ting Chiu J held (in *The Neptra Premier*) that even if there had been an illegal transaction (here, a moneylending one), the moneylender could possibly recover under the proviso to s 23 of the (here, Hong Kong) Money Lenders Ordinance (Cap 163) in the event that it would be inequitable to deny it recovery (albeit 'subject to such modifications or exceptions, as the court considers equitable'). Although a foreign statute was involved in the instant case, it is clear that, even in the local context, the legislature has the power to enact provisions that allow for recovery notwithstanding the presence of illegality in the transaction itself.

9.77 Another decision where the court found that the defendant's argument based on illegality (here, involving alleged bribery) was not borne out on the facts but was in fact 'a late invention' (see [136]) is that of the Singapore High Court in *Colombo Dockyard Limited v Athula Anthony Jayasinghe* [2003] 1 SLR 869. This decision should also be noted for its treatment of the doctrine of 'repentance' or *locus poenitentiae*, which allows for restitutionary recovery of money or property conferred provided that the party seeking recovery has backed out of the illegal transaction in a timely

fashion. MPH Rubin J surveyed the relevant case law and appeared to adopt the approach taken by the English Court of Appeal in *Tribe v Tribe* [1995] 3 WLR 913, which mitigated the rigour of the earlier English decision of *Bigos v Bousted* [1951] 1 All ER 92 by emphasising only voluntariness – as opposed to genuineness – of repentance (see generally [130] to [140]).

9.78 However, where the person concerned (here, a company) was not even party to the contract to begin with, the defence of illegality would be obviously inapplicable: see the Singapore High Court decision of *Wang CongQin Bobby v Ong Heng Huat* [2002] 3 SLR 210 (also considered *supra*, at paras 9.14 and 9.37, under '*Consideration*' and '*Capacity to contract*' respectively). Indeed, the court also held, *inter alia*, that in so far as an alleged agreement to deceive the tax authorities was concerned, this was also not proven on the facts. Nor was there any evidence to prove an alleged contravention of the Moneylenders Act (Cap 188, 1985 Ed). Both these lastmentioned points illustrate, of course, the general point considered in the preceding two paragraphs.

9.79 In the context of gaming contracts, the extremely important decision of the Singapore Court of Appeal in *Star City Pty Ltd v Tan Hong Woon* [2002] 2 SLR 22 ought to be noted. Indeed, this decision was referred to fleetingly in the previous review as it had been handed down only after that particular review had gone to press (see (2001) 2 SAL Ann Rev 118 at para 9.83). The Court of Appeal affirmed the judgment by Tan Lee Meng J at first instance (and which was also considered in some detail, *ibid* at paras 9.78–9.83). A number of salient issues and points arise as follows.

9.80 First, the court held that s 5(2) of the Civil Law Act (Cap 43, 1999 Ed) is *procedural* – rather than substantive – in nature, and therefore applied to *all* transactions as the law of the forum. This was regardless of the legal status of the transaction under foreign law and the application of s 5(2) could not be avoided by the parties by contracting out of it (see [29]). Section 5(2) itself reads as follows:

> 'No action shall be brought or maintained in the court for recovering any sum of money or valuable thing alleged to be won upon any wager or which has been deposited in the hands of any person to abide the event on which any wager has been made.'

The court helpfully observed (at [12]) that 'in every case, to determine whether a provision is substantive or procedural, one must look at the effect and purpose of that provision. If the provision regulates proceedings rather than affects the existence of a legal right, it is a procedural provision. A distinction is drawn between the essential validity of a right and its enforceability.' Applying this principle to s 5(2), the court held that the

'crucial words in s 5(2) are "no action shall be brought"' (see *ibid*). The court also held that 'the bulk of authority is that s 5(2) of the Civil Law Act is procedural' (see [13]). It therefore came to the following conclusion (see [14]):

> 'The consequence of reaching the conclusion that s 5(2) of the Civil Law Act is procedural means that our courts must apply it as part of the *lex fori*; *lex fori ad litis ordinationa.* Applying this to our facts, [the plaintiff's] claim, though originating from New South Wales, therefore becomes subject to s 5(2) of the Civil Law Act and is unenforceable in Singapore if it is "an action for recovering any sum won upon a wager".'

9.81 Secondly, there is the issue of the *characterisation* of the transaction concerned. Whilst acknowledging that an action on a *loan* for the purposes of wagering will succeed if the said loan is valid by its governing law, the court held that there had been no genuine loan in the present case: the facility extended to the defendant whereby the defendant signed house cheques and handed them over in exchange for chips for gaming at the plaintiff's tables 'cannot be genuine loans because the facility merely enables them to gamble on credit and not for any other purpose' (see [36]). We see here the triumph of substance over form (see also [29], [33] and [38]) (it is also interesting to note that the court observed (at [38]) that 'it is also obvious from the trial judge's grounds of decision that he had found as a fact that [the defendant's] position throughout the trial was that he had never obtained a loan from [the plaintiff]'). On a more *general* level, the court held that whether or not a particular transaction was characterised as a gambling transaction or not 'must ultimately depend upon the public policy of Singapore' [see [27]). This is because, regardless of the validity of the transaction at the place where it originated (which is a *substantive* issue), the court of the forum (here, Singapore), in applying the procedural laws of the forum (which included, as seen above, s 5(2)), would 'not enforce a foreign cause of action that is contrary to local public policy' (see [28]). What, then, was the relevant public policy in the Singapore context? The court held that whilst gambling and wagering was recognised in Singapore within strict limits (see [30]), what is *nevertheless* 'objectionable is *courts being used by casinos to enforce gambling debts disguised in the "form" of loans*' [emphasis added] (see [31]). Yong Pung How CJ, delivering the judgment of the court, proceeded to add (see *ibid*) that:

> 'Valuable court time and resources that can be better used elsewhere are wasted on the recovery of such unmeritorious claims. The machinery of the courts cannot be used indirectly to legitimise the recovery of moneys won upon wagers overseas when similar relief would be refused for moneys won upon wagers in Singapore. Hence in order to give full effect to s 5(2) of the Civil Law Act, which provides that no action can be brought or maintained to enforce gambling debts, the courts of the forum cannot be prevented by foreign law from investigating into the true nature of the transaction. The courts of justice must remain out of

> bounds to claims for moneys won upon wagers, however cleverly or covertly disguised … [O]nce it is recognised that the courts should not, as a matter of principle and public policy, act as gambling debt collectors for foreign casinos, we are then obliged to investigate further according to the *lex fori*.'

The court added that although such an approach would be perceived in negative light by foreign casino owners, 'the fact remains that gambling debts are debts of honour and not legal debts recoverable in the courts' (see [32]). Yong CJ added (see *ibid*) that:

> 'We consider that these are the risks and consequences that casinos in the conduct of their ordinary businesses have to bear. It is but a small price to pay in exchange for the huge profits that such businesses reap by trading in games of chance. If a result of this case is that "credit" facilities will be less readily granted to local gamblers, so be it. The courts will not be concerned with such considerations but must stand guided by the principle that the courts of justice must remain out of bounds to claims based on gaming debts. We emphasise that our conclusion on the operation of s 5(2) of the Civil Law Act merely negatives the enforcement but not the validity of gaming contracts; the casinos can always attempt to enforce their causes of action elsewhere.'

9.82 In the Singapore High Court decision of *Wu Shun Foods Co Ltd v Ken Ken Food Manufacturing Pte Ltd* [2002] 4 SLR 877 (also referred to *supra*, at para 9.2 in the '*Introduction*', in relation to both conflict of laws and civil procedure), it was held (following the Singapore Court of Appeal decision in *Hong Pian Tee v Les Placements Germain Gauthier Inc* [2002] 2 SLR 81 (considered *supra*, at para 9.51 in relation to fraud and also referred to *supra*, at para 9.2, under the '*Introduction*' (in relation to conflict of laws)) that, where an allegation of illegality (fraud, instead of illegality, was in fact the issue in the *Hong Pian Tee* case: see *supra*, para 9.51) had been considered and adjudicated upon by a competent foreign court, the said foreign judgment could be challenged 'only where fresh evidence has come to light which reasonable diligence on the part of the defendant would not have uncovered and the fresh evidence would have been likely to make a difference in the eventual result of the case' (see [35] citing from *Hong Pian Tee* (*supra*) at [30]).

9.83 Finally, it should be noted that there is a category of contracts that, whilst not complying with the necessary statutory requirements, might still be enforceable in *equity*. An instance of this may be found in the Singapore Court of Appeal decision of *Golden Village Multiplex Pte Ltd v Marina Centre Holdings Pte Ltd* [2002] 1 SLR 333 (see also *infra*, para 9.95, with regard to '*Remedies*'), where the doctrine, embodied in the leading English decision of *Walsh v Lonsdale* (1882) 21 Ch D 9, which allows the finding of an equitable lease, was applied – particularly in the light of the fact that the main provision in question (s 87(1) of the Land Titles Act (Cap 157, 1994 Ed)) was held *not* to

be mandatory. Indeed, where the statutory taint is blatantly illegal, it is submitted that the possibility of an equitable remedy is precluded.

RESTRAINT OF TRADE

9.84 The Singapore High Court decision of *Flairis Technology Corp Ltd v Gan Huan Kee* (Suit 723/2002, unreported judgment dated 29.5.2002; also considered *supra*, at paras 9.23 and 9.41, with respect to '*Implied terms*' and '*Discharge by performance and breach*' respectively) applied – in the context of confidential information and trade secrets – the English Court of Appeal decision of *Faccenda Chicken Ltd v Fowler* [1986] 1 All ER 617 (for further elaboration of this lastmentioned decision, see Phang, *Cheshire, Fifoot and Furmston's Law of Contract – Second Singapore and Malaysian Edition* (1998) especially at p 705). The court also held that the plaintiffs' pleadings had not particularised what trade secrets the defendants were alleged to have used, that the four defendants had (between themselves) over 50 years of experience in the industry concerned (electronics), that the products concerned could have been easily reverse-engineered in any event, that it was unclear that the plaintiffs in fact held the relevant copyright as well as intellectual copyrights, and that much information was publicly available on the plaintiffs' Internet website (see generally at [89]); and, in so far as the issue of trade connection was concerned, the court held that the customers concerned were common to other companies as well and that the allegations in the context of the restraint of trade doctrine were mere assertions (see [91]). In the circumstances, the court held in favour of the defendants.

Remedies

Damages

9.85 As MPH Rubin J put it (at [56]) in the Singapore High Court decision of *Trigen Industries Ltd v Sinko Technologies Pte Ltd* [2003] 1 SLR 183 (also referred to *supra*, at paras 9.2 and 9.5, with regard to agency (under the '*Introduction*') and '*The objective approach*' respectively), 'the general rule in the case of breach of contract is that the plaintiffs by way of damages are entitled to be put in the same position as he would have been if the contract had been completed' (see also the Singapore High Court decision of *Irawan Darsono v Ong Soon Kiat* [2002] 4 SLR 84 (also referred to in this paragraph and *supra*, at para 9.74, under '*Illegality*'). It is, however, axiomatic that before there can be any recovery for loss of opportunity, there must – first and foremost – be a breach of contract, with the breach causing that particular loss (see *Irawan Darsono v Ong Soon Kiat* at [31] (also referred to in this paragraph and *supra*, at para 9.74, under '*Illegality*'); reference may also be made in this regard to the Singapore High Court decision of *Winjoy*

Investment Pte Ltd v Goh Boon Huat [2002] 2 SLR 347 (also considered *supra*, at para 9.6, in relation to '*Offer and acceptance*' and *infra*, at paras 9.86 and 9.89)). Further, the Singapore High Court decision of *The Feng Hang* [2002] 2 SLR 205 (also referred to *supra*, at para 9.2, under the '*Introduction*', with reference to shipping) confirmed (at [30], and citing *Chitty on Contracts*) that damages will be awarded to the plaintiff only where the breach of contract was the 'effective' or 'dominant' cause of the loss.

9.86 Another clear proposition, illustrated by the Singapore High Court decision of *L K Ang Construction Pte Ltd v Chubb Singapore Pte Ltd* [2003] 1 SLR 635, is that no damages would be awarded by the court where no concrete evidence was forthcoming (the court had, in fact found that there had, in any event, been no contract formed to begin with: see *supra*, at para 9.10, under '*Offer and acceptance*'). This proposition was also enunciated in *Winjoy Investment Pte Ltd v Goh Boon Huat* (considered in the preceding paragraph and para 9.89, *infra*, as well as *supra*, at para 9.6, in relation to '*Offer and acceptance*').

9.87 The Singapore Court of Appeal decision of *Guobena Sdn Bhd v New Civilbuild Pte Ltd* [2002] 3 SLR 533 is important because it clarified a number of fundamental – and commonsensical – propositions which, if not within the cognisance of the parties and/or the court, could lead to great confusion. Chao Hick Tin JA, who delivered the judgment of the court, observed thus (at [11] to [13]):

> 'In our respectful opinion, the cause of all the confusion [in the case] would appear to stem from the argument of [the appellant], that in determining how the final accounts between the parties were to be computed, the contract sum should be ignored. A basic principle of contract law is that an aggrieved party is entitled to claim as damages the losses or additional expenses which he has to incur to get what he has contracted to obtain from the party in breach. To make that determination, the price at which the innocent party would have to pay under the contract must be reckoned.
>
> The point can, perhaps, be more readily appreciated by a simple illustration. Say A employs B to do a piece of work for $100. After three-quarters of the way and having been paid $75, B abandons work and A has to engage others to complete it. A incurs $35 to have the job done. On [the appellant's] argument, it will mean that A can claim the $35 from B. This is obviously wrong. A, in total, incurs $110 ($75 plus $35). That is $10 more than the contract sum. A can only claim $10 as damages and nothing more. If A were to be entitled to claim $35 as damages from B, A would have benefitted because A would then have got the job done for only $75.
>
> The principle of damages in contract is to compensate the aggrieved party for the loss he suffers, based on the concept of *restitutio in integrum*, and not to give him any gain beyond such loss.'

9.88 Unfortunately, however, the court in the *Guobena* case cited a passage from the judgment of Asquith LJ in the leading English Court of Appeal decision of *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528 at 539, which referred to the concept of 'reasonable foreseeability' in the context of remoteness of damage. With respect, this is unfortunate as the concept of 'reasonable foreseeability' applies to the sphere of *tort* law, whereas it is the narrower concept of 'reasonable contemplation' that is embodied within the sphere of *contract* law (and which can be traced to the seminal English decision in *Hadley v Baxendale* (1854) 9 Exch 341; 156 ER 145).

9.89 In the Singapore High Court decision of *Winjoy Investment Pte Ltd v Goh Boon Huat* [2002] 2 SLR 347 (also considered *supra*, at para 9.6, in relation to '*Offer and acceptance*', as well as *supra*, at paras 9.85 and 9.86), it was held that the *liquidated damages clause* concerned could not be invoked as the fact situation did *not* fall within the *scope* of the clause in the first instance.

9.90 And in the Singapore High Court decision of *Cendekia Candranegara Tjiang v Yin Kum Choy* [2002] 4 SLR 48 (see also *supra*, para 9.9, under '*Offer and acceptance*'), MPH Rubin J cited (at [58]) the definition of '*earnest money*' from the sixth edition of *Black's Law Dictionary*, as follows:

> '"[E]arnest money" is defined "as a sum of money paid by a buyer at the time of entering a contract to indicate the intention and ability of the buyer to carry out the contract. Normally such earnest money is applied against the purchase price. Often, the contract provides for forfeiture of this sum if the buyer defaults."'

However, the learned judge then proceeded to hold (at [59]) that the buyer in the present case was *not* guilty of any default and was therefore entitled to the refund of the earnest money he had paid.

9.91 The issue of *mitigation* of damage is a primarily factual one: see *eg*, the Singapore High Court decisions of *Ng Poh Guan v Chan Ai Leng* [2002] 2 SLR 377 (also referred to at *supra*, para 9.41, under '*Discharge by performance and breach*') as well as *Rapiscan Asia Pte Ltd v Global Container Freight Pte Ltd* [2002] 2 SLR 325 (also referred to *supra*, under the '*Introduction*', with regard to shipping and *supra*, paras 9.24 and 9.28, with regard to '*Implied terms*' and '*Exception clauses*' respectively). It might also be useful to note that in the latter decision, S Rajendran J also briefly considered (at [68]) the issue of concurrent actions in contract and tort (here, with regard to negligence), where it is generally accepted that the plaintiff ought to avail itself of the remedy in contract in the first instance.

9.92 Finally, in the Singapore High Court decision of *Lai Yew Seng Pte Ltd v Pilecon Engineering Bhd* [2002] 3 SLR 425 (also considered *supra*, at paras 9.15, 9.31 and 9.36, under '*Consideration*' and '*Privity of contract*' and

'*Capacity to contract*' respectively), Choo Han Teck JC (as the then was) referred to a possible claim for work done on a *quantum meruit* basis on the assumption that no claim could be mounted based on the contract itself (see especially [4]).

Equitable remedies

9.93 In the Singapore High Court decision of *Joseph Clement Louis Arokiasamy v Singapore Airlines Ltd* [2002] 4 SLR 794 (which is referred to *supra*, at para 9.2 under the '*Introduction*' and in relation to employment law), MPH Rubin J observed (at [50]) that 'there cannot be any specific performance of a contract of service; an employer can terminate the contract with his servant at any time for any reason or for none but if he does in a manner not warranted by the contract he must pay damages for the breach of contract' (see, further, Phang, *Cheshire, Fifoot and Furmston's Law of Contract – Second Singapore and Malaysian Edition* (1998) at pp 908–911). The learned judge also confirmed (see *ibid*) the existing law to the effect that:

> '[I]f an employer were to dismiss an employee in breach of s 14 of the [Employment Act (Cap 91, 1996 Ed)], only the minister has the power to reinstate the employee in his former employment; and the effect of the said s 14 is that a dismissal without notice before enquiry is wrongful and not that it is ineffective or null and void …'

9.94 In the Singapore High Court decision of *Rahmatullah s/o Oli Mohamed v Rohayaton bte Rohani* (Suit 600/2001, unreported judgment dated 20.9.2002; see also *supra*, para 9.47, with regard to '*Misrepresentation*'), it was held that an order of specific performance could not be decreed on the facts of the case inasmuch as 'he who comes to equity must come with clean hands' – a maxim which Lai Siu Chiu J characterised as a 'fundamental principle of the law of equity so well known that it requires no elaboration' (see [71]).

9.95 In the Singapore Court of Appeal decision of *Golden Village Multiplex Pte Ltd v Marina Centre Holdings Pte Ltd* [2002] 1 SLR 333 (see also *supra*, para 9.83, with regard to '*Illegality*'), L P Thean JA, who delivered the judgment of the court, observed thus (at [14]):

> 'Once an agreement is enforceable in equity, the court in enforcing it is not confined to giving only the remedy of specific performance. In enforcing an agreement, the court may grant such other remedy as it may deem fit and as circumstances may require, for instance, an injunction restraining a party from breaching or continuing to breach an agreement or a mandatory injunction compelling a party to perform certain acts under the agreement.'

9.96 In so far as the equitable doctrine of *laches* is concerned, see *infra*, para 9.99.

Quasi-contract and total failure of consideration

9.97 The Singapore Court of Appeal decision of *Ooi Ching Ling Shirley v Just Gems Inc (No 2)* [2003] 1 SLR 14 (also considered *supra*, at paras 9.6, 9.21, 9.36 and 9.41, with regard to '*Offer and acceptance*', '*The parol evidence rule*', '*Capacity to contract*' and '*Discharge by performance and breach*', respectively) considered the doctrine of total failure of consideration. Chao Hick Tin JA, who delivered the judgment of the court, observed (at [43] to [44]) thus:

> 'It is settled law that where money is paid by a plaintiff to a defendant under a contract and the defendant fails completely to discharge his part of the bargain, the plaintiff has the option of either claiming in contract for damages for breach or he may treat the contract as at an end on the ground that the defendant has repudiated it and sue for the refund of the money in quasi contract. Failure of consideration occurs when one party has not enjoyed the benefit of any part of what it bargained for. In the determination of this question, one has to judge it from the perspective of the payer plaintiff … For a plaintiff to succeed in a claim for a refund there must be a *total* failure of consideration. … If the plaintiff gets something out of the contractual arrangement, this remedy would not be available to him although he can claim in damages against the defendant for failing to fulfil all his obligations.' [emphasis in original]

However, the learned judge pertinently proceeded to observe (at [47]) that:

> 'The problem in each case is to determine whether on the facts there is a total or only a partial failure of consideration. In some situations, the line can be rather fine.'

On the facts of the present case, it was held that there had indeed been a total failure of consideration.

Limitation of actions

9.98 Section 29 of the Limitation Act (Cap 163, 1996 Ed) is, by its very terms, applicable only to actions grounded in contract and tort and, hence, a claim for unjust enrichment which was grounded in neither of the aforementioned actions did not fall within the scope of the Act in general and s 29 thereof in particular: see the Singapore Court of Appeal decision of *Management Corporation Strata Title No 473 v De Beers Jewellery Pte Ltd* [2002] 2 SLR 1 (discussed in detail at *supra*, paras 9.17 and 9.53–9.60, under '*Consideration*' and '*Mistake*' respectively) at [32].

9.99 The *De Beers* case also considered the equitable doctrine of *laches*. In the words of Yong Pung How CJ (at [33]):

> 'Laches is an equitable doctrine which considers the facts of the case rather than a fixed time bar. In *Lindsay Petroleum Co v Hurd* (1874)

> LR 5 PC 221, the court said that two important factors were: the length of the delay; and the acts done during that time.'

9.100 In the Singapore High Court decision of *Attorney-General v Tye Kheng (Pte) Ltd* [2002] 4 SLR 785 (also considered *supra*, at para 9.5, under '*The objective approach*'), it was held that the plaintiff's claim was not barred under s 6(1)(a) of the Limitation Act (Cap 163, 1996 Ed) as the material date from which time began to run was not the date of the contract but, rather, the date of the breach of contract (see [37] to [38]).

Conclusion

9.101 There have been a number of very interesting decisions during the year under review. They have provided much food for legal thought. However, decisions which reaffirm existing general principles are also very important as they are like road-signs in an ongoing journey. It is precisely these road-signs that keep us on the correct route and which therefore ought never to be taken for granted.

9.102 In summary, there has – once again – been ample evidence that there is gradually being developed a uniquely Singaporean corpus of contract law which is premised on the received English law as both its foundation as well as its point of departure.