VITIATING FACTORS IN CONTRACT LAW – SOME KEY CONCEPTS AND DEVELOPMENTS

There is a constant need to achieve a balance between certainty and fairness in the law of contract. In this respect, vitiating factors tend to focus on the latter (with the former constituting, at most, just one conception of fairness, amongst others). However, because of the consequent danger that contracts might be unravelled unnecessarily by the application of such factors, there is a need for doctrinal as well as conceptual clarity. This article focuses, first, on key (and recent) doctrinal developments – particularly with regard (but not limited) to the law of mistake and the law relating to undue influence. Doctrinal developments cannot, however, be wholly understood without an appreciation of the relevant conceptual underpinnings and linkages. To this end, a few key conceptual difficulties will also be examined with a view to elucidating a more effective practical approach towards the vitiating factors concerned.

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I. Introduction

1 I last delivered a seminar on vitiating factors in contract law almost exactly seven years ago to the day. It was somewhat of a marathon session lasting several hours, and both speaker and audience were not unlike exhausted runners staggering towards the finish line by the time the session was about to conclude. The result of that seminar reflected this: a 96-page article with 488 footnotes.[1] In the more than half decade that has passed since that seminar, the law relating to vitiating factors has continued to develop apace. There has also been a burgeoning in the

* This article is based on a seminar delivered at the Singapore Academy of Law on 17 November 2004 and is dedicated to the memory of Professor Peter Birks, an extraordinary scholar, whose scholarship was exceeded only by his immense generosity. [This article was written prior to the author's appointment as a Judicial Commissioner of the Supreme Court of Singapore and reflects only his views at the time of writing – General Editor].

1 See A Phang, "Vitiating Factors in Contract Law – The Interaction of Theory and Practice" (1998) 10 SAcLJ 1.

academic literature as well.[2] Indeed, the *content* of development in certain specific areas has been – in a word – intense. This is correspondingly reflected in the present article, which is of roughly the same length as the earlier article just mentioned,[3] and which deals with relatively substantive changes in the law itself. In this regard, two areas stand out: the first relates to the law of mistake and the second, to the law relating to undue influence.[4] Indeed, in so far as the former area is concerned, there have rarely been so many developments in the law of mistake in so relatively short a period of time, with so much actual, as well as potential, impact. So important are these developments that they will take up a substantial portion of this article (although I will, of course, also be dealing with developments in other areas as well). As we shall see, however, the law relating to mistake in its various aspects has by no means been clarified, although much food for legal thought has been generated as a result. The law relating to undue influence has also developed in different – and significant – directions. The main decision in this regard is one that I shall also be reviewing in some detail: that of the House of Lords in *Royal Bank of Scotland plc v Etridge (No 2)*.[5] As importantly, in my view, are the implications of the decision in so far as linkages with other related doctrines, such as economic duress and unconscionability, are concerned.

2 In many ways, the present article is a kind of update of developments that have taken place since I last dealt with the topic.[6] However, it is more than simply a doctrinal update. If nothing else, legal doctrine does not exist in a vacuum. Whilst it is indispensable to the very enterprise of the law itself, inasmuch as the law (or anything else for that matter) cannot function practically without a *structure*, it is insufficient (in and of itself) to ensure that *justice* is achieved.[7] In other words, the *structure* (or *architecture*) of the law, as embodied within legal doctrine, must be accompanied by a *spirit* of justice and fairness.[8] The entire process is a holistic one comprising both these factors that interact in an integrated fashion. A variation of this is the oft-cited tension between

2 Foremost amongst these must surely be Rick Bigwood's recent book entitled *Exploitative Contracts* (Oxford University Press, 2003).
3 *Supra* n 1, with, unfortunately, more footnotes this time around.
4 With corresponding impact on allied doctrines such as economic duress and unconscionability; and see the main text accompanying, *infra* n 252 *ff*.
5 [2002] 2 AC 773. And see the main text accompanying *infra* n 201 *ff*.
6 As to which see Phang, *supra* n 1.
7 See generally A Phang, "On Architecture and Justice in Twentieth Century Contract Law" (2003) 19 JCL 229.
8 See generally Phang, *ibid*; see also generally A Phang, "Security of Contract and the Pursuit of Fairness" (2000) 16 JCL 158.

procedural fairness on the one hand and substantive fairness on the other. The former looks more (on occasion, solely) to the procedures laid down by the rules whilst the latter looks to the spirit of justice that is manifested in a fair and just result or outcome.[9] Once again, this tension is more apparent than real. One cannot, in other words, divorce procedural from substantive fairness: as Prof Atiyah has perceptively – and persuasively – argued, both impact on, as well as interact with, each other.[10] There is of course an at least residuary wariness in responding to the issue of substantive fairness directly. This is due to the general sense that the issue of substantive justice is one that is susceptible to the argument from subjectivity or relativity and that it would therefore be best to confine arguments to the procedural or doctrinal spheres. However, because both the procedural and substantive spheres are, as I have just argued, both theoretically as well as practically inseparable, it is submitted that the approach just mentioned is unpersuasive and impractical. This approach is nevertheless very firmly entrenched in the psyche of English law in general and English contract law in particular and results in a strict separation of the legal from the extra-legal, which separation is more popularly known as legal positivism.[11] And it does not of course help that Singapore law finds its foundation in English law.[12] However, I have argued elsewhere that line-drawing by courts is inevitable, if nothing else because objectivity is an inherent part of the entire enterprise of the law.[13] I will return to this more general issue later.[14] It is important, at this juncture, to emphasise that it is imperative that the issue of substantive

9 See, in particular, the classic article by the late Prof Arthur Leff, "Unconscionability and the Code – The Emperor's New Clause" (1967) 111 U Pa L Rev 485, especially at 487.

10 See P S Atiyah, "Contract and Fair Exchange" (1985) 35 U Toronto LJ 1 (reprinted as Essay 11 in the same author's book of essays entitled *Essays in Contract* (Oxford University Press, 1986)).

11 See generally, the classic work of the late Prof H L A Hart in *The Concept of Law* (Clarendon Press, 2nd Ed, 1994), as well as the famous debate between the same scholar and the late Prof Lon Fuller: see H L A Hart, "Positivism and the Separation of Law and Morals" (1958) 71 Harv L Rev 593 (reprinted as Essay 2 in H L A Hart, *Essays in Jurisprudence and Philosophy* (Oxford University Press, 1983)) and L L Fuller, "Positivism and Fidelity to Law – A Reply to Professor Hart" (1958) 71 Harv L Rev 630 (and see, further, L L Fuller, *The Morality of Law* (Yale University Press, Rev Ed, 1969)). And, in the specific context of the law of contract, see A Phang, "Positivism in the English Law of Contract" (1992) 55 MLR 102.

12 See generally A Phang, *Cheshire, Fifoot and Furmston's Law of Contract* (Butterworths, Asia, 2nd Singapore and Malaysia Ed, 1998) at ch 1 as well as, by the same writer, "Cementing the Foundations: The Singapore Application of English Law Act 1993" (1994) 28 UBC Law Rev 205. But *cf* the main text accompanying *infra* n 83 *ff*.

13 See *eg*, Phang, *supra* n 1, at 94–96.

14 See the main text accompanying *infra* n 464 *ff*.

fairness not be left shipwrecked on the shoals of subjectivity merely because the primary focus of vitiating factors in contract law is invariably on the issue of substantive fairness.

II. Mistake

A. Introduction

3 It used to be thought that cases on mistake would be rare.[15] In recent years, however, there have been a few very significant decisions – one of which constituted the first major decision in mistake from the House of Lords for over seven decades. This is not, perhaps, surprising in view of the increasing importance of vitiating factors generally during economically turbulent times when parties who find themselves on the wrong side of bargains are not averse to availing themselves of such factors (including those relating to mistake) in order to free themselves of legal liability. Yet, the courts must maintain an equitable balance between maintaining the sanctity of contract on the one hand and freeing parties from contracts where not to do so would result in injustice. As we have also seen, the fundamental problem relates to how and where to draw the line. And the law relating to mistake is no exception. In this Part, we examine, in turn, three main areas of the law of mistake in contract law: the first relates to *common mistake*, the second relates to *mistaken identity*, and the third pertains to what is probably the first Internet mistake case (which emerges, significantly, from Singapore). In addition, I will touch very briefly on a recent (and significant) Singapore Court of Appeal decision which belongs, however, more appropriately under the law of restitution. Let us consider each of these areas *seriatim*.

B. Common mistake and the abolition of common mistake in equity

4 The categories of common mistake at common law and common mistake in equity have been long and firmly established in all the major contract textbooks.[16] However, the recent English Court of Appeal decision of *Great Peace Shipping Ltd v Tsavliris Salvage (International)*

15 See also D Friedmann, "The Objective Principle and Mistake and Involuntariness in Contract and Restitution" (2003) 119 LQR 68 at 70 *ff*.

16 See *eg*, M P Furmston, *Cheshire, Fifoot and Furmston's Law of Contact* (Butterworths, 14th Ed, 2001) at pp 254–267 and J Beatson, *Anson's Law of Contract* (Oxford University Press, 28th Ed, 2002) at ch 8.

Ltd[17] held that its previous decision in *Solle v Butcher*[18] was inconsistent with the House of Lords decision in *Bell v Lever Brothers, Limited*,[19] and ought therefore *not* be followed. In other words, there is – for the moment at least – *no longer* any doctrine of common mistake in *equity* – at least under English and, possibly, Singapore laws. This is, as we shall see, a radical (and even startling) development which may not augur well for the development of the law in this area.

5 The facts in the *Great Peace Shipping* case itself are relatively straightforward. A vessel, the "*Cape Providence*", suffered serious structural damage. The defendants, on learning of this, promptly offered their salvage services, which offer was accepted. The tug allotted the task of helping in the salvage operation was, however, still five to six days away. The defendants then approached a firm of London brokers whose representatives (Messrs Little and (then) Holder) negotiated (in turn) with the plaintiffs' representatives with a view to chartering the plaintiffs' vessel, the "*Great Peace*", which was intended to escort the "*Cape Providence*" (and with a view to saving life, if necessary) until the tug arrived. The London brokers' representatives had in fact earlier been informed by an organisation providing weather forecasting services to the shipping industry that the "*Great Peace*" was nearest to the "*Cape Providence*" at that particular point in time (apparently some 35 miles distant). A charter was duly entered into between the defendants and the plaintiffs (for a *minimum* of five days). However, unknown to the parties' representatives, the "*Great Peace*" was in fact *410 miles* away from the "*Cape Providence*".[20] As a result, the defendants, on being thus informed shortly after the contract had been entered into, decided only to cancel their charter for the "*Great Peace*" if no nearer available vessel could be located. Fortuitously, another vessel, the "*Nordfarer*" happened to pass by the "*Cape Providence*" and (even more fortuitously) the charterers of the former vessel also happened to be the charterers of the latter vessel. Not surprisingly, the defendants contracted with the owners of the "*Nordfarer*" directly and instructed Mr Holder to cancel the charter for the "*Great Peace*", which the latter duly did. The plaintiffs were naturally upset and when (notwithstanding the plaintiffs' representatives' efforts at

17 [2002] 3 WLR 1617 ("the *Great Peace Shipping* case"). For commentary on this particular decision, I draw from my earlier work: see A Phang, "Controversy in Common Mistake" [2003] Conv 247.

18 [1950] 1 KB 671.

19 [1932] AC 161 ("*Bell v Lever Brothers*").

20 No issue of misrepresentation arose as the information as to the original distance between the vessels did not emanate from the plaintiffs as such.

negotiating a settlement) the defendants refused to pay any hire at all, they brought the present proceedings, claiming US$82,500 as moneys payable under the terms of the contract or (alternatively) the same sum as damages for the defendants' alleged wrongful repudiation of the charter.

6 The defendants responded by arguing that the charter contract had been rendered void by a common mistake at common law as, unknown to both parties, the vessels were not in fact in close proximity to each other. Alternatively, the defendants argued that the contract was nevertheless voidable for common mistake in equity and that they were therefore entitled to rescind the contract.

7 At first instance,[21] Toulson J held in favour of the plaintiffs, rejecting the defences referred to in the preceding paragraph. The defendants appealed and the Court of Appeal dismissed the appeal, holding that, on the facts, the contract was not void owing to a common mistake at common law. Although of the view that Toulson J's finding, that the "*Cape Providence*" should have turned and steamed towards the "*Great Peace*", was unrealistic, the Court of Appeal agreed with the learned judge that the fact that the defendants were reluctant to cancel the charter until they knew if they could find a nearer vessel to assist demonstrated that the distance between the vessels did not mean that it was impossible to perform the contract. As already mentioned, the court also held that there was no doctrine of common mistake in equity and, hence, the defendants failed in their appeal on that specific ground as well.

8 There are, in fact, many reasons why the *Great Peace Shipping* case ought *not* to be followed and they are, in *summary*, as follows. Although *Solle v Butcher*[22] has itself been the subject of some criticism,[23] it is submitted that the House of Lords decision in *Bell v Lever Brothers*[24] did not, by any means, establish a clear and unambiguous doctrine of

21 (2001) 151 NLJ 1696; noted John Cartwright "Common Mistake in Common Law and in Equity" (2002) 118 LQR 196. Toulson J was, *inter alia*, of the view that Lord Denning's formulation of the doctrine of common mistake in equity was suffused with excessive discretion and/or was overbroad and that, in any event, he would decline to exercise the discretion to set aside the contract on the actual facts of the case itself.

22 *Supra* n 18.

23 See especially John Cartwright, "*Solle v Butcher* and the Doctrine of Mistake in Contract" (1987) 103 LQR 594. Reference may also be made to R P Meagher, J D Heydon & M J Leeming, *Meagher, Gummow and Lehane's Equity – Doctrines and Remedies* (Butterworths, 4th Ed, 2002) at paras 14-100 to 14-125.

24 *Supra* n 19.

common mistake at common law in the first instance. There is, indeed, some case law[25] and an influential body of academic literature[26] that suggests that there is no substantive doctrine of common mistake at common law in the first instance and that it is all, in the final analysis, a question of construction of the contract concerned. Further, a leading textbook expressed doubt as to whether or not, even assuming that there was a substantive doctrine of common mistake at common law in the first instance, such a doctrine was *practically viable*, given the almost absolute strictness with which it was applied in *Bell v Lever Brothers* itself.[27] Indeed, it was not until the judgment of Steyn J (as he then was) in *Associated Japanese Bank (International) Ltd v Crédit du Nord SA*[28] that we obtain clear judicial confirmation that there is not only such a substantive doctrine but also that it can (on occasion, at least) be invoked successfully.[29] More recently, the exhaustive historical survey as well as analysis by a recent writer with respect to *Bell v Lever Brothers* supports the argument presently considered – which is that it is far from clear that *Bell v Lever Brothers* constitutes wholly unambiguous authority in favour of a doctrine of common mistake at common law and, if so, the argument in the *Great Peace Shipping* case from precedent loses its force, and conflicting (English) Court of Appeal decisions have now been generated instead.[30]

9 We turn, briefly, now to the argument to the effect that the formulation by Denning LJ (as he then was) in *Solle v Butcher*[31] is unsupported by precedent. As I have sought to argue elsewhere,[32] even if this particular argument is accepted, it is not necessarily fatal that a case lays down a proposition of law for the *first time* (provided that that

25 See, in particular, the Australian High Court decision of *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377.

26 See *eg*, C J Slade, "The Myth of Mistake in the English Law of Contract" (1954) 70 LQR 385; P S Atiyah, "*Couturier v Hastie* and the Sale of Non-existent Goods" (1957) 73 LQR 340; and P S Atiyah & F A R Bennion, "Mistake in the Construction of Contracts" (1961) 24 MLR 421.

27 See Furmston, *supra* n 16, at pp 260–261.

28 [1989] 1 WLR 255; applied and commented upon in the Singapore High Court decision of *Ho Seng Lee Construction Pte Ltd v Nian Chuan Construction Pte Ltd* [2001] 4 SLR 407 (noted in A Phang, "Contract Law" in (2001) 2 SAL Rev 118 at para 9.42 *ff*).

29 Though *cf* the Malaysian High Court decision of *Ng Chun Lin v Foo Lian Sin* [2000] 6 MLJ 81.

30 See Catharine MacMillan, "How Temptation Led to Mistake: An Explanation of *Bell v Lever Brothers, Ltd*" (2003) 119 LQR 625.

31 *Supra* n 18, at 692–693.

32 See generally Phang, *supra* n 17, at 251–253.

proposition is a principled one);[33] *Solle v Butcher* has been applied or cited in both England and in many other Commonwealth jurisdictions[34] and *Solle v Butcher* does furnish the courts *enormous flexibility*, which is especially important, given the rigidity of the common law doctrine as well as the presence (on occasion at least) of third party rights.

10 The present writer has, in fact, gone *further*, arguing that given the fact that (from a substantive perspective) the tests for common mistake at common law and common mistake in equity are the same, a *merger* of the two doctrines, which would, in effect, subsume the common law doctrine under the equitable doctrine, should be effected – with the only difference being one of consequences or (more accurately) remedies, it being submitted that the more flexible (equitable) remedy be embraced instead.[35] Although this proposed merger has not been warmly received by any means, a close examination of both the case law as well as the literature reveals that the door is far from closed.[36] If the argument from merger is accepted, the *legislative* route would appear to be the most promising one – there being some precedent with regard to frustration in the form of (in the Singapore context) the Frustrated Contracts Act[37] and an even more direct one in the form of the New Zealand Contractual Mistakes Act 1977.[38] In Section C (where we consider the doctrine of mistaken identity), I also touch briefly on the possibility of reform.[39] As I shall suggest, it might therefore well be time for the Singapore Legislature to consider a systematic reform of the law relating to mistake.[40] In the meantime, however, the *Great Peace Shipping* case could well (and, in my view, ought to) be appealed and, if so, it is hoped that the House of Lords will reinstate the equitable doctrine first laid down in *Solle v Butcher*.[41] Indeed, even if it is thought that a legislative solution is ultimately

33 Which, *ex hypothesi*, would not have the support of any prior precedent.

34 Whilst not conclusive in and of itself, if *Solle v Butcher* were truly unsound in principle, there would have been at least indications that this was so in the subsequent case law itself: see Phang, *supra* n 17 at 252.

35 See generally A Phang, "Common mistake in English law: the proposed merger of common law and equity" (1989) 9 Legal Studies 291.

36 See Phang, *supra* n 17, at 254–255 (and the case law as well as literature cited therein).

37 Cap 115, 1985 Rev Ed; see also, in the context of mistaken identity, the main text accompanying *infra* n 58.

38 See, especially, ss 6, 7 and 8. See also *per* Rajah JC in the *Digilandmall* case, *infra* n 65, at [130].

39 See the main text accompanying *infra* n 55 *ff*.

40 See *ibid*.

41 *Supra* n 18. *Cf* also the Singapore Court of Appeal decision of *Projection Pte Ltd v The Tai Ping Insurance Co Ltd* [2001] 2 SLR 399 at [25].

preferable, it is hoped that the House will nevertheless restore the necessary flexibility provided by the equitable doctrine in the meantime.

C. Mistaken identity in the House of Lords

11 In addition to the *Great Peace Shipping* case discussed above,[42] there has in fact been a *House of Lords* decision focusing on a different (yet no less important) area of the law relating to contractual mistake (*viz*, mistaken identity) – *Shogun Finance Ltd v Hudson*.[43] This was, in fact, the first major House of Lords decision in the context of the law relating to contractual mistake for almost 70 years – the last being the decision in *Bell v Lever Brothers*.[44] It was, perhaps, not unexpected that – in its own way – the *Shogun Finance* case was (like *Bell v Lever Brothers*) not uncontroversial. Indeed, the overall decision was arrived at (as in *Bell v Lever Brothers*) by a bare majority of three to two.

12 The facts of the *Shogun Finance* case were straightforward and, indeed, quite common for cases of this nature. A rogue had obtained a motor vehicle fraudulently by signing a hire-purchase agreement with a forged signature. He then sold the vehicle to an innocent purchaser (the defendant), who had purchased the said vehicle in good faith. In so far as the process of the rogue's fraud was concerned, he had had his identity "verified" by having produced a genuine driving licence which he had unlawfully procured. The dealer's sales manager at the showroom telephoned the rogue's details to the plaintiffs' sale supports centre and also faxed a copy of both the licence as well as the draft agreement with the rogue's (forged) signature. The plaintiffs undertook a computer search[45] and also compared the signatures on the faxed documents, finding them satisfactory. The plaintiffs then informed the dealer that the proposal had been accepted. After payment of the deposit had been made, the dealer handed the vehicle to the rogue, together with the necessary documentation. The plaintiffs brought the present action against the defendant as the rogue had – not surprisingly in the least – absconded. Although the main issue related to one of statutory construction (here, of s 27 of the UK Hire Purchase Act 1964), the issue was heavily dependent on application of the relevant common law principles – in particular, whether the hire-purchase contract briefly described above was void for

42 *Supra* n 17; and see generally the main text accompanying *supra* n 17 *ff*.
43 [2004] 1 AC 919 ("the *Shogun Finance* case"); noted by A Phang, P W Lee & P Koh, "Mistaken Identity in the House of Lords" [2004] CLJ 24.
44 *Supra* n 19.
45 Which included ascertaining the relevant credit rating.

mistaken identity or was merely voidable for fraud. The trial judge found in favour of the plaintiffs, which decision was upheld (by a bare majority of two to one) by the English Court of Appeal.[46] As already mentioned, the House of Lords was also closely divided on the final outcome. In the event, the House affirmed the decision of the Court of Appeal, the majority finding in favour of the plaintiffs.[47]

13 The majority of the House in the *Shogun Finance* case avoided having to pronounce on the principles relating to face-to-face transactions, characterising the transaction concerned as one by correspondence. This is unfortunate because the difficulties surrounding the law relating to mistaken identity in face-to-face (or *inter praesentes*) situations have long vexed scholars, students and lawyers alike;[48] some clarification by the House would therefore have been welcome. The majority applied, instead, its own decision in *Cundy v Lindsay*[49] and held that there had been an instance of mistaken identity because the plaintiff had, on the face of the written contract, clearly intended to have dealt with someone other than the rogue. Lord Hobhouse of Woodborough also emphasised the application of the parol evidence rule to the facts of the present case.[50]

14 The minority (comprising Lord Nicholls of Birkenhead and Lord Millett) delivered powerful dissenting judgments. Both law lords were of the view that a contract induced by misrepresentation of identity only ever rendered the contract *voidable* (and never void) – thus endorsing Lord Denning MR's approach in the English Court of Appeal decision of *Lewis v Averay*.[51] They therefore held in favour of the defendant.

15 As has been argued in a joint comment on this decision,[52] the approaches of both the majority as well as the minority may, with respect, be questioned. The majority appear to have placed too much emphasis on

46 For comment on the Court of Appeal decision (which is reported at [2002] QB 834), see A Phang, "Mistake in Contract Law – Two Recent Cases" [2002] CLJ 272 at 273–276.

47 The analysis that follows draws heavily from Phang, Lee & Koh, *supra* n 43.

48 And see generally the "infamous" trilogy of cases comprising *Phillips v Brooks, Limited* [1919] 2 KB 243; *Ingram v Little* [1961] 1 QB 31; and *Lewis v Averay* [1972] 1 QB 198, which are, *inter alia*, discussed in Phang, *supra* n 1.

49 (1878) 3 App Cas 459.

50 And see *supra* n 43, at [49].

51 *Supra* n 48.

52 See Phang, Lee & Koh, *supra* n 43.

the literal document. Hence, in so far as contracts by correspondence are concerned, the courts are almost invariably going to hold that the contract concerned is invalid in such fact situations. With respect, this is unfortunate for it is precisely the role of the doctrine of mistaken identity to provide for those situations where, although the identity of the other party was all-important, such identity was *not* correctly reflected by the contractual terms themselves – and not to lay down a "blanket rule" which tends to "strike down" all contracts without much discrimination.

16 One also notes that the approach of the majority is almost in contradiction to the approach adopted with regard to face-to-face transactions, where the accepted approach is to have a *rebuttable* presumption that the party pleading the doctrine of mistaken identity intended to deal with the other party, regardless of that other party's precise identity. Indeed, it has been suggested that the preferred approach with regard to contracts by *correspondence* (such as was the fact situation in the *Shogun Finance* case) ought to be the *same* as well.[53]

17 Turning now, briefly, to the minority's approach, it would appear that the acceptance of their approach would effectively abolish the doctrine of mistaken identity and, viewed in that light, is far too rigid. As has been pointed out:[54]

> [I]t is not entirely clear that the original owner is *always* less meritorious than the third party. Indeed, the need for the original owner to make the necessary checks ensures that there is equity between the parties … [emphasis in original]

18 One key *normative* issue that arises from the *Shogun Finance* case is whether or not it is now time for *legislative reform*. In this regard, there are at least two possible ways forward.

19 The first was proposed by the UK Law Reform Committee almost four decades ago:[55] simply put, it would embody Lord Denning MR's as well as the minority law lords' views in statutory form.[56]

53 See *ibid* at 26.
54 *Ibid*.
55 See its Twelfth Report (on *Transfer of Title to Chattels* (Cmnd 2958, 1966)).
56 *Supra* n 51. See also s 2-403 of the US Uniform Commercial Code and which was referred to at [35] and [84] in the *Shogun Finance* case, *supra* n 43, as well as in the UK Law Reform Committee's Report, *supra* n 55 at para 15).

20 The second was advocated by Devlin LJ (as he then was) in the English Court of Appeal decision of *Ingram v Little*:[57] simply put, this particular approach would allocate legislatively to the courts the discretion to apportion loss (not unlike the approach adopted with regard to the UK Law Reform (Frustrated Contracts) Act 1943[58]). Although this particular approach was in fact rejected by the UK Law Reform Committee, "[g]iven the rigidity of the former [*ie*, the first] alternative, as well as the ability of judges to develop principles in a systematic fashion, this … alternative might not be so unattractive after all (see also *per* Lord Walker [at [182] of the *Shogun Finance* case])".[59]

21 On a broader level, in fact (and given the need for reform of other parts of the law of mistake,[60] it might well be time for the Singapore Legislature to look seriously into the systematic reform of the law relating to mistake, of which the New Zealand model, if not definitive, provides (it is suggested) an at least excellent point of departure[61] and which is of course consistent with the latter approach considered in the present paragraph.

22 It should, however, be noted that, what seems clear for the moment in the local context at least, is that – in so far as *non inter praesentes* cases are concerned – the House of Lords decision in *Cundy v Lindsay*[62] continues to govern: In the Singapore Court of Appeal decision of *Tribune Investment Trust Inc v Soosan Trading Co Ltd*,[63] the court applied the principle in *Cundy v Lindsay* and held that there had been no contract between the plaintiffs and the defendants and that whilst there might have been an intention on the part of the plaintiffs for the defendants to contract with them, the defendants' intention at all times was (in point of fact) to contract with yet another party only. Yong Pung How CJ, who delivered the judgment of the court, observed thus:[64]

> To summarise, the principle espoused in [*Cundy v Lindsay*] is simply that a person cannot make another a contracting party

57 *Supra* n 48.
58 The Singapore Frustrated Contracts Act (Cap 115, 1985 Rev Ed) is in fact modelled on this (UK) Act, as are many other similar statutes across the Commonwealth (see also *supra* n 37 and *infra* n 473).
59 See Phang, Lee & Koh, *supra* n 43, at 27.
60 See generally the main text accompanying *supra* nn 35–41.
61 See *supra* n 38.
62 *Supra* n 49. Though *cf* the English High Court decision of *Sunderland Association Football Club Ltd v Uruguay Montevideo FC* [2001] 2 All ER (Comm) 828 at 830.
63 [2000] 3 SLR 405.
64 *Ibid* at [47].

> with himself, when he knows or ought to know that the other intends to contract not with him but with another. … [W]hen an offer meant for A is purportedly accepted by B, any apparent contract formed is void and cannot confer rights on anyone.

E. Unilateral mistake in cyberspace

23 An extremely important decision was recently handed down by the Singapore High Court. Despite being a decision at first instance, its significance lies not only in the actual issues analysed and discussed by the court but also in the fact that it is probably the first case on Internet mistake. The facts in the decision by V K Rajah JC (as he then was) in *Chwee Kin Keong v Digilandmall.com Pte Ltd*[65] were, in fact, very straightforward. However, the issues raised were both important as well as complex and it comes as no surprise that an appeal is pending, at the time of writing, to the Court of Appeal. It should also be noted, at this juncture, that this decision also dealt with the issue of contract formation. This should come as no surprise as the law relating to formation of contract has a close linkage to that relating to mistake. However, the focus will be on the latter area of law, rather than the former.[66]

24 As already mentioned, the facts of the *Digilandmall* case were extremely straightforward. The six plaintiffs, who were friends, placed orders over the Internet for a total of 1,606 Hewlett Packard commercial laser printers on the defendant's (seller's) websites – an astonishing number of machines as none of the plaintiffs was apparently in the business of selling such a product. Also significant was the fact that these orders were placed at a price of $66 each, whereas the actual price was $3,854 each. In summary, for a total outlay of $105,996, the plaintiffs had procured laser printers with a total market value of $6,189,524. This great disparity in price was due to the fact that the defendant had made a mistake in posting the price on its websites on which the printers were

65 [2004] 2 SLR 594 ("the *Digilandmall* case"). [The decision was very recently affirmed by the Singapore Court of Appeal in *Chwee Kin Keong and others v Digilandmall.com Pte Ltd* [2005] 1 SLR 502, albeit on somewhat different grounds and where the focus was on the law of unilateral mistake rather than formation of contract – General Editor]. See also Yeo Tiong Min, "Unilateral Mistake in Contract: Five Degrees of Fusion of Common Law and Equity" [2004] SJLS 227 as well as Phang, *infra* n 66.

66 Indeed, a more extensive analysis by the present writer can be found in "Contract Formation and Mistake in Cyberspace – The Singapore Experience" (2005) 16 SAcLJ 361). This article is in fact a greatly expanded version of a piece which will be published in a forthcoming issue of the *Journal of Contract Law*, entitled "Contract Formation and Mistake in Cyberspace".

advertised,[67] which websites operated on an automated system, with confirmation notes being despatched to the plaintiffs within a few minutes. Not surprisingly, on learning of the error, the defendant removed the advertisement forthwith from its websites. It should also be noted that 778 others had placed similar orders on the defendant's websites: significantly, perhaps, the total number of printers ordered by the 784 persons was 4,086 (of which, as we have just noted, 1,606 were by the six plaintiffs[68]). The defendant also informed all who had placed these orders that there had been an unfortunate error and that it would therefore not be meeting any of the orders.

25 Not surprisingly, the defendant argued that it had made a genuine (here, unilateral) mistake which was known (or ought to have been known) to the plaintiffs and that it was therefore not liable to the plaintiffs. The plaintiffs, on the other hand, argued that they had not been aware of the defendant's mistake when they placed their orders and that they had believed that the defendant's offer was genuine. They also argued that if the contracts concerned were not enforced by the application of the doctrine of mistake, undesirable uncertainty would prevail in commercial transactions, especially over the Internet.

26 In summary, first, Rajah JC held that that although there had been concluded contracts between the plaintiffs and the defendant (as ascertained on an objective basis), these contracts had nevertheless been vitiated by the doctrine of unilateral mistake. More significantly, and as already mentioned, the learned judge considered (in the process) a number of difficult – even controversial – issues in the law relating to contract formation as well as contractual mistake, all of which will be considered and analysed (in turn) below.

27 The learned judge, Rajah JC, reviewed the facts and evidence with great care and thoroughness.[69] This underscores the vital importance of the facts – especially in so far as the law relating to unilateral mistake is concerned. Before proceeding to consider (albeit briefly) Rajah JC's treatment of the law relating to unilateral mistake in the context of

67 This originated from an employee's inadvertent uploading of a template during a training session conducted by an entity related to the defendant at the defendant's premises: see *supra* n 65, at [6]–[9].

68 See also *per* Rajah JC, *supra* n 65, at [10] and [154].

69 In additional to the first two paragraphs of his judgment, where Rajah JC succinctly set out the broad factual circumstances as well as the main legal issues, the learned judge devoted a total of 77 paragraphs to his review of the factual matrix. The entire judgment comprised a total of 156 paragraphs.

cyberspace, an even briefer mention of his views with regard to some other issues (particularly that of formation of contract) would not be inappropriate.

28 Rajah JC emphasised that the basic principles of contract law continued to apply, even in the context of cyberspace,[70] although he acknowledged that "not all principles will or can apply in the same manner that they apply to traditional paper-based and oral contracts" and emphasised that "[i]t is important not to force into a Procrustean bed principles that have to be modified or even discarded when considering novel aspects of the Internet".[71]

29 The learned judge also reviewed the legal status of website advertisements[72] as well as whether or not the postal acceptance rule ought to apply to transactions via electronic mail.[73] He also raised the issue as to whether or not the problematic doctrine of consideration ought to be abolished and, if so, what possible alternative might fulfil the same (or similar) functions.[74] Finally, Rajah JC emphasised – throughout his judgment – the vital importance of objectivity.[75] This focus on objectivity constituted, in fact, one of the major starting-points with regard to the doctrine of unilateral mistake, to which doctrine our attention must now briefly turn.

70 *Supra* n 65, at [91]. See also generally Andrew Phang & Yeo Tiong Min, "The Impact of Cyberspace on Contract Law" in *The Impact of the Regulatory Framework on E-Commerce in Singapore* (Daniel Seng Kiat Boon ed) (Technology Law Development Group, Singapore Academy of Law, 2002), pp 39–58.

71 *Supra* n 65, at [91].

72 Rajah JC generally adopted a flexible and open approach, although the learned judge did emphasise the importance of how web merchants framed their respective website advertisements: see generally, *supra* n 65, at [93]–[94]. Rajah JC also appeared – on the basis of the factor of availability of stock – to suggest (at least in so far as digital products were concerned or, on another reading, perhaps even all products sold on the Internet) that perhaps the relevant advertisements would constitute offers in the absence of appropriate qualifying language (see at [95]–[96]).

73 Although Rajah JC canvassed all the relevant arguments, he appeared to lean in favour of the general – as opposed to the postal acceptance – rule: and see generally *supra* n 65, at [97]–[100]. This also appears to be the predominant academic view as well: see *eg*, Sharon Christensen, "Formation of Contracts by Email – Is it Just the Same as the Post?" (2001) 1 Queensland University of Technology Law & Justice Journal 22 at 38; Jill Poole, Textbook on Contract Law (7th Ed, 2004) at pp 60–61; Simone WB Hill, "Flogging A Dead Horse – The Postal Acceptance Rule and Email" (2001) 17 JCL 151; and J K Winn & B Wright, Law of Electronic Commerce (4th ed, 2002) at para 5.03[C].

74 See *per* Rajah JC, *supra* n 65, at [138]. However, it should be noted that the learned judge did find "ample consideration" on the facts in any event: see *ibid*.

75 See *eg*, *supra* n 65, at [94], [96] and, especially, [104]–[105] as well as [109]–[113].

30 It is important, at this preliminary juncture, however, to reiterate that the learned judge paid very close attention to the *facts* of the case itself.[76] This may appear an obvious point but it is all too easy to lose sight of the fact that legal doctrines do not operate in a vacuum. More importantly, a nuanced and accurate laying out, as it were, of the factual matrix is imperative – particularly where legal doctrines centring on justice and fairness are concerned. And this is precisely what Rajah JC accomplished in the instant case: he emphasised the importance of the evidence as well as credibility of each of the plaintiffs (especially, in the latter instance, with respect to their claim that the thought that a mistake had occurred had never crossed their minds).[77] The general acumen of the plaintiffs also weighed heavily with the learned judge, as did the use of Internet search engines. And legal doctrine is also inextricably linked to reasonableness and common sense. Hence Rajah JC's reference to "[t]he stark gaping difference between the price posting and the market price of the laser printer [which] would have made it obvious to any objective person that something was seriously amiss".[78] All these facts were, as already alluded to, of course linked to the legal issues themselves – especially that of *constructive knowledge*. Indeed, an important issue Rajah JC dealt with centred on the twin criteria of fundamentality *and* knowledge. As the learned judge put it:[79]

> As the law now stands, mistakes that are not fundamental or which do not relate to an essential term do not vitiate consent. Mistakes that negative consent do not inexorably result in contracts being declared void. In some unusual circumstances where a unilateral mistake exists, the law can find a contract on terms intended by the mistaken party.

31 The second criterion – of *knowledge* – is of especial importance in so far as the doctrine of unilateral mistake is concerned, for, by its very nature, there can necessarily be a mistaken assumption on the part of only one of the parties to the contract (here, the defendant). The mistake must also be *known* to the other party (here, the plaintiffs). This is why the criterion of knowledge is so important. Where the non-mistaken

76 And see *supra* n 69.

77 See *supra* n 65, at [12].

78 *Ibid* at [143]. See also *ibid* at [145], where the learned judge observed (in a similar vein) thus:

> If the price of a product *is so absurdly low* in relation to its known market value, it stands to reason that a reasonable man would harbour a real suspicion that the price may not be correct or that there may be some troubling underlying basis for such a pricing. [emphasis in original]

79 *Supra* n 65, at [107].

party *actually knows* of the mistaken party's mistake, there is of course no problem. The more difficult issue that arises relates to the situation where the non-mistaken party did not have actual knowledge as such and whether, therefore, *constructive knowledge* would suffice. In other words, ought it to be sufficient that the non-mistaken party ought *reasonably to have known* of the other party's mistake, *having regard to the objective facts and context* of the case itself? Rajah JC delivered an affirmative response to the question just posed, endorsing the concept of constructive knowledge.[80] He also set out the *moral basis* for his view as to why knowledge, generally, of the mistake concerned disentitled the non-mistaken party from success in his claim:[81]

> It is not only reasonable but right that the objective appearance of a contract should not operate in favour of a party who is aware, in the eyes of the law, of the true state of affairs when, for instance, there is real misapprehension on the part of the mistaken party and when the actual reality of the situation is starkly obvious. There cannot be any legitimate expectation of enforcement on the party of the non-mistaken party seeking to take advantage of appearances.

32 However, the learned judge also emphasised the need for a sense of balance (particularly in so far as the maintenance of commercial certainty is concerned):[82]

> Having said that, this exception [relating to the doctrine of unilateral mistake] must always be prudently invoked and judiciously applied; the exiguous scope of this exception is necessary to give the commercial community confidence that commercial transactions will almost invariably be honoured when all the objective contractual indicia are satisfied. The very foundations of predictability, certainty and efficacy, underpinning contractual dealings, will be undermined if the law and/or equity expands the scope of the mistake exception with alacrity or uncertainty. The rigour in limiting this scope is also critical to protect third party rights that may have been acquired directly or indirectly. Certainty in commercial transactions should not be trifled with, as this will inevitably affect how commercial and business exchanges are respected and effected. The quintessential approach of the law is to *preserve* rather than to *undermine* contracts. Palm tree justice will only serve to inject uncertainty into the law. [emphasis in original]

80 And see *eg*, *supra* n 65, at [109]. See also *eg*, *Ho Seng Lee Construction Pte Ltd v Nian Chuan Construction Pte Ltd*, *supra* n 28, especially at [84].

81 *Supra* n 65, at [105].

82 *Ibid*.

33 What is significant is his rejection of the "cautious statement" in a leading *English* practitioners' text on the law of contract[83] with regard to the requirement of constructive knowledge. This is another illustration of the shift away from a blind adherence to English law, notwithstanding the fact that English law is the foundation of Singapore law.[84] Indeed, it is submitted that courts should always endeavour to adopt *the most just and principled* proposition(s), *regardless* of jurisdiction. It is further submitted that the learned judge's endorsement of constructive knowledge is both principled as well as fair: Where, as in the present decision, the non-mistaken party could not reasonably have believed – in the face of the clear facts and context concerned – that the other party had not made a mistake, it is only just and fair that they not be allowed to take advantage of that other party's mistake. It should also be noted that Rajah JC was also of the view that the plaintiffs had, in any event, *conceded* that constructive knowledge would suffice in their own written submissions.[85]

34 Other issues are also raised by the *Digilandmall* case. For example, whilst Rajah JC endorsed throughout the *rationale* of unconscionability, the learned judge would *not* endorse a *substantive doctrine* of unconscionability as such (citing the dangers of encouraging litigious behaviour as well as engendering uncertainty in the law).[86] I will, in fact, advance a case to the contrary below (when proffering the reasons for a substantive "umbrella doctrine" of unconscionability), and the reader is referred to that particular discussion.[87] It will suffice for the present to note that, in a situation where the doctrine of unilateral mistake can be invoked successfully, the very same situation could equally well be resolved via a substantive doctrine of unconscionability instead. In other words, the plaintiffs in the present case, knowing or (more accurately) having ought to have known that the defendant had clearly made a mistake and was in a disadvantageous situation, nevertheless took – with undue haste[88] – advantage of that mistake in an unconscionable manner. Hence, the Court ought to give relief to the defendant

83 *Viz*, *Chitty on Contracts* (Sweet & Maxwell 28th Ed, 1999) vol 1 at para 5-035: see *supra* n 65, at paras [108]–[109]. And see now the very recently published 29th Ed, (2004) vol 1, at para 5-064.

84 And see *supra* n 12.

85 *Supra* n 65, at [114].

86 See *eg*, *supra* n 65, at [120].

87 See the main text accompanying *infra* n 252 *ff*.

88 And *cf* Rajah JC's reference to the "snapping up" cases: see generally *supra* n 65, at [115]–[120] as well as [145] and [148].

accordingly. This constitutes, in effect, the clear application of a substantive doctrine of unconscionability.[89]

35 Another issue that was raised in the *Digilandmall* case was whether the common law and equitable jurisdictions in the law of mistake are compatible. In this regard, Rajah JC, although apparently leaning against the equitable jurisdiction, did not (in the final analysis) dismiss it out of hand. Certainly, I have sought to demonstrate that – in the context of *common* mistake – there are persuasive arguments to retain the equitable jurisdiction.[90] Retuning to the present decision, it would appear that the learned judge ultimately adopted a balanced approach that sought to draw the best from both the common law as well as the equitable jurisdictions.[91] Indeed, it is submitted that there is every reason to adopt an even more positive approach and even work towards an ultimate *merger* of the common law and equitable jurisdictions.[92] Further, as we have discussed earlier in the context of common mistake,[93] there is the related issue as to whether or not the best way forward – in so far as proposed *reform* is concerned – is via the *legislative* route instead: an approach that was apparently favoured by Rajah JC in the instant case.[94] In the meantime, however, it is submitted that it would be preferable to retain both the common law as well as equitable jurisdictions in so far as the law relating to unilateral mistake is concerned. Indeed, there is no real difference, in effect, between the elements that constitute both jurisdictions.[95] Hence, there is in fact no reason in principle why the two jurisdictions ought not to be *merged*. If this is perceived to be too radical a proposal for reform, then legislation along the lines just mentioned might be a more viable alternative.

89 See also A Phang, "Commercial Certainty, Mistake, Unconscionability and Implied Terms" (2002) 1 Journal of Obligations and Remedies 21.

90 See generally the discussion of the *Great Peace Shipping* case, *supra* n 17, in the main text accompanying *supra* n 17 *ff*.

91 See generally *supra* n 65, at [120]–[133]. *Cf* also *id* at [118] and [120].

92 See generally Phang, *supra* n 17. And for arguments with regard to a proposed merger of both jurisdictions in the context of *common* mistake, see Phang, *supra* n 35.

93 See the main text accompanying *supra* nn 37–38. And, in so far as possible reform with regard to mistaken identity is concerned, see the main text accompanying *supra* nn 55–61.

94 See *supra* n 65, at [130].

95 See also Paul M Perell, *The Fusion of Law and Equity* (Butterworths Canada Ltd, 1990) at pp 63–64. Though *cf* the approach of the defendant in the English High Court decision of *Clarion Ltd v National Provident Institution* [2000] 2 All ER 265 (noted by Phang, *supra* n 89).

36 Finally, another issue that was raised in the *Digilandmall* case was one that is, in fact, a perennial one and which is applicable to the whole law of mistake – put simply, can it be argued that there is no separate or independent doctrine of mistake and that all the courts are engaging in, in the final analysis, is an exercise in the *construction* of the contract concerned? It is submitted that it would be preferable, on balance, to retain the doctrine of mistake in its various forms. It is true that there is often an overlap – on occasion, a total coincidence – between and amongst mistake on the one hand and other doctrines (such as offer and acceptance) on the other. There is, however, still no small measure of ambiguity as well as generality in the concept of construction itself and it is therefore submitted that such a concept cannot serve as an adequate "umbrella doctrine". Further, the alternative doctrine of offer and acceptance does not necessarily apply across the board – especially where situations of common mistake are concerned[96] and/or where construction of the terms of the contract is a more appropriate device. There is, in any event, no harm in the courts having a more varied and flexible "legal armoury" in the form of the retention of the doctrine of mistake as well.

E. Rule against recovery under mistake of law abrogated

37 It used to be thought – under English law – that only payments made under a mistake of *fact* could be recovered. That rule has since been abrogated by the House of Lords decision of *Kleinwort Benson Ltd v Lincoln City Council*.[97] The Singapore position now follows the English position and *allows* recovery even with regard to payments made under a mistake of *law*. In particular, note should be taken of the Singapore Court of Appeal decision of *MCST No 473 v De Beers Jewellery Pte Ltd*.[98] Of particular interest is the fact that the court in this case, having accepted that the old rule (proscribing recovery of payments made under a mistake of law) should be changed, considered the *means* by which such change should be effected. Although the Law Reform Committee of the Singapore Academy of Law ("the SAL LRC") recommended (as did the

96 Where there is in fact an agreement but where the parties concerned are under a common misapprehension as to the subject matter of the contract itself.

97 [1999] 2 AC 349.

98 [2002] 2 SLR 1; affirming the decision of Judith Prakash J at first instance [2001] 4 SLR 90 (this Court of Appeal decision being noted by A Phang in "Contract Law" (2002) 3 SAL Ann Rev 122 at paras 9.53–9.60 and by Yeo Tiong Min in "Restitution" (2002) 3 SAL Ann Rev 345 at paras 19.2–19.47, and the first instance decision being noted by Phang in "Contract Law", *supra* n 28, at paras 9.48–9.49). *Cf* also the Singapore High Court decision of *Re PCChip Computer Manufacturer (S) Pte Ltd* [2001] 3 SLR 296.

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)[99]), the Court was of the view that a judicial abrogation of the rule would suffice.[100]

III. Misrepresentation

A. Introduction

38 There have, in fact, been several developments since my last essay,[101] and I can only touch on a few of the more major developments in the present piece[102] – not a few of which (as we shall see) deal with various aspects of *fraudulent* misrepresentation.

99 Available online at <www.http://lawnet.com.sg>.

100 For further discussion of the (Court of Appeal) decision (in particular, the other issues raised (such as whether or not a change in the law should be given retrospective effect, whether limitation periods should be introduced with regard to claims founded on a mistake of law and, if so, how long they should be, as well as possible defences)), see generally Phang, *supra* n 98 and Yeo, *supra* n 98.
Reference may also be made to the Singapore High Court decision of *Info-communications Development Authority of Singapore v Singapore Telecommunications Ltd (No 2)* [2002] 3 SLR 488 (noted Phang, *supra* n 98, at paras 9.61–9.66 and Yeo, *supra* n 98, at paras 19.48–19.66).

101 See generally Phang, *supra* n 1, at 15–33.

102 There are, of course, other relevant developments as well: see *eg*, the Singapore Court of Appeal decision of *Lim Bio Hiong Roger v City Developments Ltd* [2000] 1 SLR 289; affirming [1999] 4 SLR 451 (relating to the meaning of the expression "built-in area" in the context of the sale and purchase of real property, and discussed in A Phang, "Developments in the Law of Contract" in *Developments in Singapore Law Between 1996 and 2000* (Kenneth Tan Wee Kheng ed) (Sweet & Maxwell Asia, 2001), pp 299–385 at 354–356 as well as in "Contract Law" (2000) 1 SAL Ann Rev 95 at 109–111) and the Singapore High Court decision of *Lim Hun Ching v Lim Ah Choon* [2002] 4 SLR 315 (relating to the definition of "gross floor area", and noted in Phang, *supra* n 98 at para 9.50). Also, in the Singapore Court of Appeal decision of *Hong Pian Tee v Les Placements Germain Gauthier Inc* [2002] 2 SLR 81, Chao Hick Tin JA, delivering the judgment of the court, held (at [30]) that:

> [W]here 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.

Finally, in the Singapore High Court decision of *Trans-World (Aluminium) Ltd v Cornelder China (Singapore)* [2003] 3 SLR 501, Belinda Ang Saw Ean J observed – in so far as the Misrepresentation Act, *infra* n 111, was concerned – as follows (at [124]):

> A claim founded on the Misrepresentation Act … is an action in contract. The plaintiffs have not established the contract and the representation that induced them into contracting with the defendants. Accordingly, the claim under this Act fails.

39 On a general level, Rix J observed (quite correctly, in my view), in *Avon Insurance plc v Swire Fraser Ltd*,[103] that "[t]he law of misrepresentation has developed in fits and starts"[104] which has resulted in "piecemeal historical development".[105] Indeed, the learned judge also gave a succinct and valuable overview of the development of the law relating to misrepresentation in just two paragraphs.[106]

B. What constitutes a misrepresentation

40 The English Court of Appeal decision of *Spice Girls Ltd v Aprilia World Service BV*[107] adopted a *very broad* approach as to what might constitute a misrepresentation of fact, as follows:[108]

> Whilst it is necessary to give each episode separate consideration it is also necessary to have regard to their *cumulative effect*. This is not a case of an isolated representation made at an early stage of ongoing negotiations. It is the case of *a series of continuing representations made throughout two months' negotiations leading to the Agreement*. *Later* representations *gave added force* to the *earlier* ones; *earlier* representations *gave focus* to the *later* ones. [emphasis added]

C. Misrepresentation and entire agreement provisions

41 In the English High Court decision of *Inntrepreneur Pub Co (GL) v East Crown Ltd*,[109] Lightman J considered the effect of an entire agreement provision[110] on a claim in misrepresentation as well as its

Reference may also be made to the Singapore High Court decision of *Lim Hun Ching v Lim Ah Choon* [2002] 4 SLR 315, which concerned an instance of alleged misdescription by the vendor with regard to the gross floor area of the property sold (noted in Phang, *supra* n 98, at para 9.50).

103 [2000] 1 All ER (Comm) 573.

104 *Ibid* at [19].

105 *Id* at [20].

106 See *id* at [19]–[20].

107 [2002] EWCA Civ 15.

108 *Ibid* at [53].

109 [2000] 2 Lloyd's Rep 611.

110 Lightman J helpfully elaborated on entire agreement clauses or provisions as follows (see *ibid* at [7]):

> The purpose of an entire agreement clause is to preclude a party to a written agreement from threshing through the undergrowth and finding in the course of negotiations some (chance) remark or statement (often long forgotten or difficult to recall or explain) on which to found a claim such as the present to the existence of a collateral warranty. The entire agreement clause obviates the occasion for any such search and the peril to the contracting parties posed by the need which may arise in its absence to conduct such a search. For such a clause constitutes a binding agreement between the parties that the full

relationship to s 3 of the Misrepresentation Act,[111] and observed as follows:[112]

> An entire agreement provision *does not preclude a claim in misrepresentation, for the denial of contractual force to a statement cannot affect the status of the statement as a misrepresentation*. The same clause in an agreement may contain both an entire agreement provision and a further provision designed to exclude liability e.g. for misrepresentation or breach of duty. As an example cl. 14 in this case, after setting out in cl. 14.1 the entire agreement clause, in cl. 14.2 sets out to exclude liability for misrepresentation and breach of duty. Whether this latter provision is legally effective for this purpose may turn on the question of its reasonableness as required by s. 3 of the Misrepresentation Act, 1967.[113] But … s. 3 has no application to an entire agreement clause provision defining where the contractual terms between the parties are to be found[114] … It seems to me therefore that cl. 14.1 of the agreement provides in law a complete answer to any claim … based on the alleged collateral warranty. [emphasis added]

Reference may also be made to the (also) English High Court decision of *White v Bristol Rugby Ltd*.[115]

> contractual terms are to be found in the document containing the clause and not elsewhere, and that accordingly any promises or assurances made in the course of the negotiations (which in the absence of such a clause might have effect as a collateral warranty) shall have no contractual force, save in so far as they are reflected and given effect in that document. The operation of the clause is not to render evidence of the collateral warranty inadmissible in evidence … : it is to denude what would otherwise constitute a collateral warranty of legal effect.

111 Cap 390, 1994 Rev Ed. This is, of course, a reprint of the UK Misrepresentation Act 1967 (c 7) which is presently part of Singapore law by virtue of the Application of English Law Act (Cap 7A, 1994 Rev Ed).

112 See *supra* n 109, at [8].

113 This is of course a reference to the UK Misrepresentation Act, which is part of the corpus of Singapore law: see *supra* n 111. Section 3 of the Misrepresentation Act itself reads as follows:

> If a contract contains a term which would exclude or restrict —
>
> (*a*) any liability to which a party to a contract may be subject by reason of any misrepresentation made by him before the contract was made; or
>
> (*b*) any remedy available to another party to the contract by reason of such a misrepresentation,
>
> that term shall be of no effect except in so far as it satisfies the requirement of reasonableness as stated in section 11 (1) of the Unfair Contract Terms Act, and it is for those claiming that the term satisfies that requirement to show that it does.

The UK Unfair Contract Terms Act 1977 (c 50) is also part of the corpus of Singapore law by virtue of the Application of English Law Act (Cap 7A, 1994 Rev Ed), and is reprinted as Cap 396, 1994 Rev Ed.

114 Citing the English High Court decision of *McGrath v Shah* (1987) 57 P & CR 452.

115 [2002] IRLR 204.

D. The degree of proof for fraudulent misrepresentation

42 This particular issue relates to the *degree of proof required* to successfully found an action in fraudulent misrepresentation or deceit. Although it is clear that the degree of proof is high, the precise *content* itself is unclear – and this is due, in large part, to a difference between the Singapore and Malaysian positions.[116] I have argued elsewhere that there is no reason in principle why a higher standard of proof should not apply even if the fraud concerned has no connection whatsoever with a criminal offence as such – although the even higher (criminal) standard of proof going beyond a reasonable doubt could conceivably apply to situations where the fraud concerned is in fact *connected with* a *criminal* offence.[117] As I mentioned in an earlier essay, "[g]iven the various uncertainties, it is certainly hoped that a definitive position will be taken by the Singapore courts when they are next faced with this particular issue".[118]

E. Fraudulent misrepresentation and the measure of damages

43 In my earlier essay, it was seen that the measure of damages for fraudulent misrepresentation encompassed all loss flowing directly from the misrepresentation itself.[119] The recent English Court of Appeal decision of *Clef Aquitaine SARL v Laporte Materials (Barrow) Ltd*[120] raised

116 See generally Phang, "Developments in the Law of Contract", *supra* n 102, at 349–351. Briefly put, the Malaysian position appears to draw a distinction between criminal and civil cases (with proof beyond a reasonable doubt applying to the former and proof on a balance of probabilities applying to the latter), whilst the Singapore position adopts (regardless of whether the case is criminal or civil) a high standard of proof going beyond the civil standard of a balance of probabilities (and in this last-mentioned regard, see (for more recent decisions) *eg*, the Singapore High Court decisions of *Convergent Systems (S) Pte Ltd v Taiyotech (S) Pte Ltd* [2000] 2 SLR 512 at [12]; *Khoo Tian Hock v Oversea-Chinese Banking Corporation Limited* [2000] 4 SLR 673 at [37]; *Samwoh Resources Pte Ltd v Lee Ah Poh* [2003] SGHC 69 at [14]; *Vellasamy Lakshimi v Muthusamy Suppiah David* [2003] SGHC 75 at [15]; and *Trans-World (Aluminium) Ltd v Cornelder China (Singapore) Pte Ltd*, *supra* n 102, at [31]).

117 See generally Phang, *supra* n 116, at 350–351. See also the Malaysian Federal Court decision of *Ang Hiok Seng v Yim Yut Kiu* [1997] 2 MLJ 45; but *cf* the Malaysian High Court decision of *Eric Chan Thiam Soon v Sarawak Securities Sdn Bhd* [2000] 4 AMR 3784.

118 See Phang, *supra* n 116, at 351.

119 See Phang, *supra* n 1, at 19–22, considering the leading English House of Lords decision of *Smith New Court Securities Ltd v Citibank NA* [1997] AC 254. Reference may also be made to *Vita Health Laboratories Pte Ltd v Pang Seng Meng* [2004] 4 SLR 162, especially at [91]–[93].

120 [2001] QB 488. See also G H Treitel, *The Law of Contract* (Sweet & Maxwell, 11th Ed, 2003) at 361.

a very interesting related issue that is of great practical import as well – whether a plaintiff could claim damages for fraudulent misrepresentation despite having suffered no loss and, in fact, having made a profit (albeit less of a profit in entering into the transaction concerned in reliance on the fraudulent misrepresentation, compared to entering into a still more profitable one). The court held that the plaintiff could indeed claim damages in such a context. In this regard, Simon Brown LJ observed thus:[121]

> I have, in short, reached the conclusion that there is no absolute rule requiring the person deceived to prove that the actual transaction into which he was induced to enter was itself loss-making. (Indeed that concept itself is an uncertain one: is a business which survives only by dint of the proprietor limiting himself to subsistence wages loss-making or profitable?) It will sometimes be possible, as it was here, to prove instead that a different and more favourable transaction (either with the defendant or with some third party) would have been entered into but for the fraud, and to measure and recover the plaintiffs' loss on that basis.

44 Ward LJ also pertinently warned against the fallacy of taking "as the value of the product at the date of the transaction the sale price it achieved at a much later date".[122] The learned judge also distinguished the situation of the loss of a bargain in breach of warranty cases from the loss of bargain in a situation such as the present thus:[123]

> [T]he loss of the bargain contemplated in *breach of warranty cases* is the bargain to be made with *third parties* when selling on the goods *whereas* the bargain one might have made *if told the truth* is the *different* bargain which might have been struck with *the defendant*. [emphasis added]

45 Interestingly, Sedley LJ expressed the further view to the effect that, by ruling as it did, the court would achieve a result that was consistent with the justice of the case itself.[124]

F. Fraudulent misrepresentation and contributory negligence

46 The recent House of Lords decision of *Standard Chartered Bank v Pakistan National Shipping Corpn (Nos 2 and 4)*[125] held that the defendant

121 *Supra* n 120, at 500.
122 *Id* at 511.
123 *Id* at 513.
124 *Ibid*.
125 [2003] 1 AC 959.

could *not* apply for a reduction in damages under the UK Law Reform (Contributory Negligence) Act 1945 (c 28) in a successful action against it for *fraudulent* misrepresentation. Central to the decision of the House was the general rule (laid down most notably in *Edgington v Fitzmaurice*[126]) 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, therefore, 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. This decision would presumably apply in the Singapore context, not least because the Singapore Contributory Negligence and Personal Injuries Act[127] was modelled on the 1945 UK Act referred to above.

G. Fraudulent misrepresentation and public policy in the insurance context

47 For a recent House of Lords decision on fraudulent misrepresentation and public policy in the insurance context, reference may be made to the House of Lords decision of *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank*.[128] In this case, the House decided, *inter alia*, first, that it was (in the words of Lord Bingham of Cornhill) "clear that the law, on public policy grounds, does *not* permit *a contracting party* to exclude liability for *his own fraud* in inducing the making of the contract".[129]

48 *However*, the issue whether a contracting party could similarly exclude liability in relation to the fraud of its *agents* (here, its brokers) was *left open* by the House itself. Lord Bingham, for instance, "[did] not … think that the question need be finally resolved in this case",[130] although the learned law lord was of the view that, as a general principle, "if a party to a written contract seeks to exclude the ordinary consequences of fraudulent or dishonest misrepresentation or deceit by his *agent*, acting as such, inducing the making of the contract, such intention *must be*

126 (1885) 29 Ch D 459.
127 Cap 54, 2002 Rev Ed.
128 [2003] 2 Lloyd's Rep 61.
129 *Ibid* at [16] (emphasis added).
130 *Ibid*.

expressed in clear and unmistakable terms on the face of the contract".[131] And Lord Steyn in fact agreed with the reasoning of Lord Bingham as a whole.[132] Lord Hoffmann held that neither the case law nor the instant case concerned contracts, the language of which was held successfully to exclude liability for fraud either by the contracting party or its agent.[133] Lord Hobhouse of Woodborough was also of the view that the clause in question did not cover material fraud on the part of the agent; like Lord Bingham, the learned law lord was of the view that "express words" were necessary even if it were possible to cover such fraud.[134] However, the learned law lord did, in the final analysis, express the view to the effect that the contracting party could *not* take advantage of its agent's fraud.[135] Lord Scott of Foscote, on the other hand (who dissented), clearly thought that while a contracting party could not (as we have already seen) exclude liability for its own fraud, there was "no reason of public policy why parties should be unable by contract to exclude a right of rescission for misrepresentation by an agent, whether the misrepresentation be innocent, negligent or fraudulent".[136] The learned law lord proceeded to observe thus:[137]

> Public policy would, in my view, come into play only where the agent's principal knew of or was otherwise complicit in the fraud or where the agent was the alter ego of the principal, as an executive director may be of his company.

A little later on in his judgment, Lord Scott observed – in a similar vein – thus:[138]

> The proposition that fraud unravels all and vitiates all contracts and transactions … expresses not a rule of construction but the rule of public policy … And it begs the question "whose fraud?" If it is accepted that it is open to a contracting party by express language in a contract to exclude his responsibility for fraudulent misrepresentations or non-disclosures made without his authority or knowledge by an agent, then it must be accepted also that the "fraud unravels all" proposition does not necessarily apply where the fraud is that of an agent. And if responsibility for the fraud of an agent can be contractually excluded by

131 *Ibid* (emphasis added).
132 *Id* at [24].
133 *Id* at [69].
134 *Id* at [97].
135 *Id* at [98].
136 *Id* at [122].
137 *Ibid*.
138 *Id* at [125].

> express language, then in principle it must be possible for the same result to be reached as a matter of construction of general language in a contract. Accordingly, the issue in the present case, in my opinion, is whether, as a matter of construction, the general words in [the phrases concerned] should be given the all-inclusive width of their natural meaning or should be construed so as not to cover fraud or dishonesty.

In the event, the learned law lord held that the phrases in question could, in principle, exclude the contracting party's liability for the fraud of its agents.[139]

49 The general issue as to whether or not a principal can exclude its liability for the fraud of its agent is thus still open, although Justice K R Handley,[140] in a powerful note on the instant case, argued that a principal ought *not* to be allowed to exclude its liability in such a fact situation.[141]

H. The measure of damages under s 2(1) of the Misrepresentation Act

50 The principle laid down in the English Court of Appeal decision of *Royscot Trust Ltd v Rogerson*[142] to the effect that the measure of damages under s 2(1) of the Misrepresentation Act[143] is assessed on the *fraud basis*, whilst heavily criticised,[144] appears to remain the law in the English context: see, for example, *Avon Insurance plc v Swire Fraser Ltd*,[145] although it should be borne in mind that, as a decision at first instance, the learned judge, Rix J, had no choice but to follow the decision in the *Royscot Trust* case by virtue of the doctrine of binding precedent.[146] However, what is interesting – from a *practical perspective* – was Rix J's observation that, given that damages are awarded upon the fraud basis, "it ought in my view to follow that, where there is room for an exercise of judgment, a misrepresentation *should not be too easily found*".[147]

139 *Id* at [126].
140 A judge of the Court of Appeal of New South Wales.
141 See K R Handley, "Exclusion Clauses for Fraud" (2003) 119 LQR 537.
142 [1991] 3 All ER 294 ("the *Royscot Trust* case").
143 See *supra* n 111.
144 And see generally Phang, *supra* n 1, at 23–27.
145 *Supra* n 103.
146 Interestingly, although the defendants accepted that they were bound by the decision in the *Royscot Trust* case, they reserved the right to argue the contrary in a higher court: see *ibid* at [6]. Unfortunately, this opportunity did not, apparently, arise.
147 *Id* at [200] (emphasis added).

I. Section 2(2) of the misrepresentation Act – Whether there is a right to damages when the right to rescission has been barred

51 Section 2(2) of the Misrepresentation Act[148] allows damages to be awarded in lieu of rescission even in a situation relating to a wholly innocent misrepresentation,[149] and reads as follows:[150]

> Where a person has entered into a contract after a misrepresentation has been made to him *otherwise than fraudulently*, *and* he would be *entitled, by reason of the misrepresentation, to rescind* the contract, then, if it is claimed, in any proceedings arising out of the contract, that the contract *ought to be or has been rescinded*, the court or arbitrator *may* declare the contract subsisting *and* award *damages in lieu of rescission, if of opinion* that it would be *equitable* to do so, *having regard to the nature of the misrepresentation and the loss that would be caused by it if the contract were upheld, as well as to the loss that rescission would cause to the other party*.

52 The issue I am presently concerned with[151] is embodied within the heading to this particular subsection: Can, in other words, the plaintiff be entitled to invoke s 2(2) and claim damages in lieu of rescission, *even though his or her right to rescission has been barred*?[152] In my earlier essay, I argued that the plaintiff ought *not*, on balance, to be so entitled.[153] By way of an update, this view has recently been *confirmed* by English High Court decision of *Government of Zanzibar v British Aerospace (Lancaster House) Ltd*,[154] where Judge Raymond Jack QC declined to follow the contrary view expressed by Jacob J in *Thomas Witter Ltd v TBP Industries Ltd*.[155] Much of the learned judge's excellent

148 See *supra* n 111.

149 However, by its terms (see the note following), s 2(2) does *not* apply to a situation of *fraudulent* misrepresentation.

150 Emphasis added.

151 For a related – and no less important – issue with regard to the *measure of damages* awardable under s 2(2) of the Misrepresentation Act, see Phang, *supra* n 1, at 28–30.

152 The various bars to rescission for misrepresentation include affirmation, delay and the intervention of third party rights. And see generally Phang, *supra* n 12 at 477–482.

153 See Phang, *supra* n 1, at 30–33.

154 [2000] 1 WLR 2333; noted, Janet O'Sullivan, "Remedies for Misrepresentation: Up in the Air Again [2001] CLJ 239 and Dandy Malet, "Section 2(2) of the Misrepresentation Act 1967" (2001) 117 LQR 524.

155 [1996] 2 All ER 573.

reasoning[156] repays careful reasoning and analysis.[157] Reference may also be made to the (also) English High Court decision of *Floods of Queensferry Limited v Shand Construction Limited*.[158] In this last-mentioned case, Judge Humphrey Lloyd QC was of the view not only that s 2(2) was not ambiguous,[159] but also observed as follows:[160]

> In my view, if rescission is to continue to bear its traditional meaning and to serve its purpose, a court surely could not declare as subsisting a contract which had been affirmed since the time when it was or might have been rescinded or in respect of which there was some other similar bar to rescission. Although performance as such is no longer a bar to rescission it is very difficult to see how rescission can be ordered if it is not possible to put the party in as good a position as it was before the contract was made. The Misrepresentation Act only removed some of the grounds which have long precluded a party obtaining rescission. It should not be read as doing more than it provided. There are plainly unsatisfactory consequences, whichever is the right construction of section 2(2), but I do not consider it possible or right to give it a wider meaning than its words plainly bear.

J. Of misrepresentation and clubs

53 One case that garnered much media attention in the local context was what is now popularly referred to as "the Raffles Town Club case". Indeed, at the time of writing, the case – settled as to issues of liability – is still ongoing in so far as the assessment of damages is concerned. In so far as liability is concerned, the Singapore Court of Appeal, in *Tan Chin Seng v Raffles Town Club Pte Ltd (No 2)*,[161] held that a term would be implied to the effect that "the Club [concerned] would be a premier club, with first

156 See, especially, *supra* n 154, at 2341–2344. In particular, the learned judge was of the view that the specific reference to the relevant Parliamentary proceedings "may not be absolutely clear" and that, in any event, being "an extempore answer given a little after 3 o'clock in the morning", he questioned "how much weight should be given to it where it does not accord with other statements" (see *id* at 2343). Judge Raymond Jack QC also referred, in fact, to another speech in Parliament (which suggested the contrary) by Lord Gardiner LC, when introducing the Bill in the House of Lords (*ibid*).

157 And is also consistent with the present writer's arguments proffered in an earlier essay: see *supra* n 153.

158 [2000] BLR 81.

159 *Ibid* at [28].

160 *Id* at [29].

161 [2003] 3 SLR 307; reversing [2002] SGHC 278 (but not with regard to the issues relating to misrepresentation). The decision is noted in A Phang, "Contract Law", (2003) 4 SAL Ann Rev 127 at paras 9.34, 9.51, 9.71, 9.94 and 9.108, whilst the decision at first instance is noted in Phang, *supra* n 98, at para 9.48.

class facilities and that the discretion vested in [the defendant] by the Rules [of the Club] would always be exercised in a manner consistent with the maintenance of the Club as a premier club".[162] It held, further, that this (implied) term had in fact been *breached*.[163]

54 *However*, the court held that, in so far as the issue of misrepresentation was concerned, there was no liability since there had been no actionable misrepresentation to begin with. Not surprisingly, therefore, it also held that s 2(1) of the Misrepresentation Act was not applicable on the facts of the case itself.[164]

55 In arriving at its decision on the issue of misrepresentation, the court touched on a number of related issues.

56 First, the court held that the statements in the promotional materials issued by the defendant did not constitute representations of fact. In this regard, Chao Hick Tin JA, who delivered the judgment of the court, began by observing that:[165]

> A representation is a statement which relates to a matter of fact, which may be a past or present fact. But a statement as to a man's intention, or as to his own state of mind, is no less a statement of fact and a misstatement of the state of a man's mind is a misrepresentation of fact: *per* Bowen LJ in *Edgington v Fitzmaurice* (1885) 29 Ch D 459 at 483.

The learned judge then proceeded to observe, in a practical vein, thus:[166]

> Of course, it will be difficult to prove what was the state of a person's mind at any particular point in time. Nevertheless, that is a matter of proof and it should not be confused with the substantive principles of law.

57 In the present case, Chao JA expressed the view of the court to the effect that the statements made by the defendant pertained, instead, to "matters as to the *future*".[167] Indeed, the "need to differentiate between actionable misrepresentation and future promise" was emphasised

162 *Ibid* at [37].
163 *Id* at [55].
164 And see *infra* n 174.
165 See *supra* n 161, at [12].
166 *Id* at [14].
167 *Id* at [17] (emphasis added).

again.[168] Further, the plaintiffs had *not* alleged that the defendant had, in making the relevant statements, "no honest belief in them or had no intention to fulfil them"[169] (indeed, it was also clear that no fraud as such had been alleged against the defendant[170]). The learned judge observed that "[t]he crux of the [plaintiffs'] complaint is that [the defendant] had admitted too many people, almost 19,000, as founder members", which had (according to the plaintiffs) "caused a squeeze on the facilities which were available to members and the Club could no longer be considered to be an 'exclusive' or 'premier' club offering first class facilities".[171] However, this was, in Chao JA's view, relevant more to the issue of breach,[172] as opposed to misrepresentation.

58 Secondly, the court also considered the plaintiff's claim under s 2(1) of the Misrepresentation Act.[173] In rejecting the plaintiff's claim, Chao JA very helpfully elaborated on the scope and nature of the provision itself, as follows:[174]

> We think there is a misconception [by the plaintiffs] on the scope and effect of s 2(1). That provision does not alter the law as to what is a representation. This can be seen from its opening words, "[w]here a person has entered into a contract after a misrepresentation has been made to him by another party thereto and as a result thereof he has suffered loss". The change effected by that subsection is that it enables a party who suffers loss on account of a non-fraudulent misrepresentation to claim for damages which he would not be entitled to do under the then existing law; for such a misrepresentation, rescission was the only remedy. However, the subsection allows the representee to claim damages for any non-fraudulent misrepresentation, subject to the proviso that the representor need not pay damages if he could prove that he had reasonable grounds to believe, and did believe, up to the time the contract was made, that the facts represented were true.
>
> Thus s 2(1) only alters the law as to the reliefs to be granted for a non-fraudulent misrepresentation but not as to what constitutes an actionable misrepresentation.

168 *Id* at [21], citing Phang, *Cheshire, Fifoot and Furmston's Law of Contract*, *supra* n 12, at pp 444–445.
169 *Id* at [19].
170 *Id* at [11].
171 *Id* at [19].
172 And see the main text accompanying *supra* nn 161–163.
173 See also *supra* n 164.
174 See *supra* n 161, at [22]–[23].

IV. Economic duress

59 One central difficulty (not, by any means, peculiar to the doctrine of economic duress alone) has been that of *line-drawing*: In particular, how does one distinguish between mere commercial pressure (which is legitimate and which therefore does not constitute economic duress) on the one hand and illegitimate pressure (which *does* constitute economic duress) on the other?[175] In one sense, this is not something new as the law generally requires courts to draw the line constantly as they exercise their discretion to achieve justice in the case at hand.[176] It is nevertheless true that such line-drawing is not easy – particularly in the context of *application*.[177]

60 In so far as the issue of *causation* is concerned, the English High Court decision of *Huyton SA v Peter Cremer GmbH & Co*[178] should be noted. The learned judge, Mance J, dealt with a number of related issues. However, the most significant is the holding to the effect that the

175 See generally A Phang, "Whither Economic Duress? Reflections on Two Recent Cases" (1990) 53 MLR 107 and, by the same writer, "Economic Duress – Uncertainty Confirmed" (1992) 5 JCL 147. Both pieces were referred to by Giles J in the New South Wales Supreme Court decision of *Equiticorp Financial Services Ltd (NSW) v Equiticorp Financial Services Ltd (NZ)* (1992) 29 NSWLR 260 at 297 and (on appeal) by Kirby P (as he then was) in *Equiticorp Finance Ltd v Bank of New Zealand* (1993) 32 NSWLR 50 at 107, and by Hunter J in the New South Wales Supreme Court decision of *Cox v Esanda Finance* [2000] NSWSC 502 at [146] (citing the views of Kirby P, *supra*). Reference may also be made to A Phang, "Economic Duress: Recent Difficulties and Possible Alternatives" [1997] RLR 53.

176 And on possible difficulties with regard to (in the main) subjectivity and relativity, see the main text accompanying *infra* n 464 *ff*.

177 And see generally the pieces cited at *supra* n 175. The various factors for practical application, on the other hand, do appear relatively straightforward and may be found in the Hong Kong Privy Council decision of *Pao On v Lau Yiu Long* [1980] AC 614 at 635–636, where the following factors were laid down, as follows:

(a) whether the party coerced had an alternative course of action open to him or her (*eg*, an adequate legal remedy);
(b) whether the party coerced protested;
(c) whether the coerced party had independent advice; and
(d) whether after entering the contract the coerced party took steps to avoid it.

The Board also drew a distinction (referred to at *supra* n 100) between "mere commercial pressure" on the one hand (which would not constitute economic duress) and "illegitimate pressure" on the other (which would) – and which, as I have already indicated in the main text, constitutes the central difficulty of line-drawing in the context of the doctrine of economic duress itself.

There is a specific theoretical problem as well (as embodied in the conflict between the "overborne will" doctrine on the one hand and the "illegitimate pressure" doctrine on the other), which problem has now been settled by the case law: see generally Phang, *supra* n 1, at 34–35, and the literature cited therein.

178 [1999] 1 Lloyd's Rep 620.

economic duress concerned must *not* merely be (as was once thought[179]) *a* reason for the coerced party entering the contract. The learned judge observed, in this regard, thus:[180]

> The minimum basic test of subjective causation in economic duress ought, it appears to me, to be a "but for" test. The illegitimate pressure must have been such as actually caused the making of the agreement, in the sense that it would not otherwise have been made either at all or, at least, in the terms in which it was made. In that sense, the pressure must have been decisive or clinching.

This approach brings, in fact, the law relating to causation in economic duress in line with that in relation to undue influence.[181] Indeed, there is much to be said for the adoption of such an approach and it is submitted that Mance J was entirely correct in pointing out that the prior precedent[182] adopted a much broader test because that case involved an extreme situation where a threat of serious (even fatal) physical injury to the person concerned was involved.[183]

61 On a more specific level, there have, in fact, been a few cases on the local front in recent years. One, that of the Singapore High Court in *Sharon Global Solutions Pte Ltd v LG International (Singapore) Pte Ltd*,[184] has been noted in some detail in the literature.[185] I will therefore only raise a few of what I consider to be the more salient points that arise from the case itself (where it was held that there was both sufficient consideration as well as an absence of economic duress).

62 First, the defendant had in fact pleaded two defences: that the agreement it had entered into with the plaintiffs was unenforceable because of economic duress *and* that the agreement was not, in any event, supported by consideration. One notes the close linkage between the

179 See the Australian Privy Council decision of *Barton v Armstrong* [1976] AC 104.
180 *Supra* n 178 at 636.
181 See the English Court of Appeal decision of *Bank of Credit and Commerce International SA v Aboody* [1990] 1 QB 923 at 970 (overruled by the House of Lords in *CIBC Mortgages Plc v Pitt* [1994] 1 AC 200, but not on this particular point).
182 *Ie*, *Barton v Armstrong*, *supra* n 179.
183 See *supra* n 178, at 638.
184 [2001] 3 SLR 368.
185 See *eg*, Pearlie Koh, "Economic Duress and a Drop of Fairness – A Singapore Perspective" [2003] JBL 572; Daniel Tan, "Grounds of Economic Duress – Further Clarification or Further Confusion?" [2001] SJLS 268; and Phang, *supra* n 28, at paras 9.54–9.65.

doctrine of consideration on the one hand and that of economic duress on the other.[186]

63 Secondly, the learned judge, Kan Ting Chiu J, adopted a holistic approach, examining the material facts from the *perspectives* of both the plaintiff *and* the defendant.[187]

64 Thirdly, and in a related vein, the learned judge's meticulous consideration as well as analysis of the facts illustrate how especially important the facts are when doctrines of this nature are concerned. It also illustrates a point made right at the outset of the present Part to the effect that it is often very difficult to distinguish between mere commercial pressure on the one hand and illegitimate pressure on the other. Indeed, the present writer has ventured to suggest that, on another view of the facts, the court might indeed have come at least, possibly, to the opposite conclusion.[188]

65 Finally, Kan J held that "as the difficulties the parties encountered arose from the plaintiff's inaptitude in making a proper provision for the freight costs and in securing the vessel, [he] awarded the plaintiff half the costs of the actions".[189] Admittedly, this is, literally speaking, a wholly different issue but it does, it is suggested, illustrate the flexibility available to the court to balance the interests of the parties so as to achieve a measure of justice and fairness in a balanced fashion *vis-à-vis* the case at hand.[190]

66 More recently, two related Singapore High Court decisions raised the issue of duress in the context of the compromise of actions for defamation, and which have been briefly noted elsewhere.[191] One of the general propositions affirmed – to the effect that a threat to enforce one's *legal* rights does not amount to duress, at least where it is made in good

186 And see Phang, "Whither Economic Duress? Reflections on Two Recent Cases", *supra* n 175, at 115–116.

187 See Phang, *supra* n 185, at paras 9.59–9.61.

188 See *id* at para 9.63.

189 See *supra* n 184, at 378–379.

190 And on the broader topic of justice and fairness, see Part VIII of the main text below entitled "On Justice and Fairness".

191 See *Lee Kuan Yew v Chee Soon Juan* [2003] 3 SLR 8 and *Goh Chok Tong v Chee Soon Juan* [2003] 3 SLR 32. And see generally Phang, *supra* n 161, at para 9.74, from which I do draw for the brief analysis which follows.

faith and is not manifestly frivolous or vexatious[192] – is consistent with the prevailing English law.[193]

67 Secondly, the learned judge, MPH Rubin J, did appear to leave open the point as to whether or not "the state of mind of the parties is a relevant consideration in determining whether duress exists".[194] "Recent authority" appeared to indicate that the state of mind of the parties was relevant and that, hence, the issue of *mala fides* would be relevant. On the other hand, such an approach appears to conflict with the proposition, mentioned briefly above, to the effect that (as counsel for the plaintiff argued) a threat to enforce one's legal rights via legal proceedings could not amount to duress. However, on the facts of the instant case, the court did not have to address this potential conflict as the defendant's "belated submission was wholly tendentious and appeared to have been introduced in vain to overcome the deficiencies in his purported defence".[195] What is interesting, however, is the learned judge's reference to plaintiff's counsel's argument that a threat to enforce one's legal rights by way of legal proceedings *could* constitute duress if "it was used as an instrument to extort money from others",[196] thus suggesting that there could be a point (especially in egregious cases) when the threat of a lawful act could nevertheless constitute duress.[197]

68 Finally, and looking beyond the shores of Singapore, the New Zealand Privy Council decision of *Attorney-General of England and Wales v R*[198] may also be briefly noted. Once again, there is a demonstration – in the actual sphere of the application of the law to the facts of the case – of the great difficulty facing the court concerned in distinguishing between legitimate and illegitimate pressure. I have dealt with this – and other points[199] arising from the case itself – in a joint comment elsewhere, and the interested reader is referred to that particular piece for further elaboration and analysis.[200]

192 See *Lee Kuan Yew v Chee Soon Juan*, *supra* n 191, at [42].
193 See the English Court of Appeal decision of *CTN Cash and Carry Ltd v Gallaher Ltd* [1994] 4 All ER 714; noted by Phang, *supra* n 175.
194 See *Lee Kuan Yew v Chee Soon Juan supra* n 191, at [45].
195 *Ibid*.
196 *Ibid*.
197 And see generally Phang, "Economic Duress: Recent Difficulties and Possible Alternatives", *supra* n 175.
198 [2004] 2 NZLR 577; noted by A Phang & H Tjio, "Drawing Lines in the Sand? Duress, Undue Influence and Unconscionability Revisited" [2003] RLR 110.
199 *Eg*, those relating to undue influence and unconscionability.
200 See generally Phang & Tjio, *supra* n 198, especially at 112–114 in so far as the doctrine of duress is concerned.

V. Undue influence, the *Etridge* case, and a few local cases

A. Introduction

69 The leading decision in recent years must surely be that of the House of Lords in *Royal Bank of Scotland v Etridge (No 2)*.[201] The case itself involved a consolidated appeal relating to eight decisions. The judgments in *Etridge* itself are both long and complex and it is not always easy, with respect, to ascertain what the judges concerned intended.

70 At this preliminary juncture, however, it might be appropriate to set out, in the briefest of fashions, the basic legal backdrop in order that the significance of *Etridge* itself might be appreciated even better. Simply put, the traditional categories of undue influence comprise *actual* (or Class 1) undue influence on the one hand and *presumed* (or Class 2) undue influence on the other. The latter category of Class 2 undue influence is divided into two further sub-categories, Class 2A and Class 2B undue influence, respectively. In so far as Class 2A undue influence is concerned, undue influence is presumed by virtue of established relationships.[202] In so far as Class 2B undue influence is concerned, a presumption of undue influence arises only upon *proof by* the party pleading the doctrine that there existed *facts that justified* such a presumption arising.

B. The elements of undue influence Class 1 – The evidential nature of presumed undue influence

71 In *Etridge* itself, Lord Nicholls of Birkenhead emphasised the *evidential* nature of presumed (or Class 2) undue influence, which is dependent on proof both that the plaintif had placed trust and confidence in the defendant and that the transaction itself was one that called for an explanation. What was involved was "a rebuttable evidential

201 *Supra* n 5 ("*Etridge*"). And see A Phang & H Tjio, "The Uncertain Boundaries of Undue Influence" [2002] LMCLQ 231, upon which much of the analysis which follows is based. Reference may also be made to the House of Lords decision of *National Westminster Bank Plc v Amin* [2002] UKHL 9. For other decisions subsequent to that in *Etridge*, see *eg*, *McGregor v Michael Taylor & Co* [2002] 2 Lloyd's Rep 468; *Hammond v Osborn* [2002] EWCA Civ 885; *The Times*, 18 July 2002 (noted P Birks, (2004) 120 LQR 34 at 36–37 and Karen Scott, "Taking the 'Undue' out of Presumed Undue Influence" [2003] LMCLQ 145); and *UCB Corporate Services Ltd v Williams* [2002] EWCA Civ 555.

202 Such as parent-child and solicitor-client.

presumption of undue influence",[203] where the legal or persuasive (as opposed to the evidential) burden remained with the plaintiff throughout.[204] It should, however, be noted that the learned law lord did point out that the plaintiff could nevertheless succeed despite the absence of such a presumption – presumably because, in such a situation, the plaintiff would have proved *actual* (or Class 1) undue influence on the part of the defendant. As I have pointed out in a joint article with regard to the implications of such an approach:[205]

> It is submitted that such an approach in fact *blurs the lines between Class 1 and Class 2 undue influence* inasmuch as it is a distinction not of kind but rather of mode of proof; however, the [plaintiff] bears the burden of proof throughout, which burden might be alleviated by the rebuttable evidential presumption that may arise on the facts of the particular case itself. It is further submitted, however, that, where *Class 2B* undue influence is concerned, *there may be no distinction even from an evidential perspective: the proof of facts that raise an evidential presumption would simultaneously constitute the proof of actual undue influence*; to put it another way, it may be plausibly argued that, where such proof is forthcoming, it would *necessarily*[206] furnish the [plaintiff] with the advantage of the *evidential*[207] presumption *in any event*,[208] and that there would therefore be *no substantive distinction*[209] as such between Class 1 and Class 2B undue influence.

72 It is true that the proof mentioned in the above quotation may fall short of actually establishing actual undue influence. Such proof, however, is certainly an integral part of the overall successful invocation of the doctrine of undue influence itself.

73 It should also be noted that the argument above to the effect that the line between Class 1 and Class 2 undue influence has been blurred is further buttressed by the related argument to the effect that the requirement of *manifest disadvantage* for Class 2 undue influence underscores the similarity – even coincidence – between both these categories of undue influence. Indeed, Lord Clyde was even more explicit

203 *Supra* n 5, at [16] and [17].
204 And see generally C Tapper, *Cross and Tapper on Evidence* (Butterworths, 9th Ed, 1999) at p 122.
205 See Phang & Tjio, *supra* n 201, at 232–233 (emphasis added, except where otherwise indicated).
206 Emphasis here in the original text.
207 Emphasis here in the original text.
208 Emphasis here in the original text.
209 Emphasis here in the original text.

and thought that the division between Class 1 and Class 2 undue influence appeared "illogical"; the learned law lord further disputed the distinction between Class 2A and Class 2B undue influence.[210]

74 The evidential perspective adopted by Lord Nicholls in *Etridge* was endorsed by Lord Scott of Foscote, who also (significantly, in my view) was of the view that the category of Class 2*B* undue influence "was not a useful forensic tool".[211]

75 The result in *Etridge* appears to be this: that *the death knell has been sounded for Class 2B undue influence*, although it is perhaps unfortunate that the House did not articulate the justification for such an approach by explicit reference to the relationship between Class 2B and Class 1 undue influence. On a related note, it is also unfortunate that Class 2*A* undue influence continues to be endorsed since the *source and justification* for this particular category remains unclear.[212]

C. The elements of undue influence Class 2 – The requirement of manifest disadvantage

76 The requirement of manifest disadvantage was *abolished* in so far as *actual* (or Class 1) undue influence was concerned in the House of Lords decision of *CIBC Mortgages Plc v Pitt*.[213] It has, however, been retained in so far as *presumed* (or Class 2) undue influence is concerned. And the House, in *Etridge*, refused to abolish this concept, despite the many criticisms that have hitherto been levelled against it.[214] Instead, it sought to clarify the function of manifest disadvantage in the context of presumed undue influence. However, it would nevertheless appear that this requirement presently has a much reduced – and merely evidential – role to play. In a joint article on *Etridge*, it was pointed out that:[215]

210 In his words, "[a]ll these classifications to my mind add mystery rather than illumination": see *supra* n 5, at [92].

211 *Supra* n 5, at [107]. Indeed, the learned law lord doubted the utility of this particular category of undue influence, which he perceived as "doing no more than recognising that evidence of the relationship between the dominant and subservient parties, coupled with whatever other evidence is for the time being available, may be sufficient to justify a finding of undue influence on the balance of probabilities", with the onus shifting to the defendant: see *id* at [161].

212 As to which, see A Phang, "Undue Influence Methodology, Sources and Linkages" [1995] JBL 552 at 564–565.

213 *Supra* n 181.

214 See *eg*, David Tiplady, "The Limits of Undue Influence" (1985) 48 MLR 579 and Malcolm Cope, "Undue Influence and Alleged Manifestly Disadvantageous Transactions: *National Westminster Bank plc v Morgan*" (1986) 60 ALJ 87.

215 See Phang & Tjio, *supra* n 201, at 234 (emphasis in the original text).

> The House, in essence, viewed manifest disadvantage as performing a *sifting* function; in particular, it viewed manifest disadvantage as being the catalyst for the operation of the presumption of undue influence. … [I]n other words, the presence of manifest disadvantage would enable the courts to ascertain whether the given relationship should trigger the evidential presumption of undue influence.

77 It is submitted, with respect, that this continued retention of the requirement of manifest disadvantage is unfortunate. In the first place, the role now allocated to the requirement of manifest disadvantage has (as we have just seen) been reduced to that of a catalyst for the evidential presumption. The evidential presumption, however, is (as we have also just seen) itself "of limited application and, in any event, serves only to blur the lines between Class 1 and Class 2B undue influence".[216]

78 Secondly, it has also been argued that:[217]

> [T]he establishment of manifest disadvantage would serve to blur the lines between Class 1 and Class 2B undue influence even *further*. If the [plaintiff] proves facts establishing manifest disadvantage to him or her, does this not simultaneously aid in establishing actual (or Class 1) undue influence in any event?[218] Perhaps more to the point, given the views of the House on the operation of the presumption under Class 2B undue influence, one might not even have to go as far: the establishment of manifest disadvantage aids in triggering the presumptions that, in turn, aid in establishing undue influence. Looked at in this light, the entire process of proof is *coincident* with that which is adopted *vis-à-vis* the establishment of *Class 1* undue influence. If so, wherein lies the difference between Class 1 and Class 2B undue influence? It is true that manifest disadvantage would also perform a sifting function with regard to Class 2A undue influence. It is, however, submitted that the points just made would apply with equal force to this particular category as well and hence support the argument (already made) that there is only, in effect, one category of undue influence, in the final analysis. [emphasis in original]

79 Thirdly, it has already been noted that the House of Lords had *abolished* the requirement of manifest disadvantage with respect to *Class 1* undue influence.[219] In this regard, it has been argued that:[220]

216 See *ibid*.
217 See *id* at 235.
218 And citing here Phang, *supra* n 212.
219 See *supra* n 213.
220 See Phang & Tjio, *supra* n 201, at 235.

> If … manifest disadvantage is viewed as a merely evidential requirement, its abolition with regard to Class 1 undue influence would appear to suggest its abolition with regard to Class 2 undue influence as well: the more so as we have already argued[221] that there is no real distinction between Class 1 and Class 2B undue influence and, perhaps, even with respect to Class 2A undue influence.

80 Could one counter the argument in the above quotation by arguing, instead, that manifest disadvantage is a *substantive* requirement with regard to Class 1 undue influence but only an *evidential or procedural* one with regard to Class 2 undue influence? It is submitted that such an argument would be rather unpersuasive. First, the House in *Etridge* did not draw a distinction as such between substantive and procedural aspects of the requirement of manifest disadvantage. In any event, we have seen earlier in the present essay that the distinction between substance and procedure is rather artificial.[222]

81 Fourthly, one might also usefully note the acknowledgment by the English Court of Appeal in *Barclays Bank Plc v Coleman*[223] to the effect that the reliance by the House of Lords in *National Westminster Bank Plc v Morgan*[224] on the Indian Privy Council decision of *Poosathurai v Kannapa Chettiar*[225] in formulating and justifying the requirement of manifest disadvantage may have been less than fortunate, simply because the latter decision was decided on the basis of s 16 of the Indian Contract Act 1872, where the requirement of manifest disadvantage was clearly spelt out. This argument was, in fact, one of the major themes by the present writer in an article already referred to earlier.[226] It remains to be observed that the House, in *Etridge*, did not (unfortunately) refer to this particular argument at all.

82 Fifthly, and most importantly perhaps, the *Singapore* situation is *quite different* – manifest disadvantage *no longer appears* to be required, and this took place as far back as the previous related essay by the present writer some seven years ago.[227] I will not repeat what I had written then, save to state that there is an observation by Lim Teong Qwee JC in

221 And see *supra* n 205.
222 See *supra* n 10.
223 [2001] QB 20.
224 [1985] AC 686.
225 (1919) LR 47 Ind App 1.
226 See Phang, *supra* n 212, at 558–563 as well as, by the same writer, *supra* n 1, at 42–44.
227 See generally Phang, *supra* n 1, at 45–46.

Kushvinder Singh Chopra v Mooka Pillai Rajagopal[228] that suggests that manifest disadvantage is no longer required with respect to both actual *and* presumed undue influence.[229] However, the actual *reasoning* in the observation may not, with respect, be wholly convincing,[230] although there are, as alluded to above, sufficiently persuasive reasons that suggest that the requirement of manifest disadvantage ought to be abolished even with regard to presumed undue influence as well.[231]

D. Undue influence and constructive notice

83 The issue in this particular regard relates to the circumstances under which a third party would be adversely affected by a contracting party's exercise of undue influence or other vitiating factor[232] (*ie*, become "infected" by the contracting party's wrong actions) over the other contracting party. One set of circumstances relates to that of *agency* (*ie*, where the third party has appointed the wrongdoer as an agent) and which is thought to be relatively rare. The other set of circumstances pertains to the third party having had *notice* of the wrongdoing,[233] and it is with regards to this particular issue that the House in *Etridge* made some helpful observations as well.[234]

84 Before proceeding to consider briefly these observations, however, it might be appropriate to recall that the guidelines that should be considered when a third-party creditor (here, a bank) is put on inquiry when a wife offers to stand surety for her husband's debts, were first laid down by Lord Browne-Wilkinson in the seminal House of Lords decision of *Barclays Bank Plc v O'Brien*,[235] as follows:[236]

228 See [1996] 2 SLR 379 at 399; reversed in *Mooka Pillai Rajagopal v Kushvinder Singh Chopra* [1996] 3 SLR 457, but not on this particular point.

229 *Cf*, though, the recent Singapore High Court decision of *Standard Chartered Bank v Uniden Systems (S) Pte Ltd* [2003] 2 SLR 385 at [60].

230 See Phang, *supra* n 1, at 45–46.

231 Having, as we have seen, already been abolished with regard to actual undue influence, as to which see *supra* n 213.

232 *Eg*, misrepresentation.

233 In the words of Lord Browne-Wilkinson in the House of Lords decision of *Barclays Bank Plc v O'Brien infra* n 235, at 195, "[t]he doctrine of notice lies at the heart of equity".

234 And see generally Phang & Tjio, *supra* n 201, at 236–241.

235 [1994] 1 AC 180. And in the learned law lord's view, "a creditor is put on inquiry when a wife offers to stand surety for her husband's debts by the combination of two factors: (a) the transaction is on its face not to the financial advantage of the wife; and (b) there is a substantial risk in transactions of that kind that, in procuring the wife to act as surety, the husband has committed a legal or equitable wrong that entitles the wife to set aside the transaction": see *ibid* at 196.

> Normally the reasonable steps necessary … consist of making inquiry of the person who may have the earlier right (i.e. the wife) to see whether such right is asserted. It is plainly impossible to require of banks and other financial institutions that they should inquire of one spouse whether he or she has been unduly influenced or misled by the other. But in my judgment the creditor, in order to avoid being fixed with constructive notice, can reasonably be expected to take steps to bring home to the wife the risk she is running by standing as surety and to advise her to take independent advice. As to past transactions, it will depend on the facts of each case whether the steps taken by the creditor satisfy this test. However for the future in my judgment a creditor will have satisfied these requirements if it insists that the wife attend a private meeting (in the absence of the husband) with a representative of the creditor at which she is told of the extent of her liability as surety, warned of the risk she is running and urged to take independent legal advice. … I should make it clear that I have been considering the ordinary case where the creditor knows only that the wife is to stand surety for her husband's debts. I would not exclude exceptional cases where a creditor has knowledge of further facts which render the presence of undue influence not only possible but probable. In such cases, the creditor to be safe will have to insist that the wife is separately advised.

85 The *Etridge* case attempts to furnish more guidance. Lord Nicholls elaborated on Lord Browne-Wilkinson's guidelines in *Barclays Bank v O'Brien*,[237] in so far as the steps a bank should take when it has been put on inquiry and is looking (for its protection) to the fact that the wife has received independent advice from a solicitor, as follows.[238] Firstly, the bank must check directly with the surety the name of the solicitor she wishes to act for her, and to explain to the surety the conclusive effect of the solicitor's certificate. The concern of the bank here is with the quality of legal advice, including its independence, which she will receive. Secondly, recognising that banks are often unwilling to warn the surety of the financial risks directly, Lord Nicholls required banks to provide such information to the solicitor advising the surety. This would include information about the principal debtor's borrowings and current overdraft facility. Thirdly, where a bank has cause to believe that the surety is labouring under some undue influence or misrepresentation

236 *Id* at 196–197.

237 *Supra* n 235.

238 The following summary is taken from [79] of the judgment (*supra* n 5). And for a discussion of the case law between *O'Brien* and *Etridge*, see A Phang, "Undue Influence" in A Phang (gen ed), *Halsbury's Laws of Singapore – Contract*, vol 7 (Butterworths Asia, 2000) at paras 80.241–80.243.

exercised by the debtor, it has to inform the solicitor of its suspicions. Finally, the bank has to obtain the solicitor's written confirmation, which is also the only prescribed requirement for transactions that pre-dated the *Etridge* case.

86 In so far as the *solicitor's advice to the surety is concerned*, Lord Nicholls set out the "core minimum" that has to be disclosed in a series of four propositions.[239]

239 See *supra* n 5, at [65], as follows:

> (1) He will need to explain the nature of the documents and the practical consequences these will have for the wife if she signs them. She could lose her home if her husband's business does not prosper. Her home may be her only substantial asset, as well as the family's home. She could be made bankrupt. (2) He will need to point out the seriousness of the risks involved. The wife should be told the purpose of the proposed new facility, the amount and principal terms of the new facility, and that the bank might increase the amount of the facility, or change its terms, or grant a new facility, without reference to her. She should be told the amount of her liability under her guarantee. The solicitor should discuss the wife's financial means, including her understanding of the value of the property being charged. The solicitor should discuss whether the wife or her husband has any other assets out of which repayment could be made if the husband's business should fail. These matters are relevant to the seriousness of the risks involved. (3) The solicitor will need to state clearly that the wife has a choice. The decision is hers and hers alone. Explanation of the choice facing the wife will call for some discussion of the present financial position, including the amount of the husband's present indebtedness, and the amount of his current overdraft facility. (4) The solicitor should check whether the wife wishes to proceed. She should be asked whether she is content that the solicitor should write to the bank confirming he has explained to her the nature of the documents and the practical implications they may have for her, or whether, for instance, she would prefer him to negotiate with the bank on the terms of the transaction. Matters for negotiation could include the sequence in which the various securities will be called upon or a specific or lower limit to her liabilities. The solicitor should not give any confirmation to the bank without the wife's authority.

And Lord Scott of Foscote observed (*id* at [169]) thus:

> Normally, however, a solicitor, instructed to act for a surety wife in connection with a suretyship transaction would owe a duty to the wife to explain to her the nature and effect of the document or documents she was to sign. Exactly what the explanation should consist of would obviously depend in each case on the facts of that case and on any particular concerns that the wife might have communicated to the solicitor. In general, however, the solicitor should, in my opinion: (i) explain to the wife, on a worst case footing, the steps the bank might take to enforce its security; (ii) make sure the wife understands the extent of the liabilities that may come to be secured under the security; (iii) explain the likely duration of the security; (iv) ascertain whether the wife is aware of any existing indebtedness that will, if she grants the security, be secured under it; (v) explain to the wife that he may need to give the bank a written confirmation that he has advised her about the nature and effect of the proposed transaction and obtain her consent to his doing so.

E. A few local cases

87 In addition to a significant local decision already covered above,[240] recent years have witnessed a few local decisions which I have dealt with briefly elsewhere.[241] Only a couple of points will be highlighted here.

88 The first is that there are a few pronouncements in the local case law[242] which support the argument, made below, to the effect that there are *close linkages* amongst the doctrines of economic duress, undue influence and unconscionability and that, in the circumstances, all three doctrines should be brought under an "umbrella doctrine" of unconscionability.[243]

89 The second relates to the very recent Singapore High Court decision of *The Bank of East Asia Ltd v Mody Sonal M*.[244] This case involved an action by the plaintiff bank against three family members with respect to a joint and several guarantee given by the latter to the former to secure overdraft facilities extended by the plaintiff's Singapore branch to a company in which the defendants were directors. The first and third defendants were, respectively, the daughter and wife of the second defendant and were also shareholders in the company. One of the issues that arose was whether or not the guarantee was procured from the first and third defendants by the undue influence of the second defendant and, if so, whether the plaintiff bank should be fixed with constructive notice of such undue influence. On this issue, Andrew Ang JC (as he then was) *distinguished* both *Barclays Bank Plc v O'Brien*[245] and the *Etridge* case,[246] holding that the plaintiff bank was not put on inquiry and hence could not be fixed with constructive notice for not having taken steps to satisfy itself that the guarantee in question had been properly obtained in so far as the first and third defendants were concerned. In particular, the learned judge pointed, first, to the fact that both the aforementioned defendants were *shareholders* in the company, noting, in fact, that the second defendant held no shares in the company itself. Secondly, Ang JC

240 See *supra* n 228.
241 See generally Phang, "Contract Law", *supra* n 102, at 111–112; and, by the same writer, *supra* n 28, at paras 9.66–9.73; *supra* n 98, at paras 9.69–9.70; and *supra* n 161, at paras 9.76–9.77.
242 See *eg*, *Pelican Engineering Pte Ltd v Lim Wee Chuan* [2001] 1 SLR 105 at 112 and *Wong Ser Wan v Ng Cheong Ling* [2002] SGDC 93 (noted at Phang, *supra* n 28, at paras 9.66–9.71 and Phang, *supra* n 98, at para 9.60, respectively).
243 See generally the main text accompanying *infra* n 252 *ff*.
244 [2004] 4 SLR 113.
245 *Supra* n 235.
246 *Supra* n 5.

also observed that the guarantees given by the first and third defendants "were given as directors of the Company";[247] the learned judge further elaborated thus:[248]

> Contrary to their [the first and third defendants'] assertions that they had nothing to gain but everything to lose, they, as shareholders of the Company, of course stood to gain if the Company were to use the facilities to advantage.

In any event, Ang JC held that, on the facts of the present case, there had been neither actual nor presumed undue influence exercised by the second defendant *vis-à-vis* the first and third defendants.[249] Neither had there been any evidence of duress.[250]

VI. Unconscionability[251]

90 The present writer has consistently advocated that the doctrines of economic duress, undue influence and unconscionability be subsumed under an "umbrella doctrine" of unconscionability – not least because of the many linkages amongst these various doctrines themselves.[252] Unfortunately, however, English contract law (and, not surprisingly, Singapore contract law) has continued to resist what would be a salutary simplification of the law in this area – having regard (in particular) to the natural linkages that already exist amongst economic duress, undue influence and unconscionability.[253] One major concern has been the

247 See *supra* n 244, at [11].
248 *Ibid*.
249 See generally *id* at [12]–[20].
250 *Id* at [21]. Interestingly, the pleading of both undue influence as well as duress is not unusual to this decision alone and, whilst by no means conclusive, supports the general argument with respect to linkages between both these doctrines as well as with the doctrine of unconscionability – a point I pursue in a little more detail below: see the main text accompanying *infra* n 252 *ff*.
251 And see generally A Phang, "Unconscionability" in Phang (gen ed), *supra* n 238, at paras 80.247–80.251 (which also includes a discussion of the local position: see *id* at para 80.250).
252 See *eg*, Phang, *supra* n 212, and, by the same writer, *supra* n 1, at 60–63. See also, more recently, Phang & Tjio, *supra* n 198, especially at 117–120. It should be added that this was also one of the themes of my earlier essay on vitiating factors in contract law (see the second citation in my present note). However, it is sufficiently important to merit reconsideration. It should also be noted that there have been, as we shall see, new case law and theoretical developments as well as arguments.
253 See generally Phang, *supra* n 212.

danger of releasing the "floodgates of discretion".[254] In point of fact, however, courts generally have no choice (save in the rarest of instances) but to exercise discretion. Even where the rule or principle of law concerned is ostensibly settled, the court in question would invariably have to exercise some discretion when applying that rule or principle to the facts of the case itself. In other words, in virtually every case, the exercise of discretion is a necessary and integral part of the entire process. The real issue, it is submitted, is (rather) whether such discretion is constrained, and is logical as well as consistent with our intuitive sense of justice. This, in turn, presupposes that absolute values are indeed embodied within the entire enterprise of law itself. In this regard, the chief obstacle appears to be that of relativity or subjectivity – an important topic to which I will return later.[255] It will suffice for the moment to reiterate the fact that if the problem of relativity or subjectivity is accepted, then such a problem would infuse itself within the warp and woof of the very fabric of the law itself. At this point, it becomes no longer simply a difficulty that afflicts, as it were, vitiating factors in contract law, but (rather) is one that threatens the very legitimacy of the law itself – for if the law is merely an instrument by which subjective whims are effected, its very *raison d'être* would have been wholly undermined and the enterprise of law itself correspondingly discredited.

91 The specific issue, therefore, for our present purposes is whether or not the embrace of an "umbrella doctrine" of unconscionability would be inferior to that which presently exists, *viz*, a system comprising three separate doctrines (of economic duress, undue influence and a very limited doctrine of unconscionability). It is submitted that the proposed "umbrella doctrine" would not be inferior and, indeed, would be preferable in so far as it would simplify the law which has now been gradually fused together (albeit unintentionally) into a bit of a tangle.[256] Further, the guidelines within the existing doctrines of economic duress, undue influence and unconscionability would furnish both lawyers and the courts alike with excellent points of departure. Indeed, the deep

254 See *eg*, most recently (albeit in the context of unilateral mistake) *per* Rajah JC in the *Digilandmall* case, considered in some detail above (as to which, see the main text accompanying *supra* n 65 *ff*): see *supra* n 86.

255 See the main text accompanying *infra* n 464 *ff*.

256 This stems, in part at least, from the very nature of the common law process itself, although the common law system itself has, as Prof Milsom correctly points out, developed in a strikingly systematic fashion, notwithstanding the apparent absence of a clear blueprint as such: see generally S F C Milsom, "Reason in the Development of the Common Law" (1965) 81 LQR 496.

similarity on many fronts amongst these doctrines[257] would – not surprisingly – entail a substantial overlap amongst these various guidelines in the first instance.

92 It should also be noted that even the more limited concept of unconscionability which presently exists within English law (covering, principally, expectant heirs and improvident transactions) is not – on closer analysis – as limited as it purports to be. First, the categories (in particular, the latter, involving improvident transactions) are themselves susceptible of natural "expansion" into a full-blown and all-encompassing doctrine of unconscionability. Second, and as a closely related point, the first argument just made is in fact supported by the broad language that one can locate within the more recent English case law.[258] Indeed, in isolated (and, not surprisingly perhaps, egregious) instances, the actual approach and tenor of the court concerned is wholly consistent with a substantive doctrine of unconscionability.[259]

93 The closest "'rival", as it were, to an "umbrella doctrine" of unconscionability is the doctrine of good faith. However, as I have argued

257 And see generally *supra* nn 252 and 253.

258 See *eg*, Phang, *supra* n 238 at para 80.249, and the authorities cited therein. But *cf* *Irvani v Irvani* [2000] 1 Lloyd's Rep 412 at 424, where Buxton LJ, who delivered the judgment of the English Court of Appeal, observed that although the doctrines of undue influence and unconscionablity "have some similarities", "[u]ndue influence is concerned with the prior relationship between the contracting parties, and with whether that was the motivation or reason for which the bargain was entered into" whereas "[u]nconscionable bargain is, as its title suggests, concerned with the nature and circumstances of the bargain itself, and can arise without there being any relationship, outside that of the immediate contract, between the parties". It is submitted, with respect, however, that unconscionable bargains are also concerned with the formation of the contract concerned rather than with the fairness of the terms themselves. Indeed, it was precisely such a preoccupation that led Prof Atiyah to point to the artificiality of such an approach (which attempts to distinguish sharply between procedural and substantive fairness) in his famous essay: see Atiyah, *supra* n 10). One cannot also ignore the very close linkages between these doctrines, as well as the linkages with the doctrine of economic duress as well (as to which see generally Phang, "Undue Influence Methodology, Sources and Linkages", *supra* n 212).

259 See *eg*, *Credit Lyonnais Bank Nederland NV v Burch* [1997] 1 All ER 144, noted H Tjio, "*O'Brien* and Unconscionability" (1997) 113 LQR 10; Richard Hooley & Janet O'Sullivan, "Undue Influence and Unconscionable Bargains" [1997] LMCLQ 17; and Mindy Chen-Wishart, "The *O'Brien* Principle and Substantive Unfairness" [1997] CLJ 60.

elsewhere, the doctrine of good faith is still a fledgling one.[260] More importantly, its precise structure is still the subject of no small amount of controversy and debate.[261] One might conceivably argue that a substantive doctrine of unconscionability falls prey to the same critique. However, it is submitted that, given the *close linkages* amongst economic duress, undue influence and unconscionability (a point already emphasised[262]), a substantive "umbrella doctrine" of unconscionability is, in substance and effect, less radical than the rival doctrine of good faith. All this, it is submitted, is also germane to the "floodgates" critique considered above with regard to unconscionability. Given the nature and structure of good faith – and its differences from unconscionability, as just briefly considered – this particular critique is likely to be more persuasive in the case of the former compared to the latter.

94 However, despite all the arguments that have been made, it is admitted that the prognosis for an "umbrella doctrine" of unconscionability is not particularly good. This is due not only to the more conservative approach by the English courts briefly noted above but also because there may be signs of a "retreat" in the Australian context where a broader doctrine of unconscionability has otherwise traditionally been fairly dominant.[263] In the recent Australian High Court decision of *Tanwar Enterprises Pty Ltd v Cauchi*,[264] for example, members of the court emphasised the importance of not endorsing a wholly abstract concept of unconscionability.[265] However, it is submitted, with respect, that an independent and substantive doctrine of unconscionability is by no means unrealistic and that the dangers of both abstraction and

260 See Phang, *supra* n 8, at 186–188 (and the literature cited therein). And for the distinction between good faith in the making of the contract on the one hand and good faith in the performance of the contract, see *eg*, the House of Lords decision of *Manifest Shipping Co Ltd v Uni-Polaris Shipping Co Ltd* [2001] 1 All ER (Comm) 193 at [50], [52], [57] and [102].

261 See Phang, *supra* n 8, at 186–188.

262 See *supra* nn 252 and 253.

263 The leading decisions of the Australian High Court include the oft-cited cases of *The Commonwealth Bank of Australia Limited v Amadio* (1983) 151 CLR 447; *Louth v Diprose* (1992) 175 CLR 621; as well as the more recent (also) High Court decision of *Bridgewater v Leahy* (1998) 158 ALR 66 – all of which illustrate the traditional strength of the doctrine in the Australian context.

264 (2003) 201 ALR 359 (which pertained to relief against forfeiture, and which has been noted by G J Tolhurst & J W Carter, "Relief Against Forfeiture in the High Court of Australia" (2004) 20 JCL 74).

265 See *eg*, *per* Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ, *ibid* at [20] *ff*, and *per* Kirby J at [83] *ff*. Indeed, Kirby J was, like Rajah JC (see *supra* n 86), especially concerned with the dangers of uncertainty – especially in the context of commercial transactions and real property (see *ibid* at [83]).

uncertainty have been overstated. Indeed, I have already dealt briefly with the danger of uncertainty above[266] and will return (in somewhat more detail) to the issue of subjectivity or relativity below.[267]

95 But hope may not have been altogether lost. The Canadian courts still appear quite supportive of the doctrine.[268] On the level of analysis and general principle (particularly in so far as linkages are concerned), the arguments are, as I have sought to demonstrate, extremely persuasive. Indeed, as we have seen, a substantive "umbrella doctrine" of unconscionability has uses beyond even the already broad areas of economic duress and undue influence – its linkages with the doctrine of unilateral mistake being another instance.[269] It is hoped that the Singapore courts will seriously consider adopting a bolder approach that will, it is submitted, lead the way across the Commonwealth and even the world. It is not inappropriate, in my view, to point out (at this juncture) that the small size of Singapore is no impediment whatsoever when it comes to matters of the law – in particular, the development of the law (which is very much dependent on the quality of the *mind*). Although not everyone may agree that the mind is infinite (and I am one of them), it is nevertheless a powerful instrument which – together with the imagination – can take us very much further than things that are bounded by material constraints (such as land area). Blazing the trail globally in principled legal development is therefore not something that is necessarily some "pie in the sky" but is, rather, achievable – if only in relatively smaller steps in the first instance.[270]

266 See the main text accompanying *supra* nn 254–255.

267 See Part VIII of the main text below entitled "On Justice and Fairness".

268 A point that was emphasised by Rajah JC (albeit in the context of unilateral mistake) in the *Digilandmall* case (see *supra* n 65, at [119]; though *cf* the learned judge's views, *id* at [120]). Reference may also be made to the recent New Zealand Privy Council decision of *Attorney-General of England and Wales v R*, *supra* n 198, and noted by Phang & Tjio, *supra* n 198.
And for a very brief reference to the current Malaysian position, see (2002) 3 SAL Ann Rev 122 at paras 9.72–9.73.

269 See the main text accompanying *supra* nn 86–89.

270 Interestingly, in the Singapore context, the doctrine of unconscionability has in fact been accepted in a more limited context – as an established exception in the context of performance bonds: and see generally Phang, "Contract Law", *supra* n 102 at 112; and, by the same writer, *supra* n 28, at para 9.74; *supra* n 98, at para 9.71; and *supra* n 161, at para 9.79.

VII. Illegality and public policy

A. Introduction

96 This is probably one of the most difficult areas in the common law of contract.[271] This is due, in no small part, both to the fluid (and often ambiguous) nature of public policy[272] as well as to the difficulty (in the context of statutory illegality) of ascertaining the intention of the Legislature.[273] In addition to the relevant case law which has emerged in recent years, very significant conceptual difficulties remain. We will deal with issues arising from both these broad categories briefly, wherever relevant; the main thrust will, however, be – for ease of exposition – upon topical lines.

97 It has to be pointed out, however, that because of the intractability of many of the issues (particularly at the conceptual level), there has been (unfortunately) little progress since my last essay almost seven years ago.[274] The law – in particular, the case law – has not, however, stood still. Further, many of the issues, because of their importance, bear revisiting in their own right – if nothing else than in the hope that by keeping them in mind, we will endeavour to suggest solutions wherever possible.

B. Formation vs performance

98 I have attempted to argue that although the distinction between contracts illegal as formed and contracts illegal as performed is relatively well established,[275] this distinction should be discarded because it is unhelpful – both on conceptual as well as practical levels.[276]

271 For an important decision dealing with the issue of conflict of laws, see the Singapore Court of Appeal decision of *Peh Teck Quee v Bayerische Landesbank Girozentrale* [2000] 1 SLR 148 (noted by A Phang, "Contract Law", *supra* n 102, at 113–114).

272 And see generally A Phang, "Illegality and Public Policy" in ch 5 of M P Furmston (gen ed), *Butterworths Common Law Series – The Law of Contract* (2nd Ed, 2003) at para 5.1.

273 In this last-mentioned respect, it is of course true that difficulties arising from statutory interpretation are not peculiar to illegality and public policy alone; they are, nonetheless, very real and (on occasion at least) quite perplexing.

274 See Phang, *supra* n 1.

275 *Cf eg*, the recent Singapore High Court decision of *Irawan Darsono v Ong Soon Kiat* [2002] 4 SLR 84 at [14].

276 And see generally Phang, *supra* n 272, at paras 5.27–5.31.

99 Certainly, situations of *express* prohibition necessarily fall within the category of contracts illegal as *formed*, as it is clear that the statute concerned prohibits, by virtue of its plain language, the very formation of the contract itself.

100 In so far as situations of *implied* prohibition are concerned, I have argued that everything, in the final analysis, also ultimately coalesces back under the rubric of *formation* and that, therefore, the distinction between contracts illegal as formed as contracts illegal as performed is apt to generate more confusion than clarity.[277] And as I have argued elsewhere, "[t]he *crux* of each inquiry is … not with respect to the illegal performance as such but, rather, [with] whether or not the *contract* is intended (by the legislature) to be adversely affected".[278]

101 Although there has been no clarification thus far, it is hoped that the courts would clarify the situation when an appropriate case arises. The law relating to (especially, statutory) illegality is already in a complex state and it is all to the good for it to be clarified wherever possible.

C. A new formulation?

102 Although the traditional classifications have been, first, between statutory and common law illegality and, second, between express and implied prohibition, there has been one problematic (and additional) formulation that has engendered possible confusion. This further formulation was by Kerr LJ in the English Court of Appeal decision of *Phoenix General Insurance Co of Greece SA v Halvanon Insurance Co Ltd*,[279] where the learned judge made the following observations:[280]

> (i) Where a statute prohibits *both* parties from concluding or performing a contract when both or either of them have no authority to do so, the contract is *impliedly* prohibited: see *In re Mahmoud and Ispahani*[281] … and its analysis by Pearce L.J. in *Archbolds (Freightage) Ltd. v. S. Spanglett Ltd.*[282] … with which Devlin L.J. agreed. (ii) But

277 See Phang, *supra* n 276, and, by the same writer, *supra* n 1, at 65–66. See also the leading English decision of *St John Shipping Corporation v Joseph Rank Ltd* [1957] 1 QB 267, especially at 284, *per* Devlin J (as he then was).

278 See Phang, *supra* n 1, at 66 (emphasis in the original text; and also referring to Devlin J (as he then was) in *St John Shipping Corporation v Joseph Rank Ltd*, *supra* n 277, at 287).

279 [1988] QB 216 ("the *Phoenix General Insurance* case").

280 *Ibid* at 273.

281 *In re an Arbitration between Mahmond and Ispahani* [1921] 2 KB 716.

282 [1961] 1 QB 374.

> where a statute merely prohibits *one* party from entering into a contract without authority, and/or imposes a penalty on him if he does so (i.e. a *unilateral* prohibition) it *does not follow* that the *contract* itself is *impliedly* prohibited so as to render it illegal and void. Whether or not the statute has this effect depends upon considerations of public policy in the light of the mischief which the statute is designed to prevent, its language, scope and purpose, the consequences for the innocent party, and any other relevant considerations. [emphasis added]

103 I have, in fact, dealt with the ramifications and (in particular) the difficulties generated by the above observations in more detail elsewhere,[283] although it should be noted that these observations by Kerr LJ were, in any event, themselves *obiter dicta*.[284] It will suffice for our present purposes to note that the distinction drawn in the above quotation between a unilateral prohibition on the one hand and a bilateral prohibition (of the *parties*[285]) on the other is difficult to correlate with the traditional distinctions referred to at the outset of this Section – in particular, that drawn between express prohibition and implied prohibition of *contracts*.[286] More specifically, there is *no* reference to an *express* prohibition which would, in any event, *not* require the ascertainment of the relevant legislative intention since such intention is clear on the face of the language of the statute (or provision thereof itself). Indeed, for this very reason, *and despite* the reference to the concept of implied prohibition in (i) of Kerr LJ's speech above, it seems very much that proposition (i) above is, in effect, coterminous with the concept of an *express* prohibition. If so, however, then the situation referred to in (ii) above must logically apply to a situation of *implied* prohibition. Unfortunately, though, such a correlation is *inconsistent* with the *literal language* to be found in (ii) above. Nevertheless, it is submitted that correlating (i) above to the category of express prohibition under the traditional classification and (ii) above to the category of implied prohibition (again, under the traditional classification) makes the best sense from a substantive point of view (notwithstanding the problem in reconciling such a submission with the literal language utilised).

104 However, even if the explanation or correlation proffered in the preceding paragraph is accepted, difficulties remain. More specifically, it

283 See Phang, *supra* n 272, at paras 5.20 and 5.23, and, by the same writer, *supra* n 1, at 67–69.

284 Because the court in fact held that there had been no contravention of the statute concerned to begin with.

285 This is an important point, as we shall see in the discussion below.

286 And see the preceding note.

is submitted that the focus in so far as the nature of the prohibition is concerned ought to be on *the intention of the Legislature* with regard to *the contract itself* – and *not* on the *parties* as such. Indeed, there is *no necessary linkage* between the nature of the contractual prohibition and *who are the parties prohibited*. It is, for example, entirely possible for a statute to *expressly* prohibit a contract *without* directing the prohibition at *both* parties; by the same token, it is possible for a statute to *impliedly* prohibit a contract *even though* the prohibition is directed at *both* parties. As I have argued elsewhere, "[w]hether or not the actual language of the statute is directed at one or both *parties* really relates to the *mechanics and details* of the prohibition itself which *may or may not* impact on the *nature of the prohibition* (ie, whether express or implied) on the *contract*".[287]

105 The approach proffered in the present Section appears to have the support of the English Court of Appeal in *P & B (Run-Off) Ltd v Woolley*.[288] Although the court in this case cited the principles laid down by Kerr LJ in the *Phoenix General Insurance* case above,[289] it nevertheless applied, as the touchstone, the construction of the intention of the statute (or subsidiary legislation) concerned as being all-important (here, the contravention of a Lloyd's byelaw was held not to result in civil consequences lest the very objective of Lloyd's itself be defeated). Such an approach is, of course, entirely consistent with the present writer's views just made above.

D. Gaming and wagering contracts

106 This particular area of the law has witnessed a great many developments in both England[290] as well as locally. This is perhaps not surprising in view of the even greater increase in the popularity of gaming and wagering and the fact that many persons are now also gambling in foreign jurisdictions as well.[291] The topic of gaming and wagering – at least in so far as casinos are concerned – is a very controversial topic in Singapore at the moment. A review of some of the

287 See Phang, *supra* n 272, at para 5.20 (emphasis in the original text).
288 [2002] 1 All ER (Comm) 577; affirming [2001] 1 All ER (Comm) 1120 (Lord Phillips of Worth Matravers MR delivering the judgment of the Court of Appeal).
289 See *supra* n 280.
290 See Phang, *supra* n 272, especially at paras 5.55–5.56.
291 The topic of gaming and wagering is, in fact, the topic of much scrutiny and reform at the moment. In so far as the UK is concerned, for example, see Phang, *supra* n 290.

recent developments might therefore not be inappropriate in order to provide a brief sketch of the existing legal backdrop.

107 A very strict approach has hitherto been adopted with regard to gaming and wagering contracts which fall within the purview of what is now s 5 of the Civil Law Act.[292] However, it has been well established that a *loan* for gaming or wagering that is *valid* by the law of the place where the loan was made is recoverable.[293] As we shall see, the *characterisation* of the transaction concerned then becomes of the first importance.

108 What has also been helpful has been the clarification – by the local courts – of the precise ambit and scope of s 5 of the Civil Law Act itself. In this regard, the important Singapore Court of Appeal decision of *Star City Pty Ltd v Tan Hong Woon*[294] ought to be noted. First, the court held that s 5(2) of the Civil Law Act[295] was *procedural* – as opposed to substantive – in nature, and hence applied to *all* transactions as the law of the forum. The legal status of the transaction under foreign law was, to this extent, immaterial and the impact of s 5(2) could not be avoided by attempted contracting out of the provision by the parties themselves.[296] The court also helpfully observed that:[297]

> [I]n 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.

109 Indeed, applying the principle embodied in the above quotation to s 5(2) of the Civil Law Act, the court held that the "crucial words in s 5(2) are 'no action shall be brought'".[298] It also held that "the bulk of

292 Cap 43, 1999 Rev Ed. And see *eg*, *Quek Chiau Beng v Phua Swee Pah Jimmy* [2001] 1 SLR 762 (noted by Phang, "Contract Law", *supra* n 102, at 114).

293 See *eg*, the Singapore decision of *Las Vegas Hilton Corp v Khoo Teng Hock Sunny* [1997] 1 SLR 341.

294 [2002] 2 SLR 22 ("the *Star City* case") (noted by Phang, *supra* n 98, at paras 9.79–9.81, and upon which the analysis which follows is based). This decision affirmed that of Tan Lee Meng J at first instance: see *Star City Pty Ltd v Tan Hong Woon* [2001] 3 SLR 206 (noted by Phang, *supra* n 102, at paras 9.78–9.83).

295 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.

296 See *supra* n 294, at [29].

297 See *id* at [12].

298 *Ibid*.

authority is that s 5(2) of the Civil Law Act is procedural".[299] The court therefore concluded that:[300]

> 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".

110 Secondly, and as already alluded to above, the *characterisation* of the transaction is also extremely important. 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,[301] 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".[302] We see here the triumph of substance over form.[303]

111 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".[304] 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".[305] 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,[306] what was nevertheless "objectionable is *courts being used by*

299 *Id* at [13].
300 *Id* at [14].
301 See the main text accompanying *supra* n 293.
302 See *supra* n 294 at [36].
303 See also *id* at [29], [33] and [38]. It is also interesting to note that the court observed (*id* 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]".
304 See *supra* n 294, at [27].
305 See *id* at [28].
306 *Id* at [30].

casinos to enforce gambling debts disguised in the 'form' of loans".[307] Yong Pung How CJ, delivering the judgment of the court, proceeded to add thus:[308]

> 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 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 … once 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*.

112 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".[309] Yong CJ added that:[310]

> 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.

113 In the very recent (also) Singapore Court of Appeal decision of *Liao Eng Kiat v Burswood Nominees Ltd*,[311] however, the actual *factual matrix* was somewhat *different*. In this case, as in the *Star City* case,[312] the

307 *Id* at [31] (emphasis added).
308 *Ibid*.
309 *Id* at [32].
310 See *ibid*.
311 [2004] 4 SLR 690; affirming [2004] 2 SLR 436 (but not with regard to the characterisation of the transaction as such).
312 *Supra* n 294.

court characterised the transaction concerned as not involving a genuine loan as such.[313] *However*, there was (as already mentioned) a difference between the facts of the present decision and those in the *Star City* case: this particular decision involved the attempted *enforcement of a foreign judgment* pursuant to the Reciprocal Enforcement of Commonwealth Judgments Act ("RECJA").[314] The respondent casino operated a licensed casino in Perth, Western Australia and had obtained judgment against the appellant (on a dishonoured cheque) in the District Court of Western Australia. The respondent then successfully applied for registration of the Australian judgment in the Singapore High Court under the RECJA. The appellant sought to set aside the registration. He failed and his appeal to the High Court was dismissed, thus prompting the present appeal. In the present case, the Singapore Court of Appeal dismissed the appellant's appeal, holding that the registration of the Australian judgment could not be set aside.

114 The main issues centred on whether or not s 5(2) (now renumbered as s 6(2)) of the Civil Law Act ("CLA")[315] and s 3(2)(f) of the RECJA[316] precluded registration of the Australian judgment on grounds of public policy. The court held that there was a *fundamental distinction* between the *standards* of public policy embodied within both these provisions:[317]

> While s 5(2) of the CLA elucidates Singapore's *domestic* public policy on the enforcement of gambling debts, a rule of our public policy as it applies to the *registration of foreign judgments* under the *statute in question* is *clearly different*. [emphasis added]

In particular, the court proceeded to elaborate thus:[318]

> Section 3(2)(f) of the RECJA requires *a higher threshold of public policy* to be met in order for registration of a foreign judgment to be refused. As such, we could not countenance [the appellant's] attempt to get around s 3(2)(f) of the RECJA by arguing that s 5(2) of the CLA would

313 See generally *supra* n 311, at [14]–[21].
314 Cap 264, 1985 Rev Ed.
315 See *supra* n 295.
316 Section 3(2)(f) reads as follows:
> No judgment shall be ordered to be registered under this section if the judgment was in respect of a cause of action which *for reasons of public policy or for some other similar reason* could not have been entertained by the registering court. [emphasis added]
317 See *supra* n 311, at [24].
318 *Ibid*.

> have precluded this court from entertaining [the respondent's] cause of action. [emphasis added]

115 Indeed, as the court demonstrated in some detail,[319] the general approach of foreign courts "have repeatedly emphasised that a high standard of public policy must be met before they will refuse to enforce a foreign judgment".[320] This is not, of course, surprising in view of the fact that situations such as those in the present case involve considerations of *comity* across nations and not merely domestic public policy *per se*. Indeed, one might argue that the domestic public policy in *this* particular context *itself* involves – and necessarily, at that – such considerations of comity. Indeed, this is why it has also been traditionally accepted that a *loan* for gaming or wagering that is valid by the law of the place where the loan was made is recoverable.[321]

116 In the event, the court held that the higher threshold or standard of public policy required in order for the registration of the foreign judgment in the present case to be refused had *not* been met. Referring to the case law in various foreign jurisdictions surveyed in its judgment, the court was of the view that such case law "indicate quite clearly that other nations do not view the recognition of foreign judgments on gambling debts as being against fundamental principles of justice and morality".[322] More importantly, the court, referring to its decision in the *Star City* case, reiterated its stand that "gambling *per se* is not contrary to the public interest in Singapore",[323] although the waste of valuable court time in casinos utilising local courts "to enforce gambling debts disguised in the 'form' of loans" was.[324] Not surprisingly, therefore, the court concluded thus:[325]

> We do not think that there were any public policy grounds militating against registration of the Australian judgment which would offend a fundamental principle of justice or a deep-rooted tradition of Singapore. Neither did we have any evidence before us to indicate that the general community in Singapore would be offended by the registration of a foreign judgment on a gambling debt that was incurred

319 *Id* at [26]–[32]. Indeed, this was the approach in so far as arbitration cases were concerned as well: see *id*, especially at [33]–[39].
320 *Id* at [26].
321 See the main text accompanying, *supra* n 293.
322 See *supra* n 311, at [43]. In addition, the court referred to the Malaysian decision of *The Aspinall Curzon Ltd v Khoo Teng Hock* [1991] 2 MLJ 484: see *ibid*.
323 See *supra* n 311, at [45].
324 See *supra* nn 306–307.
325 See *supra* n 311, at [46].

> in a licensed casino. If anything, we were of the opinion that the prevalent conception of good morals in the Singaporean community at large would be against Singaporeans who ran up gambling debts in overseas jurisdictions and sought to evade their responsibility for those debts when judgment had been issued against them.

117 The court then proceeded to raise a further provision "which was neglected by counsel for both parties but which [it] found relevant to the resolution of [the] case".[326] This was s 3(1) of the RECJA;[327] in the court's view:[328]

> Whilst s 3(2) of the RECJA lays down various restrictions on the court's power to order the registration of foreign judgments, s 3(1) of the RECJA gives the court the general discretion to order the registration of a foreign judgment if "in all the circumstances of the case [the court] thinks it is *just and convenient* that the judgment should be enforced in Singapore" [emphasis added].[329] In our assessment, [the appellant] had failed signally in his attempt to show that it was not just and convenient for us to register the Australian judgment.

118 Finally, on a more general level, the court observed thus:[330]

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

119 The crucial factor, in this regard, appears to be the attitude of the Singapore public itself.[331] There has been no definitive conclusion arrived

326 *Id* at [47].

327 The provision itself reads as follows:

> Where a judgment has been obtained in a superior court of the United Kingdom of Great Britain and Northern Ireland the judgment creditor may apply to the High Court at any time within 12 months after the date of the judgment, or such longer period as may be allowed by the Court, to have the judgment registered in the Court, and on any such application the High Court may, if in all the circumstances of the case it thinks it is just and convenient that the judgment should be enforced in Singapore, and subject to this section, order the judgment to be registered accordingly.

328 See *supra* n 311, at [47].

329 This notation is in the original text. For the full text of s 3(1) itself, see *supra* n 327.

330 See *supra* n 311, at [45].

331 And see the reference by the court to the New York decision of *Intercontinental Hotels Corporation (Puerto Rico) v Golden* 15 NY 2d 9 (1964) at *supra* n 311 at para [45], where the reference was made to the attitudes of the New York public.

at at the time of writing, although there certainly has been some controversy – and understandably so, in view of the very nature of the issues concerned. On an even more general level, this very recent development also illustrates a point made in my earlier essay to the effect that public policy is not immutable and necessarily changes with the changing mores in any given society.[332] It should be reiterated that the entire topic is presently receiving significant attention in many other countries as well.[333]

332 See generally Phang, *supra* n 1, at 74–77.

333 Including the United Kingdom: see *eg*, Phang, *supra* n 290. And see now the very recent – and massive – Gambling Bill, which comprises 337 clauses and 15 Schedules. Interested readers are referred to the following URL which was functioning at the time of writing: <http://www.culture.gov.uk/gambling_and_racing/gambling_bill/default.htm>.
See also "UK gambling Bill clears vital obstacle", *The Straits Times*, 3 November 2004 at 15, where it was reported, *inter alia*, that:

> Legislation that would allow giant Las Vegas-style casinos to operate in Britain cleared an important parliamentary hurdle despite fears that the new law could lead to a rise in gambling addiction.
> Lawmakers voted … by 286 to 212 to back the Gambling Bill and send it to a special House of Commons committee for further scrutiny.
> It faces a lengthy journey through Parliament's upper and lower chambers and further votes, but the government hopes it will become law by the middle of next year. … But critics have focused on the plans for super casinos and fear an explosion of gambling addiction in Britain.

E. Illegality and public policy at common law – With a focus on contingency fee arrangements

120 There have been a number of developments at common law,[334] but I would like, in the present essay, to focus on the issue of contingency fee arrangements. This is a topic not only of great currency but also one that (by its very nature) will have enormous practical ramifications in the Singapore context. Indeed, it is no coincidence, perhaps, that two major articles have only just recently been published with regard to the issue of contingency fees in the Singapore context.[335]

121 The general position with regard to contracts savouring of maintenance or champerty has never been an entirely easy one.[336] "Maintenance" is the somewhat broader concept and involves the

334 See *eg*, in the context of contracts prejudicial to the administration of justice, *Faryab v Phillip Ross & Co (a firm)* [2002] All ER (D) 174 and *Carnduff v Rock* [2001] 1 WLR 1786 (petition to the House of Lords refused: see [2001] 1 WLR 2205), discussed briefly in Phang, *supra* n 272, at paras 5.64 and 5.74, respectively. The latter decision may be of particular interest inasmuch as it concerned the (failed) claim by a registered police informer against a police inspector and his chief constable, where it was sought to recover payment for information and assistance provided to the police. Also claimed were damages for consequential loss and damage caused by the defendants' alleged breach of contract and arising from the plaintiff's role as a police informer becoming generally known as a result of having brought the present action. As already mentioned, the English Court of Appeal held (Waller LJ dissenting) in favour of the defendants, affirming the trial judge's decision to strike out the claim on the ground that it disclosed no reasonable cause of action. It was in fact held that the various matters in issue "cannot be litigated consistently with the public interest": see [2001] 1 WLR 1786 at 1795. However, the majority of the court in this case did not wholly dismiss the possibility that there might be a claim in contract by an informer against a police force to recover payment for information supplied, although it was of the view that "the present claim cannot and should not be litigated": see at 1797. For further views by the present writer, see Phang, *supra* n 272, at para 5.74.
In so far as contracts to oust the jurisdiction of the courts are concerned, see *eg* (in the context of arbitration agreements), the English Court of Appeal decision of *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd* [2000] 1 QB 288 and the English High Court decision of *Omnium de Traitement et de Vaolorisation SA v Hilmarton Ltd* [1999] 2 Lloyd's Rep 222.
Finally, for a decision on the interpretation of the UK Rent Act 1977, but which has more general implications with regard to public policy (and which is also useful as another point of departure for comparison with the Singapore context in so far as (especially) sexual morality is concerned), see the House of Lords decision of *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27 (which was interestingly decided by a three to two majority).

335 See Gary K Y Chan, "Re-examining Public Policy – a Case for Conditional Fees in Singapore?" (2004) 33 Common Law World Rev 130 and Adrian Yeo, "Access to Justice: A Case for Contingency Fees in Singapore" (2004) 16 SAcLJ 76.

336 And see generally RA Buckley, *Illegality and Public Policy* (Sweet & Maxwell, 2002) at Ch 9 as well as Phang, *supra* n 272, at paras 5.67– 5.72.

improper stirring up of litigation by furnishing aid to a party in order that he or she might either bring or defend a claim without just cause.[337] "Champerty" occurs when there is, additionally, an agreement that the person furnishing such aid shall receive a share of what is recovered in the action brought.[338]

337 Lord Denning MR in *Hill v Archbold* [1968] 1 QB 686 at 693 describes maintenance as "officiously to intermeddle in another man's lawsuit". But *cf per* Fletcher Moulton LJ in *British Cash and Parcel Conveyors Ltd v Lamson Store Service Co Ltd* [1908] 1 KB 1006 at 1013–1014 (but probably with respect to more detailed attempts at definition only, which the learned judge thought rather unhelpful because such definitions were based on ancient concepts that were no longer tenable; the case itself, however, concerned contracts of indemnity given in the legitimate defence of *bona fide* commercial interests and where the doctrine was not, therefore, applicable); reference may also be made to *Bradlaugh v Newdegate* (1883) 11 QBD 1 at 7, *per* Lord Coleridge CJ. See further *per* Hobhouse LJ in *Camdex International Ltd v Bank of Zambia* [1996] 3 WLR 759 at 765, as follows:

> A person is guilty of maintenance if he supports litigation in which he has no legitimate interest without just cause or excuse. Champerty is an aggravated form of maintenance and occurs when a person maintaining another's litigation stipulates for a share of the proceeds of the action or suit … What is objectionable is trafficking in litigation.

338 The following observations by Lord Mustill, delivering the only substantive judgment in the House of Lords decision in *Giles v Thompson* [1994] 1 AC 142, [1993] 2 WLR 908 (with which all the other law lords agreed) at 153–154 and 911–912, respectively (emphasis added), are instructive and interesting in so far as they give us an insight into the historical aspects, the background to abolition of maintenance and champerty as crimes and torts as well as the present status of both doctrines:

> … the crimes of maintenance and champerty are so old that their origins can no longer be traced, but their importance in medieval times is quite clear. The mechanisms of justice lacked the internal strength to resist the oppression of private individuals through suits fomented and sustained by unscrupulous men of power. Champerty was particularly vicious, since the purchase of a share in litigation presented an obvious temptation to the suborning of justices and witnesses and the exploitation of worthless claims which the defendant lacked the resources and influence to withstand … As the centuries passed the courts became stronger, their mechanisms more consistent and their participants more self-reliant. Abuses could be more easily detected and forestalled, and litigation more easily determined in accordance with the demands of justice, without recourse to separate proceedings against those who trafficked in litigation. In the most recent decades of the present century maintenance and champerty have become almost invisible in both their criminal and tortious manifestations. In practice, they have maintained a living presence in only two respects. First, as the source of the rule, now in the course of attenuation, which forbids a solicitor from accepting payment for professional services on behalf of a plaintiff calculated as a proportion of the sum recovered from the defendant. Secondly, as the ground for denying recognition to the assignment of a 'bare right of action'. The former survives nowadays, so far as it survives at all, largely as a rule of professional conduct, and the latter is in my opinion best treated as having achieved an independent life of its own.
>
> It therefore came as no surprise when Parliament, acting on the recommendation of the Law Commission Report on Proposals for Reform of the Law relating to Maintenance and Champerty (1966) (Law Com No 7)

122 In so far as the *English* position itself is concerned, there has been some recent controversy. In the English Court of Appeal decision of *Thai Trading Co v Taylor*,[339] for example, it was held that it was not improper for a lawyer to act in litigation on the basis that he is to be paid his *ordinary costs* if his or her client wins but not if his or her client loses. *However*, in the even more recent English Court of Appeal decision of *Awwad v Geraghty & Co*,[340] the Court *refused to follow* the *Thai Trading* case and endorsed *Hughes v Kingston upon Hull City Council*[341] instead.

123 In *Awwad*, a solicitor in the defendant firm entered into an oral contract to represent the plaintiff in libel proceedings, with the parties agreeing that the plaintiff would pay the firm £90 per hour and that he would pay a higher rate in the event that he was successful in his claim. The court held that such an arrangement was indeed a "contingency fee" within the meaning of r 18(2) of the UK Solicitors' Practice Rules 1990

> abolished the crimes and torts of maintenance and champerty. After this, it might be supposed that the ancient crimes and torts would have disappeared from general view, of interest only to any legal historian … Remarkably, this has proved not to be the case, and we find that 25 years after the Act of 1967 they are being ascribed a vigorous new life, in a context [in this case] as far away from the local oppressions practised by overweening magnates in the 15th century as one could imagine.

See also *Thai Trading Co v Taylor* [1998] 3 All ER 65 ("the *Thai Trading* case") at 69, *per* Millett LJ (as he then was), where the learned judge observed as follows:

> There can be no champerty if there is no maintenance; but there can still be champerty even if the maintenance is not unlawful. The public policy which informs the two doctrines is different and allows for different exceptions. In examining the present scope of the doctrine, it must be remembered that public policy is not static. In recent times the roles of maintenance and champerty have been progressively redefined and narrowed in scope.

And in the House of Lords decision of *Regina (Factortame Ltd and others) v Secretary of State for Transport, Local Government and the Regions (No 8)* [2002] 3 WLR 1104, Lord Phillips of Worth of Matravers MR observed (at 1116) that "[c]hamperty is a variety of maintenance".

339 *Supra* n 338; and overruling *Aratra Potato Co Ltd v Taylor Joynson Garrett (a firm)* [1995] 4 All ER 695 and *British Waterways Board v Norman* (1993) 26 HLR 232. *Contra* now *Hughes v Kingston upon Hull City Council* [1999] 2 All ER 49 where the court refused to follow the *Thai Trading* case, *inter alia*, because of the view that the *Thai Trading* case had been decided *per incuriam*. However, as has been persuasively argued, the Hughes case may itself have miscontrued the actual reasoning in the *Thai Trading* case, not to mention doubts about whether the per incuriam doctrine could be involved in the first instance: see J Levin "No win, no fee, no costs" (1999) 149 NLJ 48. But see now the recent decision in *Awwad v Geraghthy & Co* [2000] 3 WLR 1041 ("*Awwad*"), which is discussed below: see the main text accompanying *infra* n 340 *ff*.

340 *Supra* n 339.

341 *Supra* n 339.

and thereby contravened r 8(1) of the same Rules.[342] As the Rules were made pursuant to s 31 of the UK Solicitors Act 1974 (c 47), they (as secondary legislation) had the force of law and any contravention (as was the case here) was contrary to public policy and the agreement concerned was therefore unenforceable. Indeed, this was the general legal effect of the House of Lords decision in *Swain v The Law Society*,[343] which, however, was not in fact cited in the *Thai Trading* case. Although the court in *Awwad* did not expressly state so, there is more than a hint here that the *Thai Trading* case was decided *per incuriam*. Schiemann LJ, for example, observed that "[i]t is manifestly unfortunate that the *Swain* case was not cited in the *Thai Trading* case … As it seems to me the criticism made of the *Thai Trading* case in the [*Hughes v Kingston upon Hull City Council*] was justified".[344] The learned judge then proceeded to observe thus:[345]

> However, although the court in the *Thai Trading* case may have been in error in asserting that breach of a professional rule did not involve any illegality, it does not necessarily follow that the court could not have decided that the illegality in question was not of such a nature as to render the whole agreement unenforceable. In that state of the recent authorities in my judgment while this court is bound by the *Swain* case we are not bound to follow either the *Thai Trading* case or [*Mohamed v Alaga & Co*].

124 It should also be noted that the court did consider the arguments both for and against contingency fee arrangements,[346] but (most importantly, it is submitted) Schiemann LJ held that "acting for a client in pursuance of a conditional normal fee agreement, in circumstances not sanctioned by statute, is against public policy."[347] However, the learned judge did also observe thus:[348]

342 Rule 8(1) provided (at the material time) as follows:

> A solicitor who is retained or employed to prosecute any action, suit or other contentious proceeding shall not enter into any arrangement to receive a contingency fee in respect of that proceeding.

As noted below, this particular rule was in fact amended to take into account the *Thai Trading* case (see *supra* n 338), but the decision in *Awwad* ironically renders that particular amendment of no significant effect.

343 [1983] 1 AC 598; also applied in the (also) English Court of Appeal decision of *Mohamed v Alaga & Co* [2000] 1 WLR 1815.

344 *Supra* n 339, at 1055.

345 *Id* at 1055–1056.

346 *Id* at 1044–1045 and 1055–1056, *per* Schiemann LJ.

347 *Id* at 1062.

348 *Ibid*. *Cf* also *per* May LJ at 1067.

> For my part, I would hesitate to say, in the absence of full argument, that any breach of the Rules in the course of reaching a fees agreement necessarily involved forfeiting all possibility of enforcing the agreement. But the present case is one where it seems to me that, if such an agreement is against public policy (as I think it was in 1993 [when the agreement concerned was entered into]) then it should not be enforced by the courts. It would be inappropriate to leave the enforcement of this policy purely to the disciplinary processes of the professional body.

125 May LJ, agreeing, observed that he was not persuaded "that there is any difference in substance between an agreement to charge a fee or an enhanced fee if the client wins and an agreement to forego some or all of the fee if he loses. They are the same and each comes within the definition in r 18(2)(c) [of the UK Solicitors' Practice Rules 1990]".[349] However, like Schiemann LJ,[350] he did appear to stress the *exhaustiveness*, as it were, of *statutory provision in the area*:[351]

> In my judgment, where Parliament has, by what are now (with section 27 of the UK Access to Justice Act 1999) successive enactments, modified the law by which any arrangement to receive a contingency fee was impermissible, there is no present room for the court, by an application of what is perceived to be public policy, to go beyond that which Parliament has provided. That applied with, if anything, greater force in 1993 than it does today.

126 Lord Bingham of Cornhill CJ agreed with the reasons given by both Schiemann and May LJJ.[352] It should, finally, be noted that there is also very perceptive commentary on this particular decision, to which the reader is referred.[353]

349 *Id* at 1066.
350 See *supra* n 347.
351 *Supra* n 339, at 1068.
352 *Ibid*.
353 See A Walters, "Contingency Fee Arrangements at Common Law" (2000) 116 LQR 371 and N Enonchong, "Supervening Legality: Effect on the Enforcement of an Illegal Agreement" (2000) 116 LQR 377. The former piece contains a succinct historical overview and the learned author also proffers some views as to how an Awwad-type agreement might be treated in the light of the availability now of conditional fee arrangements (as to which see the main text accompanying, *infra* nn 354–356). He also discusses the amendment to r 8 of the Solicitors' Practice Rules 1990 that (ironically) was introduced by the Law Society *in response to the decision in* the *Thai Trading* case! However, the learned author – correctly, in my view – argues (at 376) that "[w]hatever the merits of *Thai Trading*, it may prove difficult to challenge *Awwad* in the courts" (and, for the detailed arguments, see especially 376–377). See also generally Buckley, *supra* n 336, at paras 9.20–9.23.
Reference may also be made to the English Court of Appeal decision of *Mohamed v Alaga & Co*, *supra* n 343 . The Court, applying the House of Lords decision in *Swain*

127 Although dealing with the English position, the controversy just considered underscores the relative strictness with which contingency fee arrangements are generally viewed by the courts as well as the importance of the governing statutory regime. In this latter regard, it is significant to note that the strict rules against such arrangements have (as also alluded to in the judgments in *Awwad*) been mitigated to some extent, first, by s 58 of the UK Courts and Legal Services Act 1990 (c 41), which originally provided for a "conditional fee agreement" to be entered into between a solicitor and his or her client, whereby the solicitor received normal fees or normal fees plus an uplift in the event of success – although it should be noted that such an agreement was not permitted for certain categories of agreements.[354] This last-mentioned provision has in fact undergone even more radical transformation, which was effected by changes introduced by the Access to Justice Act 1999,[355] in particular via ss 27 and 28 thereof.[356]

128 The more important issue, in so far as *Singapore* is concerned is this: Should changes be made to the law relating to contingency fee arrangements (especially since there have, as we have just seen, been changes wrought in the English context) and, if so, what form should such changes take? I have already referred to two comprehensive articles,[357] both of which suggest that changes ought indeed to be made to the present local situation, which is now stricter than the present English position and which enforces the common law relating to maintenance and champerty in all their rigour.[358] Both the aforementioned articles emphasise the need to ensure that there is adequate *access to justice* for all

v The Law Society, *supra* n 343, affirmed the decision in the trial court to the effect that r 7 of the UK Solicitors' Practice Rules 1990 had the force of law and that the agreements concerned were therefore illegal. The court also emphasised the important point that there could, in the circumstances, be no 'backdoor claim', as it were, in restitution which would have undermined the public policy behind the promulgation of the rule itself. However, the Court (disagreeing with the trial court) did nevertheless hold that the plaintiff could successfully recover by way of *quantum meruit* a reasonable sum for professional services rendered since he was not claiming any part of the consideration payable under the illegal agreement as such and since he was not *in pari delicto* with respect to the other party. This route was not, however, open to the plaintiff on the facts in *Awwad*: see *supra* n 339, at 1064.

354 See generally Phang, *supra* n 272, at para 5.70.

355 Cap 22.

356 For more details, see Phang, *supra* n 272, at para 5.71.

357 See *supra* n 335.

358 And see generally s 107 of the Legal Profession Act (Cap 161, 2001 Rev Ed) and the Legal Profession (Professional Conduct) Rules (Cap 161, R 1, 2000 Rev Ed), especially r 37 thereof.

concerned,[359] particularly given the absence of compelling alternatives in the local context. These articles contain, in fact, very detailed arguments that incorporate comparative elements as well, and which cannot therefore (owing to constraints of space) be incorporated within the present article. The interested reader is nevertheless strongly commended to read these excellent – and comprehensive – studies.

129 What might be noted, if only briefly, are the respective *suggestions for reform* from each writer. One writer proposes a combination of speculative fees;[360] a (complementary) Contingency Legal Aid Fund scheme; as well as the introduction of conditional fees[361] with an uplift capped at 100 per cent.[362]

130 The other writer is of the view that "American-style contingency fees should not be brushed aside too quickly"[363] as "it is conceivable (at least mathematically) that the success fee under the American model may well be less than that under the United Kingdom or Australian models".[364] He also argues that "legislating a cap on the fee percentage of the amount recoverable under the American-style contingency fee system" might furnish a safeguard of sorts[365] and that assessment of damages is also decided by judges in the Singapore context and, hence, the potential problem of juries inflating the amount of damages recoverable will not pose a problem.[366] The writer also proposes an *alternative* which is "a hybrid between the conditional fee based system and legal aid".[367] Finally, he suggests that a good overall strategy "might be to permit conditional fees in stages or in a *piecemeal* fashion based on specific types of proceedings or matters (such as personal injury claims, inheritance claims

359 An emphasis or focus that appears – as these articles emphatically argue – to have been embraced as a virtually global trend.

360 See Yeo, *supra* n 335, at 81:

> Under a speculative fee arrangement, a lawyer agrees with the client that he will charge the client his normal hourly fee only if a settlement is arrived at or if the case is successfully litigated. As such, the lawyers' fees are tied to the number of hours he works.

361 See Yeo, *ibid*:

> Also known as 'uplift fees', the conditional fee is almost identical to the speculative fee, except that the lawyer and client agree upon a percentage premium, called an 'uplift', which is added to the lawyer's normal fee in the event of success.

362 See Yeo, *ibid*, especially at 161.

363 See Chan, *supra* n 335, at 158.

364 *Ibid*.

365 *Ibid*.

366 *Ibid*.

367 *Id* at 159.

or summary-type proceedings for a simple debt) as part of a pilot project or trial".[368] In his view, "[t]his would allow the system to be tested and fine-tuned if necessary", for "[i]t is neither possible nor practicable, from the outset, to design a comprehensive conditional fee system for implementation in Singapore" as "[t]he issues surrounding conditional fees are complex and wide-ranging".[369] In addition, "[i]f conditional fees do 'take root' in Singapore, there should be *adequate publicity* of the system to ensure that the general public are aware of the existence of and their rights under the conditional fee based system (or any appropriate variant)".[370]

F. Restraint of trade

131 There have been numerous developments in this area of the law as well.[371] Four, in particular, may be mentioned.[372]

132 *Firstly*, there has, in more recent times, been another device utilised by employers in order to "neutralise" the employee during the *notice period* – colloquially known as "garden leave". The employee, in other words, whilst being paid his remuneration, is not allowed to come to the workplace. If there is an express contractual term permitting the employer to impose "garden leave" on the employee, there is no problem. Where, however, there is no such express term, it is a question of the construction of the contract concerned as to whether or not the employer is under a legal obligation to provide the employee with work which is available; if this is so, then the employee has a right to work and, hence, the employer obviously cannot insist that the employee take "garden leave". If, indeed, the employer is under an obligation to provide its employee with work, then it (the employer) can only send the employee

368 *Ibid* (emphasis in original).
369 *Ibid*.
370 *Ibid* (emphasis added).
371 See generally Phang, *supra* n 272, at paras 5.98–5.132. Reference may also be made to Phang, *supra* n 102, at 115–116; Phang, *supra* n 98, at para 9.84; and Phang, *supra* n 161, at paras 9.88–9.89.
372 There is, arguably, one other – dealing with the doctrine of *severance*, which figures most prominently in the context of restraint of trade. However, this is dealt with below under Section G entitled "The Consequences of Illegality" (as to which, see the main text accompanying *infra* n 144 *ff*).

concerned on "garden leave" if there is an express term permitting it to do so.[373]

133 *Secondly*, it is important to note that, as is the case with the law generally, construction of restraint of trade clauses ought to be effected with good common sense. An illustration of this may be found in the English Court of Appeal decision of *Hollis & Co v Stocks*.[374] The plaintiffs comprised a small firm of practising solicitors and the defendant was an assistant solicitor in the said firm. The defendant later left the plaintiff firm and went to work for another firm which, however, sent the defendant back to their office which was located in exactly the same vicinity as the plaintiff firm (*ie*, Sutton-in-Ashfield). The restrictive covenant concerned read as follows:

> You [*viz* the defendant employee] will not for 12 months from the termination of your employment work within 10 miles of the firm's office to include not advising or representing any clients whatsoever at Sutton-in-Ashfield or Mansfield Police Station or Mansfield Magistrates' Court.

Aldous LJ rejected the defendant's argument to the effect that the above covenant should be read literally as meaning any work at all and, hence, was void as being in unreasonable restraint of trade. The learned judge referred to the context in which the contract was made, in particular, the fact that the contract concerned began with a definition of the defendant's employment as being that of a solicitor and that all the terms of the contract were directed to that particular form of employment. In addition, the phrase in the clause, "advising or representing any clients whatsoever at Sutton-in-Ashfield or Mansfield Police Station or Mansfield Magistrates' Court", itself gave an indication as to the scope of the clause itself.[375] Given that the ten-mile radius was reasonable, the covenant concerned could pass legal muster. Sedley LJ agreed, observing

373 For an excellent summary of the relevant principles just summarised, see the English Court of Appeal decision of *William Hill Organisation Ltd v Tucker* [1999] ICR 291. The court held, in the present case, that, given that the employee held a particular as well as unique post and the fact that the skills required for the proper discharge of the duties concerned required the frequent exercise of such skills as well as the content of the terms of the contract concerned, the employer was under an obligation to provide the employee with work. Reference may also be made to *Symbian Ltd v Christensen* [2001] IRLR 77, where there was an express provision with respect to "garden leave".

374 [2000] IRLR 712.

375 See generally *ibid* at 714–715.

that "[t]his … was a contract which from end to end related to work as a solicitor".[376]

134 *Thirdly*, the English Court of Appeal decision of *Dranez Anstalt v Hayek*[377] is also worth mentioning briefly. I have observed elsewhere, in fact, that despite the two-pronged test enunciated by Lord Macnaghten in the seminal House of Lords decision in *Nordenfelt v Maxim Nordenfelt Guns & Ammunition Co Ltd*[378] to the effect that to pass muster, as it were, the covenant in restraint of trade must be reasonable *both* in the interests of the parties as well as in the interests of the public, the focus has (unfortunately) been more on the former – on many occasions to the total exclusion of the latter.[379] The present case was a welcome exception to this (otherwise unfortunate) general rule. Chadwick LJ, with whom Lord Woolf CJ and Brooke LJ agreed, was of the view that where the pith and marrow of the transaction concerned subject matter that was already the subject of protection (here patent rights that received statutory protection), this was a significant factor that militated against the enforcement of a restraint of trade clause. More importantly, perhaps (and in a related vein), the learned judge emphasised the *public interest*: in particular, he was of the view that whilst a "statutory monopoly" which accrued via patent rights that receive statutory protection did encourage inventors as well as those who funded them, any *further* contractual restraint (in the form, here, of a restraint of trade clause) might in fact turn out to be *detrimental* to the *public interest*; in the event, Chadwick LJ was of the view that "it must be a wholly exceptional case in which the imposition of such restraints on a pioneer in the field of medical science [the covenantor in the present case] – in the development of which there is, at least prima facie, such an obvious public benefit – can be justified".[380] This emphasis on the public interest is to be welcomed, particularly in the light, hitherto, of the attempts by English courts generally to conflate both the parties' as well as the public interest.[381]

376 *Id* at 715.
377 [2003] 1 BCLC 278.
378 See [1894] AC 535 at 565.
379 And see generally Phang, *supra* n 12, at 701 *ff*. In this regard, the Singapore High Court decision of *Thomas Cowan & Co Ltd v Orme* [1961] MLJ 41 was an extremely early example of non-English cases being – in many ways – ahead of their time. *Cf* also, now, the decision being presently discussed in the main text. See also Phang, *supra* n 12, at 721–722 and, by the same writer, "Of Generality and Specificity: A Suggested Approach Towards the Development of an Autochthonous Singapore Legal System" (1989) 1 SAcLJ 68 at 75–78 and KL Koh, "Restraint of Trade and Public Interest" (1961) 3 U Mal LR 118.
380 See *supra* n 377, at [25].
381 On such conflation, see generally *supra* n 379.

135 *Fourthly*, in so far as solus agreements are concerned, the leading House of Lords decision in *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd*[382] held, *inter alia*, that in order for the restraint of trade doctrine to apply, the covenantor must have given up some freedom or right which it would otherwise have had prior to entry into the solus agreement concerned.[383] Professor (now Justice) Heydon has, however, argued powerfully that this distinction between giving up a freedom or right previously held with regard to the property in question and having no previous freedom or right to begin with is a distinction based more on form rather than substance and, hence, could lead to rather anomalous results.[384] A Singapore decision has, in fact, attempted to free the law from such anomaly and artificiality by throwing doubt on this particular distinction.[385]

136 The latest Australian position, embodied in the very recent Australian High Court decision of *Peters (WA) Ltd v Petersville Ltd*,[386] whilst referring to the Heydon critique, and whilst (it is submitted) coming close to accepting that particular critique, did not, however, arrive at a conclusive determination.[387] Neither did the court express any concluded view on Lord Wilberforce's broader approach in the *Esso*

382 [1968] AC 269 ("the *Esso Petroleum* case").

383 See *ibid* at 298, 309, 316–317 and 325, *per* Lord Reid, Lord Morris of Borth-y-Gest, Lord Hodson and Lord Pearce, respectively.

384 See J D Heydon, *The Restraint of Trade Doctrine* (2nd Ed, 1999) at pp 51–54 and, by the same writer, "The Frontiers of the Restraint of Trade Doctrine" (1969) 85 LQR 229. Other criticisms include the problem of evasion; the possibility of injustice; and the fact that the *Esso Petroleum* case, *supra* n 382, was decided wrongly on its facts if the proposition we are presently examining is in fact correct. See also *Australian Capital Territory v Munday* (2000) 99 FCR 72 at 82 *ff*, which contains a very comprehensive survey of the various possible theories with regard to when the restraint of trade doctrine might be applicable.

385 See Phang, *supra* n 12, at 716 (*however*, for possible counter-arguments against the critique by Prof Heydon, see Phang, *supra* n 272, at para 5.125). The decision concerned is that by Lim Teong Qwee JC in the Singapore High Court decision of *Shell Eastern Petroleum (Pte) Ltd v Chuan Hong Auto (Pte) Ltd* [1995] 3 SLR 281 at 288; affirmed (but without consideration of this particular point) in *Chuan Hong Auto (Pte) Ltd v Shell Eastern Petroleum (Pte) Ltd* [1996] 1 SLR 415. The learned Judicial Commissioner preferred the much broader and open-ended view of Lord Wilberforce in the *Esso Petroleum* case, *supra* n 382, which centred on trade practice with (in his Lordship's words) the relevant agreements becoming "accepted as part of the structure of a trading society" (see *supra* n 382 at 335).

386 (2001) 181 ALR 337 ("the *Peters* case").

387 *Ibid* at 344.

Petroleum case.[388] And, in the subsequent Australian High Court decision of *Maggbury Pty Ltd v Hafele Australia Pty Ltd*,[389] Gleeson CJ, Gummow and Hayne JJ did not resolve the point left open in the *Peters* case as to whether or not Lord Wilberforce's broader approach in the *Esso Petroleum* case ought to be adopted.[390] In the same case, Callinan J observed that "it is not entirely clear what is to be the test in Australia".[391] Indeed, the learned judge did, on a much broader level, deliver a powerful critique of the restraint of trade doctrine generally,[392] arguing, *inter alia*, that "the time is ripe for considering whether the doctrine should have any application, or a much more limited application, in modern times";[393] nevertheless, he did concede that he was "constrained by authority to apply the doctrine".[394]

137 The anomalies and artificialities discussed above can, however, be minimised by urging the courts to look to the *substance rather than the form of the transaction in question*. A particularly striking illustration of this rather commonsensical principle and approach is to be found in the English Court of Appeal decision of *Alec Lobb (Garages) Ltd v Total Oil (GB) Ltd*.[395] In this case, the plaintiff company (which was, in fact, a family company owned by Mr Lobb and his mother) leased the service station concerned to the defendant oil company, which then granted a lease-back – but not to the plaintiff company as such but, rather, to Mr Lobb and his mother. Significantly, the *solus* agreement was contained in the *lease-back*. Counsel on behalf of the defendant oil company ingeniously argued that the restraint of trade doctrine was not applicable to begin with because Mr Lobb and his mother had no previous right which they had to give up as the previous occupier was the family company. The court rejected this argument, having especial regard to the fact that Mr Lobb and his mother were the *proprietors* of the family company itself. In the words of Dillon LJ, the granting of the lease-back

388 *Ibid* (and in so far as Lord Wilberforce's test is concerned, see *supra* n 385). The court did, however, *reject* the "sterilisation of capacity" test which was also canvassed in the *Esso Petroleum* case, which test holds "that the restraint of trade doctrine does not apply to contracts which absorb the capacity of a covenantor rather than sterilise it": see *supra* at 347 (and citing the critique by Heydon, *The Restraint of Trade Doctrine*, *supra* n 384, at p 60); see also n 383 at 348 and 352.

389 (2001) 185 ALR 152.

390 See *ibid* at 167–168.

391 *Id* at 178 (the learned judge dissented, but not on this particular point).

392 *Id* at 176–178.

393 *Id* at 176.

394 *Id* at 178.

395 [1985] 1 WLR 173. Reference may also be made to the Privy Council decision of *Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Co Pty Ltd* [1975] AC 561.

by the defendant oil company was "a palpable device in an endeavour to evade the doctrine of restraint of trade".[396]

G. The consequences of illegality

138 This is an extremely important topic as well – with a great many (oftimes equally-important) sub-topics. Constraints of space preclude an extended discussion. I will, in fact, deal with just three developments – one of which was dealt with in some detail in my previous essay, *viz*, the conceptual difficulties underlying restitutionary recovery under an independent cause of action.[397] The second development is also an intensely practical one and centres on the doctrine of *severance*, which (although traditionally associated with restraint of trade cases) is (because of its at least potential general application) dealt with under this particular Section. The third development relates to the very topical (and obviously important) issue of *reform*.

139 Because of its extensive treatment previously,[398] I can be relatively brief in so far as the *first* issue is concerned. However, because of its importance at both conceptual as well as practical levels, it is worth revisiting. It is important to point out, at the outset, that the law continues to remain unsatisfactory – which is especially unfortunate, given the passage of years since I last considered the topic in detail. The central modern precedent continues to be that of the House of Lords in *Tinsley v Milligan*,[399] which held that a party could claim on a resulting trust, although no recovery would have been possible if there had been, in addition, a presumption of advancement as the rebutting of that presumption by the plaintiff would necessarily bring into aid the illegal transaction itself. *Tinsley* has been criticised, with the main critique focusing on the technicality as well as artificiality generated as successful recovery would depend on the precise factual scenario as well as pleadings.[400] Indeed, the subsequent English Court of Appeal decision of *Tribe v Tribe*[401] avoided the harsh effects of the above distinction by recourse to another general exception permitting restitutionary recovery,

396 *Supra* n 395, at 178.
397 See Phang, *supra* n 1, at 77–83.
398 See the preceding note.
399 [1994] 1 AC 340 ("*Tinsley*"). See also *Bowmakers Ltd v Barnet Instruments Ltd* [1945] KB 65.
400 See *eg*, N Enonchong, "Illegality: The Fading Flame of Public Policy" (1994) 14 OJLS 295 and H Stowe, "The 'Unruly Horse' has Bolted: *Tinsley* v *Milligan*" (1994) 57 MLR 441.
401 [1996] Ch 107.

viz, timely repudiation.[402] And in the Australian High Court decision of *Nelson v Nelson*,[403] the court refused to follow *Tinsley* on this particular point. Conceptually, the difficulty with restitutionary recovery by way of an independent cause of action is the fact that there would necessarily be reliance on the illegal contract where title or proprietary interests are involved, notwithstanding ingenious attempts to rationalise away the problem.[404] Indeed, one writer has simply argued that given the inevitable reliance on the illegal contract, the courts, whilst allowing recovery, should simply admit that there has been reliance on the illegal contract – even in situations where the cause of action is premised on title or some other proprietary interest.[405] However, whilst such practical candour is commendable, there might, as the present writer has suggested, be a better way forward, which truly avoids having (in some way, at least) to rely on the illegal contract or transaction – that *a substantive and independent* doctrine of *restitution* should be utilised instead.[406] Unfortunately, however, in the years since this proposal was proffered, there has – in the English context at least – been no real attempt to grapple with the difficulties generated by *Tinsley*, let alone an attempt to furnish alternative ways forward. Indeed, at the time of writing, *Tinsley* is (unfortunately) still alive and well in England itself – and this has been confirmed (in a variety of contexts) by a great many decisions handed down since my previous essay[407] first appeared.[408] *However*, the approach

402 And see *eg*, the leading decisions of *Kearley v Thomson* (1890) 24 QBD 742 and *Taylor v Bowers* (1876) 1 QBD 291, both cases which may not, however, be easily reconcilable with each other; though *cf* the attempt at such reconciliation by Furmston, *supra* n 16, at 435–436.

403 (1995) 70 ALJR 47, (1995) 184 CLR 538; and analysed in A Phang, "Of Illegality and Presumptions – Australian Departures and Possible Approaches" (1996) 11 JCL 53.

404 See generally the discussion in Phang, *supra* n 403, and the literature cited therein, in particular, B Coote, "Another Look at *Bowmakers v Barnet Instruments*" (1972) 35 MLR 38.

405 See N Enonchong, "Title Claims and Illegal Transactions" (1995) 111 LQR 135.

406 See Phang, *supra* n 403, especially at 65–71.

407 See Phang, *supra* n 1.

408 See *eg*, *Douglas Hunter Lowson v Rebecca Caroline Coombes* [1999] Ch 373; *Anzal v Ellahi* (CA, Unreported, Lexis Transcript, 21 July 1999); *Choudhry v United Bank Ltd* (QB Div, Unreported, Lexis Transcript, 18 November 1999); *Bhopal and Kaur v Walia* (1999) 32 HLR 302; *Standard Chartered Bank v Pakistan National Shipping Corporation (No 2)* [2000] 1 Lloyd's Rep 218; *Aldrich v Norwich Union Life Insurance Co Ltd* [2000] Lloyd's Rep IR 1; *Webb v Chief Constable of Merseyside Police* [2000] QB 427; *Plummer v Tibsco Ltd* [2000] ICR 509; *Hall v Woolston Hall Leisure Ltd* [2001] 1 WLR 225; *Costello v Chief Constable of Derbyshire Constabulary* [2001] 1 WLR 1437; *MacDonald v Myerson* [2001] EWCA Civ 66; *Halley v Law Society* [2002] EWHC 139 (Ch); *De Beer v Kanaar & Co* [2002] EWHC 688 (Ch); and *Mortgage Express Ltd v Robson* [2002] FCR 162.

in the *Singapore* context appears to be, with respect, somewhat more progressive than that to be found in England.

140 In the very recent Singapore High Court decision of *Lim Eng Beng v Siow Soon Kim*,[409] MPH Rubin J considered the criticism of the House of Lords decision in *Tinsley v Milligan*, particularly by the High Court of Australia in *Nelson v Nelson*.[410] The learned judge also referred to the UK Law Commission's Consultation Paper.[411] However, the court did not appear to arrive at a clearly preferred view. Perhaps this was because, on the facts of the case itself, this was a straightforward recovery (in restitution) under an independent cause of action (as exemplified by the leading English decision of *Bowmakers, Ltd v Barnet Instruments Ltd*.[412] In the words of Rubin J:[413]

> [T]he plaintiff's claim was not for the refund of any monies paid under an illegal agreement, nor was it for any property infused or employed in any illegal object. He was merely asking for his just entitlements upon his retirement from the partnership which he had entered into with the first defendant and another person. He had, in my finding, established his rights to claim one third shares from the assets of the partnership, both concealed and yet to be accounted for, without relying on his own illegality.

It is heartening to note, therefore, that – in the Singapore context, at least – there is an acknowledgment of the weaknesses in *Tinsley v Milligan* and signs (at least) of a possible departure in the perhaps not too distant future.

141 Before proceeding to the next substantive issue in this Section, a further interesting – but not oft-noticed or discussed – point relating to the issue of restitutionary recovery under an independent cause of action may be usefully noted. This centres on the observations by du Parcq LJ in the earlier (albeit leading) discussion of *Bowmakers Ltd v Barnet Instruments Ltd*,[414] as follows:[415]

409 [2003] SGHC 146 (noted in Phang, *supra* n 161, at para 9.85).
410 *Supra* n 403. See also generally Phang, *supra* n 403.
411 See *infra* n 445.
412 *Supra* n 399. *Cf* also, in related proceedings, *Lim Eng Beng @ Lim Jia Le v Siow Soon Kim* [2003] SGHC 151 at [8].
413 See *supra* n 409, at [80].
414 *Supra* n 399 ("the *Bowmakers* case").
415 *Ibid* at 72. Significantly, perhaps, these observations occur in the last paragraph of the court's judgment in this seminal decision.

> It must not be supposed that the general rule which we have stated is subject to no exception. Indeed, there is one obvious exception, namely, that class of case in which the goods claimed are of such a kind that it is unlawful to deal in them at all, as for example, obscene books. *No doubt, there are others, but it is unnecessary, and would we think be unwise, to seek to name them all or to forecast the decisions which would be given in a variety of circumstances which may hereafter arise.* [emphasis added]

142 The "catch-all" nature embodied in the above quotation does contain the potential for the generation of uncertainty and, to that extent, actually supports the suggested approach proffered above which centres on an independent doctrine of restitution.[416] More recently, there has been some discussion in the case law on the impact that *Tinsley* ought to have on the principle contained in this particular quotation. It will be recalled that *Tinsley* lays down a uniform rule (under both common law and in equity) to the effect that there can be restitutionary recovery under an independent cause of action so long as there is no reliance as such on the illegal contract (this last-mentioned condition being rather liberally construed, as we have seen[417]). It would now appear that, in the light of *Tinsley*, the principle embodied in the observations by du Parcq LJ above[418] must now be viewed as operating within a somewhat narrower compass tahn was originally thought. For example, Lightman J, in the English Court of Appeal decision of *Costello v Chief Constable of Derbyshire Constabulary*,[419] made the following observations (which were concurred in by both Keene and Robert Walker LJJ):[420]

> The exceptions to which du Parcq LJ refers must in my view be confined to cases where it would be unlawful for any reason for the police to transfer the property to the claimant or it would be unlawful for the claimant to be in possession of it (eg, when the goods consist of controlled drugs or a gun and the claimant does not have the necessary authorisation to have possession of them); but where no such exception applies, the court cannot withhold equitable relief in the form of a mandatory order for its delivery up to the person legally entitled to possession, whether or not he be a thief or receiver of stolen property.

416 See the main text accompanying *supra* n 406.
417 Thus giving rise to the suggestion by the present writer that a substantive and independent doctrine of restitution ought to apply instead and which would be less problematic from both theoretical as well as practical perspectives: see the main text accompanying *supra* n 406.
418 See *supra* n 415.
419 [2000] 1 WLR 1437.
420 *Ibid* at 1451–1452.

143 And in the (also) English Court of Appeal decision of *Webb v Chief Constable of Merseyside Police*,[421] May LJ was of the view that the exception mentioned by du Parcq LJ referred to "goods of such a kind that it is unlawful to deal in them at all. The example given was obscene books. If [the plaintiff in the present case] were claiming the return of controlled drugs seized by the police, that would come within the exception."[422] However, in this particular case, the plaintiffs had brought an action for the return of money lawfully seized by the police on the suspicion that it constituted the proceeds of drug trafficking. In the circumstances, the exception did not apply as "money is not something which it is unlawful to deal in at all".[423] Pill LJ was of the view that "[t]he scope of the exception remains uncertain".[424] The learned judge also noted that whilst no comment was made on du Parcq LJ's exception enunciated in the *Bowmakers* case in *Tinsley* (notwithstanding the endorsement by the House of the *Bowmakers* case itself in *Tinsley*), "[s]ome of the situations which the court almost certainly had in mind in the *Bowmakers* case would now be covered by statutory provisions which did not exist in 1945".[425] However, Pill LJ did agree with May LJ that there might still be situations where the exception enunciated by du Parcq LJ in the *Bowmakers* case could possibly be relied upon.[426]

144 *Secondly*, we turn to consider the doctrine of *severance* – specifically, to one mode by which severance can be effected, and which is commonly referred to as the "blue pencil test".[427] The general principle with respect to this particular test is this: In order for the doctrine of severance to apply, the court must be able to run a "blue pencil" through the offending words in the covenant without altering the meaning of the covenant itself and without "butchering" the covenant to the point where it does not make any sense, grammatically or otherwise. *However*, in the recent Ontario Superior Court of Justice decision of *Transport North American Express Inc v New Solutions Financial Corp*,[428] Cullity J delivered

421 [2000] QB 427.
422 *Ibid* at 444.
423 *Ibid*, *per* May LJ.
424 *Id* at 449.
425 *Ibid*. The year 1945 was, of course, the date when the decision in the *Bowmakers* case was handed down.
426 *Ibid*; see also *supra* n 422.
427 The doctrine of severance is, of course, very important and comes into play when one attempts to save a contract, which is illegal or contrary to public policy, by excising the illegal part either in the form of whole terms and clauses or smaller portions within clauses that are the source of the illegal taint. And see generally Phang, *supra* n 272, at para 5.223 *ff*.
428 (2001) 200 DLR (4th) 560.

an extremely powerful critique of the "blue pencil test", preferring (in fact) to *reject* it altogether:[429]

> The blue-pencil test is, I believe, a relic of a bygone era when the attitude of courts of common law – unassisted by principles of equity – towards the interpretation and enforcement of contracts was more rigid than is the case at the present time. At an early stage in the development of the law relating to illegal promises, severance was held to be justified on the basis of the blue-pencil test alone. … we have moved a long way beyond that mechanical approach. Enforcement may be refused in the exercise of the kind of *discretionary judgment* I have mentioned even where blue-pencil severance is possible.
>
> Despite repeated statements in the cases that the court will not make a new agreement for the parties, that is, of course, exactly what it does whenever severance is permitted …
>
> [emphasis added]

145 This is a bold and pragmatic approach indeed. Cullity J points to the practical reality that the doctrine of severance does necessarily make a new agreement of sorts for the parties. However, with respect, his advocating of a discretionary approach to strike out promises is not only very similar to the blue pencil test but also confers more flexibility than can be justified under a common law system where there is a constant need to balance the tension between certainty on the one hand and fairness on the other. The learned judge's approach tends to lean too far in favour of the latter at the expense of the former. Further, whilst precedent should not be adhered to for the sake of precedent alone, the blue pencil test is very firmly embedded in the contractual landscape. This comes as no surprise for, despite its imperfections, the blue pencil test does appear to mediate the tension between certainty and fairness quite well. Its insistence that the court not (obviously, at least) re-write the contract for the parties when applying the test does help in ensuring that unnecessary inroads into the doctrine of freedom of contract are not created. It might also be argued that the above case is only a first instance one, although it is submitted that this would not be a very strong reason since the persuasiveness (or otherwise) of the reasoning of every court – regardless of its level – must rest, in the final analysis, on the respective merits (or otherwise) based on arguments of principle.

429 *Ibid* at 573.

146 Interestingly, the majority of the Ontario Court of Appeal, in *Transport North American Express Inc v New Solutions Financial Corp*,[430] disagreed with the approach of "notional severance" adopted by Cullity J above and endorsed (instead) the traditional principles of severance instead. It should be noted, however, that Sharpe JA, who dissented, endorsed the approach adopted by Cullity J.

147 *However*, in yet another "twist" in the proceedings, the Canadian Supreme Court *reversed* the decision of the Ontario Court of Appeal – but by only a bare majority of four to three! In *New Solutions Financial Corporation v Transport North American Express Inc*,[431] the majority of the court[432] affirmed the approach of "notional severance", thus reinstating Cullity J's views rendered (as we have seen) at first instance. The concept of "notional severance" furnished the necessary "remedial discretion" that could respond to the various contexts and degrees of illegality involved in (here) the contravention of s 347 of the Canadian Criminal Code[433] (which prohibited the levying of a "criminal rate" of interest).[434] Arbour J, who delivered the judgment of the majority, was of the view that it was artificial and "unconvincing" to argue that the application of the "blue pencil test" did not change the terms of the bargain.[435] In the learned judge's view, "[c]ourts inescapably make a new bargain for the parties when they use the blue-pencil approach".[436] In his view:[437]

> The blue-pencil test is imperfect because it involves mechanically removing illegal provisions from a contract, the effects of which are apt to be somewhat arbitrary. The results may be arbitrary in the sense that they will be dependent upon accidents of drafting and the form of expression of the agreement, rather than the substance of the bargain or consideration involved.

148 *However*, Bastarache J, who dissented, delivered a quite different view, emphasising the dangers of excessive uncertainty, as follows:[438]

430 (2002) 214 DLR (4th) 44.
431 (2004) 235 DLR (4th) 385.
432 Comprising Iacobucci, Major, Arbour and LeBel JJ, Arbour J delivering the judgment of the majority.
433 RSC 1985, c C-46.
434 See *supra* n 431, at [6]. See also *id* at [31] and [40].
435 See, generally, *id* at [28]–[30].
436 *Id* at [30].
437 *Id* at [33].
438 *Id* at [59].

> [T]here is *no* legal or other principled reason to *limit the application* of the new approach …, that is notional severance, to the application of the criminal rate of interest. This means that other illegal provisions would be open to judicial redrafting. In my opinion, the availability of "notional severance" as a remedy *creates greater uncertainty in the law*. It is clear that both severance and notional severance alter the parties' agreement in some way. However, under the traditional severance approach, courts continue to work with the words of the parties themselves, removing only those portions of the contract that render it illegal. In stark contrast, under notional severance, courts will be permitted to literally add new words to the parties' agreement. By doing so, courts will be substituting their intentions for those of the parties. Notional severance would extend the judicial role in what I consider to be an unfortunate way. [emphasis added]

149 Two other judges also dissented. Fish J, delivering the reasons of both Deschamps J and himself, agreed with the majority of the Ontario Court of Appeal, expressing the following view:[439]

> I do not believe this case required a new and novel prescription to ensure a fair and reasonable solution. The well-established "blue-pencil" remedy … respects the trial judge's findings of fact, as it must, and achieves an equitable result consistent with established principle.

150 Unlike Bastarache J, however, both Fish and Deschamps JJ did not dismiss the concept of "notional severance" out of hand; in particular, the learned judges were of the view that the concept might be appropriate where it "is necessary to resolve a private dispute fairly and in a manner that is not incompatible with the social and legal objectives of the criminal law", although this "is not the case here".[440] In particular, they were of the view that "notional severance" would be permissible:[441]

> [O]nly where: (1) public policy does not require that the entire agreement be declared unenforceable; (2) severance is found to be warranted; and (3) severance *simpliciter* – or "blue pencil severance" – is impracticable or would occasion an unjust result.

On the facts of the present case, "the first two criteria are satisfied but the third is not: blue-pencil severance is both possible and fair. And, unlike notional severance as applied by the trial judge, blue-pencil severance does not do violence to the policy purposes of s 347 of the Criminal Code

439 *Id* at [80].
440 *Id* at [81].
441 *Id* at [100]. See also *id* at [107] and [134].

or require a judicial rewriting of the interest clause agreed to, as such, by the parties".[442]

151 What is clear is that quite a bit of "legal food for thought" has been generated in this regard for the Singapore courts should they desire to re-examine the "blue pencil test" in the not too distant future. There is, in fact, also a broader point here: there has been much said about increased – and increasing – globalisation and internationalisation. A related point – not discussed extensively, to the best of the present writer's knowledge – is the issue of *comparative common law*. Given the increased – and increasing – inter-connectedness of nations and jurisdictions, as well as the benefits of technology, it is submitted that it is imperative that courts in every jurisdiction be alert (as far as it is possible) to significant or major developments in the common law (as well as, of course, equity) in other jurisdictions. This does not mean that domestic courts must necessarily be slaves to cases from other jurisdictions – if nothing else, because the local context might be quite different. However (and this will be the case especially in the commercial context), where decisions from other jurisdictions embody rules and principles that are just when viewed from an objective or universal perspective, there is no reason why such rules and principles ought not to be embodied into our local jurisprudence. Indeed, this point has already been touched on briefly earlier in the context of unilateral mistake.[443] And there are other benefits in the broader context as well, at least in theory: To the extent that the Singapore legal system *embodies the best in both the common law and in equity from other jurisdictions, whilst simultaneously developing its own system with principle and justice*, to that extent will Singapore not only ensure justice and fairness amongst the various litigants in the local context but also become *itself* a *model* for *other* jurisdictions to consider. In this regard, the physical size of the jurisdiction concerned is irrelevant: the power of one's jurisprudence (which finds its source and strength in the power of one's legal analysis and synthesis) knows no (at least, theoretical) boundaries and certainly transcends the physical borders which one inhabits. Indeed, as we have seen, even physical boundaries are becoming less and less relevant in an increasingly inter-connected world.

442 *Id* at [101].
443 See para 33 of the main text above.

152 Thirdly, my earlier essay did in fact touch on the topic of *reform*.[444] Shortly after that essay was published, the English Law Commission published a Consultation Paper entitled *Illegal Transactions: The Effect of Illegality on Contracts and Trusts*.[445] The Law Commission advocated reform via legislation.[446] In so far as the law of contract itself was concerned,[447] it recommended a *structured discretion* conferred by legislation on the courts to decide whether or not (in the context, generally, of illegality as a defence) to enforce an illegal transaction, to allow benefits conferred under the contract to be recovered,[448] or to recognise that property rights have been transferred or created by the contract.[449] In the exercise of such discretion, the Law Commission provisionally proposed that the court should consider:[450]

> (a) the seriousness of the illegality involved;
>
> (b) the knowledge and intention of the party seeking to enforce the contract, seeking to recover benefits conferred under it, or seeking the recognition of legal or equitable rights under it;
>
> (c) whether denying the claim would deter the illegality;
>
> (d) whether denying the claim would further the purpose of the rule which renders the contract illegal; and

444 See Phang, *supra* n 1, at 83–89. See also generally, by the same writer, *supra* n 272, at paras 5.237–5.244.

445 Law Com Consultation Paper No 154 (1999). See also RA Buckley, "Illegal transactions: chaos or discretion?" (2000) 20 Legal Studies 155, which also contains an excellent comparative account of law reform in this particular area of the law of contract.

446 See *supra* n 445, at Pt V.

447 See generally *ibid* at paras 1.18–1.21 as well as Pt IX for an overview of the various proposals. See also generally Pts II and IV to VII.

448 *Ie*, to allow for the reversal of unjust enrichment where the contract is unenforceable for illegality.

449 It should, however, be noted that in so far as the first category is concerned (whether or not to enforce an illegal transaction), a "legal wrong" must be involved, as contrasted with contracts "which are otherwise contrary to public policy". As to contracts "which are otherwise contrary to public policy", the Law Commission provisionally recommends that the courts should not be given a discretion to enforce contracts, the common law continuing to be the governing legal regime: see generally *supra* n 445, at paras 7.13–7.16. However, the Law Commission does add thus (at para 7.16):

> It is, however, our provisional view that a legislative provision should make it clear that the courts are to judge whether a contract is contrary to public policy in the light of policy matters of the present day and that contracts which were previously considered to be contrary to public policy may no longer be so and vice versa.

450 See *ibid* at paras 1.19 and 7.27–7.43, in so far as contracts are concerned.

(e) whether denying relief would be proportionate to the illegality involved.

153 Generally the Law Commission provisionally proposed that illegality should continue to be used only as a *defence*. However, it did also provisionally propose that an exception be made inasmuch as the doctrine of timely repudiation or *locus poenitentiae*[451] should be allowed to be utilised as a cause of action.[452]

154 The Law Commission's proposals differ from the approach embodied in the New Zealand Illegal Contracts Act 1970[453] in so far as they reject giving the courts the discretion to go beyond treating illegality as a defence to standard rights and remedies and to make any adjustment to the rights and remedies of the parties as they (the courts) think just.[454]

155 The Law Commission also provisionally proposed that where a statute had expressly provided what the effect of the involvement of the illegality on a contract should be, the proposed discretion described above would not apply.[455] It should also be noted that where the doctrine of severance at common law[456] applied, the proposed discretion would also not apply.[457]

156 There have hitherto been no further developments with regard to the Law Commission Consultation Paper, the broad contours of which have been sketched out very briefly above, although the Law Commission did subsequently publish a complementary Consultation Paper in the context of the law of tort (entitled *The Illegality Defence in Tort*[458]).

157 Closer to home, the Law Reform Committee of the Singapore Academy of Law published (relatively recently) a Report entitled *Relief*

451 As to which, see Phang, *supra* n 272, at paras 5.218–5.221. And for a recent local decision, see the Singapore High Court decision of *Colombo Dockyard Limited v Athula Anthony Jayasinghe* [2003] 1 SLR 869 (noted in Phang, *supra* n 98, at para 9.77 and in Phang, *supra* n 161, at para 9.84).

452 See *supra* n 445, at paras 7.58–7.69.

453 And see generally Phang, *supra* n 1, especially at 87, fn 468.

454 See *supra* n 445, at paras 7.73–7.87. See also s 7(1) of the New Zealand Illegal Contracts Act 1970 as well as Buckley, *supra* n 445, and, *supra* n 444 for a brief overview of the various approaches mooted in other jurisdictions.

455 See *ibid* at paras 7.94–7.102, in so far as contracts are concerned.

456 See generally Phang, *supra* n 272, at paras 5.223–5.233 as well as (in a more specific context) the main text accompanying *supra* nn 427–442.

457 See *supra* n 445, at para 7.103.

458 See Law Com Consultation Paper No 160 (2001). And see generally Phang, *supra* n 272, at para 5.244.

from Unenforceability of Illegal Contracts and Trusts[459] which also contains a draft Act that attempts to integrate, in the main, what is perceived to be the best in the New Zealand Illegal Contracts Act 1970, the proposals in the English Law Commission Consultation Paper[460] and the draft British Columbia Contract Law Reform Act. There are, however, some differences – particularly with respect to the former two approaches.[461] The proposed bill, which is an interesting synthesis, repays close analysis.[462] In a nutshell, the *Report* summarises its basic approach thus:[463]

> [W]hile we do not favour alterations to the law relating to when a contract or trust is illegal, we recommend that the courts and arbitrators exercising their proper jurisdiction should be empowered to afford relief in their discretion in respect of an illegal contract or trust, having regard to all the circumstances and in particular, such considerations as: (i) the seriousness of the illegality involved; (ii) the knowledge and intention of the party seeking to enforce the contract, seeking to recover benefits conferred under it, or seeking the recognition of legal or equitable rights under it; (iii) whether denying the claim would deter the illegality; (iv) whether denying the claim would further the purpose of the rule which renders the contract illegal; and (v) whether denying relief would be proportionate to the illegality involved.

158 The above development is also an illustration of how an ostensibly small jurisdiction like Singapore can (assuming that legislation

459 Dated 5 July 2002 and available online at <http://www.lawnet.com.sg>.

460 *Supra* n 445.

461 The proposals differ from the New Zealand Act inasmuch as title would not pass under an illegal contract (unlike s 6 of the New Zealand Act): see *supra* n 459 at para 8.9. The proposals also differ from the UK Law Commission Consultation Paper as follows (see *ibid* at para 8.11):

> First, whereas the English Law Commission proposals involve abrogation of the reliance principle, we have recommended retaining the existing law. Second, we have recommended that the court's power to grant relief should not be restricted but should go beyond mitigating the defence of illegality. Third, the English Law Commission suggests that while the statutory discretion to afford relief in respect of an illegal contract or trust or gift should be exercised having regard to all the circumstances, the consideration of certain factors should be made obligatory; but we have not found it necessary to stipulate an obligatory list of considerations to be taken into account when granting relief. In order to provide comprehensive guidance on how the discretion to grant relief should be exercised, our proposed draft bill spell out very fully the relevant considerations which bear on the exercise of that discretion.

462 The proposed bill can be found in Appendix I of the Report (see *supra* n 459). The relevant sources from which the bill draws are also helpfully incorporated within this Appendix. Reference may also be made to the preceding note.

463 *Supra* n 459, at para 8.3. And see, in particular, cll 5 and 6 of the proposed bill: *supra* n 462.

along the lines suggested be enacted) have a positive impact on the law not just domestically but as a possible model for other jurisdictions as well. In the meantime, however, even the very content of the Report itself gives much food for legal thought.

159 It is in fact hoped that legislative reform can be effected soon. It is certainly clear that the consequences of illegality – with which the actual and proposed reforms generally deal with – constitute an area best suited to such reform. Although it is true that not every difficulty will thereby be eliminated and that the court will inevitably have to exercise some discretion, this still appears (on balance) to be the best way forward in this very complex area of the common law of contract.

VIII. On justice and fairness

160 One of the main thrusts (if not the main thrust) of vitiating factors in contract law is the attainment of justice and fairness – particularly where a technical (or even dogmatic) adherence to the doctrine of freedom and sanctity of contract would engender the opposite result. However, as we have seen, the principal difficulty is the *justification* of both the various factors as well as their application to the facts at hand. More specifically, the issue of subjectivity or relativity constantly threatens any attempt at achieving justice and fairness by an application of such vitiating factors – of which the "floodgates argument" is (as we have also seen) a symptom. The issue I endeavour to respond to in this part of the essay is this: To what extent are absolute values both necessary as well as logical and, if so, how can we (even approximately) be confident that they may be both ascertained as well as applied in the form of legal doctrine(s)?

161 I have, in fact, sought to deal with the issues just mentioned in a number of previous articles.[464] It will suffice for our present purposes to note, first, that absolute values are indeed both necessary as well as logical. Any legal argument (or any argument, for that matter) embodies, *within itself*, an *absolute* claim. Prof Ronald Dworkin has, in my view, convincingly demonstrated this by arguing, *inter alia*, that, if subjectivity or relativity is taken seriously and hence to its logical conclusion, there would be no basis for proper discourse in the first instance – since true interaction would be rendered nugatory. In other words, it would be

464 See *eg*, Phang, *supra* n 7 and, by the same writer, *supra* n 8.

impossible to have true intellectual discourse if each person did not intend what he or she says to have any universal and absolute significance beyond his or her own subjective and individual circumstances. Such a stance, which Dworkin terms "external skepticism",[465] is therefore less than helpful. It is nevertheless possible (Dworkin argues) to have different views about the same issue, but with the participants in the discourse concerned all agreeing that (notwithstanding their different views) there *is* a correct answer to the legal conundrum in question. This is what Dworkin terms "internal skepticism",[466] and is characteristic of what does indeed take place in day-to-day discourse, especially in the context of controversial (here, legal) issues. There is a sense in which lawyers and judges alike *actually believe* that there is a correct – and objective – answer to the legal issue(s) before them. Indeed, anything other than such a belief would jeopardise the entire enterprise of law in the eyes of the public – the law would become nothing more than a sham. Whilst some legal scholars would be prepared to accept such an approach,[467] I would certainly argue vigorously against it – not because of self-interest, but (rather) because I truly believe that the law is an enterprise that is both worthwhile as well as noble, and hence, despite its undoubted imperfections, ought to be worked out as best as possible.

162 Further, if the argument from subjectivity or relativity is indeed true, then it is *itself* suspect! There is, indeed, no escape from absolute values – even for the subjectivist or relativist. It is submitted, with respect, however, that those who promulgate such "values" are advocating one of the most impoverished value systems on offer. In any event, such a value system is total anathema to the functions and ideals embodied in the enterprise of the law itself. And, as I have already argued, a subjectivist or relativist approach towards the law would wholly undermine its legitimacy in the eyes of the public. This would constitute an unmitigated disaster, to say the least.

163 However, even if one accepts the proposition that absolute values are an integral part of the law, there are two further – and related – issues

465 See Ronald M Dworkin, *Law's Empire* (Harvard University Press, 1986) at pp 78–85, on the distinction between internal and external skepticism.

466 See generally Dworkin, *ibid*.

467 See, in particular, the Critical Legal Scholars, as to which see (in turn) *eg*, M Kelman, *A Guide to Critical Legal Studies* (1987) and A C Hutchinson & P J Monahan, "Law, Politics and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought" (1984) 36 Stanford Law Rev 199. Both works, whilst admittedly somewhat dated, still give what is (in the present writer's view) the best overview of this particular jurisprudential movement.

to resolve. First, where then is the *source of justification* for these values? Second, how does one resolve the difficulty of at least perceived subjectivity when the rules or principles of law concerned are actually *applied* to the facts of the case at hand?

164 As already mentioned, I have attempted to deal with both the related issues mentioned in the preceding paragraph elsewhere and the interested reader is referred to these articles.[468] This is by no means the last word on the subject.[469] To this extent, Dworkin's argument from "internal skepticism"[470] – inasmuch as that there is a uniquely correct answer to every legal issue, although persons may disagree as to what that correct answer is (proffering, as I have, their own theories in the process[471]) – holds true at the present time. This is (unfortunately, in many ways) especially true as postmodernism has established its parlous grip over not only the law but life generally. This is greatly to be regretted, particularly where the law is concerned. Indeed, I have already attempted to demonstrate why the subjectivist or relativist approach that results from postmodernism is neither logical nor persuasive.[472] I would only add that a postmodernist approach is also practically unliveable. We all function with absolute standards of reference. In so far as the law is concerned, such standards are as – if not more – imperative. Lawyers and judges moving around in a chaotic state, arguing what pleases them at a given point in time, is something too unimaginable to even contemplate.

165 It is submitted, with respect, that what *is* clear is that all who are truly involved in – and committed to – the enterprise of the law must necessarily believe that objective standards of justice and fairness exist and ought therefore to prevail. There may be some controversy as to the precise source of such standards. Nevertheless, the existing case law across

468 See, *supra* n 464. Reference may also be made to Phang, *infra* n 469.

469 And see *eg*, A Phang, "The Natural Law Foundations of Lord Denning's Thought and Work" [1999] Denning LJ 159 (a paper delivered at a Symposium celebrating Lord Denning's 100th birthday at Buckingham Law School on 23 January 1999). However, and reflecting the controversy generated by arguments from objectivity and, *a fortiori*, religion mentioned above, see M Kirby, "Judicial activist and moral fundamentalist" (1999) New LJ 382 at 383, where the author (a Justice of the Australian High Court) summarises the substance as well as (more importantly) the less than enthusiastic responses to the paper mentioned at the outset of this note.

470 *Supra* n 466.

471 This is W B Gallie's idea of "essentially contested concepts" (see W B Gallie, "Essentially Contested Concepts" (1956) Proceedings of the Aristotelian Society 167 (reprinted in ch 8 of W B Gallie, *Philosophy and the Historical Understanding* (Schocken, 2nd Ed, 1968)).

472 See the main text accompanying *supra* n 464 *ff*.

the globe gives us more than sufficient cause for optimism in this regard. There is a great commonality of rules and principles within the complex mesh of case law that presently exists and which (especially under the common law) continues to grow apace.[473] This doctrinal structure does, it is submitted, reflect very much an underlying commonality of values (both legal as well as extra-legal) that transcend jurisdictions, cultures and societies. To be sure, certain rules and principles have developed in response to the unique needs of a particular jurisdiction – or may even have departed from the then existing common law.[474] However, we find, in the main (and particularly in commercial or mercantile transactions) a commonality of both doctrine and values that are uncannily similar. All this supports the view proffered in this essay to the effect that the law embodies common values and standards of justice and fairness. In the absence of a definitive theory, the courts can continue – in *practical terms* – to administer the law, being attentive not only to the existing legal rules and principles and how they ought to be developed but also (I would suggest) ensuring that both the application as well as development of such rules and principles are consistent with their intuitive sense of justice and fairness – which sense, as I have sought to argue, is one that is (for the most part, at least) common to all judges and lawyers within the common law tradition.[475] And this is, as I have already alluded to at the outset of this Part, of particular significance in so far as vitiating factors in contract law are concerned.

473 And, on occasion, even statutory enactments as well. A good example is the English Law Reform (Frustrated Contracts) Act 1943, which has been adopted throughout most of the Commonwealth, including Singapore (see also *supra* nn 37 and 58).

474 An excellent illustration in the Singapore context is the decision of the Singapore Court of Appeal in *Xpress Print Pte Ltd v Mooncrafts Pte Ltd* [2000] 3 SLR 545. Under English law, the right to support to land only extended to land in its natural state. Yong Pung How CJ, who delivered the judgment of the Court, rejected this rule, and made the following observations that, it is suggested, are wholly consistent not only with local conditions but with the layperson's conception of justice (see *ibid* at [37]):

> [W]e are of the view that the proposition that a landowner may excavate his land with impunity, sending his neighbour's building and everything in it crashing to the ground, is a proposition inimical to a society which respects each citizen's property rights, and we cannot assent to it. No doubt the trial judge felt constrained by [the various authorities, including the leading English case], but this court is entitled to depart from those cases, and therefore does not suffer from any such impediment. In the event, we are of the opinion that the current state of affairs cannot be allowed to persist.

See also generally Tang Hang Wu, "The Right of Lateral Support of Buildings from the Adjoining Land" [2002] Conv 237.

475 The same would, it is submitted, apply to the civil law tradition as well.

IX. Conclusion

166 In my earlier essay,[476] I focused on two main themes: first, the tension between the search for fairness (which, it will be recalled, is the hallmark of vitiating factors generally) on the one hand and the maintenance of certainty and predictability on the other and, secondly, the need to be aware of the substantive linkages between and amongst doctrines and even within the doctrines themselves.[477] In many ways, the present article re-emphasises the importance of both these themes. It also affirms the correlation sought to be drawn in the earlier piece between theory on the one hand and practice on the other.[478] Indeed, the present article elaborates on this further by arguing that *both structure (or architecture) and the spirit of justice and fairness are necessary and, indeed, integrate (and interact) with each other in a holistic fashion*.[479] It is therefore imperative that we pay close attention to developments in both these spheres. To this end, therefore, I sought first to consider – within each broad topic – key *doctrinal* developments that either strengthened, complemented or (unfortunately) even weakened the structure of the law in this particular area. I also considered arguments of justice and fairness wherever relevant and, indeed, also allotted the preceding Part exclusively to a discussion and analysis of these qualities.

167 Despite my attempts at economy, I have covered a great deal of material. Despite the length of the present article, much more elaboration is still required for a great many topics. To attempt, therefore, a full summary at this juncture is virtually impossible. It might, however, assist the reader if I draw his or her attention – in the briefest of fashions – to (first) the main doctrinal issues and (secondly) to the main issues relating to the attainment of justice and fairness which (as we have and shall see) constitutes the *raison d'être* of vitiating factors in contract law generally.

168 Turning, first, to the *doctrinal* issues, in so far as the law relating to *mistake* is concerned:

> (a) On a general level, the law relating to *mistake* in its various aspects has witnessed a great many developments in recent years which, given the relative dearth of cases across the

476 See Phang, *supra* n 1.
477 See Phang, *ibid* at 3–4 and 89–96.
478 And see the title of the essay itself at Phang, *supra* n 1. See also *ibid*, especially at 94–96.
479 See the main text accompanying *supra* nn 8–10. See also Phang, *supra* n 7.

decades, is therefore a little surprising and may be a manifestation of the increased (and even increasing) use of vitiating factors generally and certainly of the various doctrines of mistake in particular.

(b) The doctrine of *common mistake in equity* has, until further notice, been *abolished* (see the decision of the English Court of Appeal in the *Great Peace Shipping* case[480]). However, this is not, in the present writer's view, a development that is to be welcomed, and it is therefore hoped that the doctrine of common mistake in equity will be reinstated as soon as an opportunity arises in the English courts and that that development ought not to be followed in the Singapore context.[481]

(c) The doctrine of *mistaken identity* as embodied in the recent House of Lords decision in the *Shogun Finance* case[482] sidestepped unfortunately the issues relating to *inter praesentes* (or face-to-face) transactions. A bare majority of the House rejected the minority's argument to the effect that a contract procured through mistaken identity is only voidable, never void. Unfortunately, though, the arguments made by both the majority as well as the minority may be questioned. The time may, in fact, now be ripe for *reform*.[483]

(d) The doctrine of *unilateral mistake in cyberspace* was canvassed in the *Digilandmall* case[484] – probably the first case, in fact, on Internet mistake. The case also dealt with closely related issues in *contract formation*. A great many issues were in fact raised, including the legal status of website advertisements, whether the postal acceptance rule applies to transactions via electronic mail, whether the problematic doctrine of consideration ought to be abolished and replaced by appropriate alternatives, the importance of the concept of objectivity, the confirmation that constructive knowledge suffices in so far as the doctrine of unilateral mistake is concerned, the status of unconscionability as rationale and/or substantive doctrine,

480 *Supra* n 17.
481 And see generally the main text accompanying *supra* nn 16–41. See also Phang, *supra* n 17.
482 *Supra* n 43.
483 And see generally the main text accompanying *supra* nn 42–64.
484 *Supra* n 65.

whether the common law and equitable jurisdictions in the law of mistake are compatible, as well as whether or not there is indeed a separate and independent doctrine of mistake.[485]

(e) The Singapore courts have generally followed the current English law, which now allows payment under mistakes of *law* to be recovered as well (see, in particular, the *De Beers Jewellery* case[486]).[487]

169 In so far as the law relating to *misrepresentation* is concerned:

(a) If the approach in the English Court of Appeal decision in the *Spice Girls Ltd* case[488] is adopted, a *very broad* approach as to what might constitute a misrepresentation of fact would ensue: in particular, the court might have regard to a series of continuing representations, taking into account their cumulative effect.[489]

(b) An entire agreement provision does *not* preclude a claim in misrepresentation; neither does such a provision fall within the purview of s 3 of the Misrepresentation Act (see, for example, the *Inntrepreneur Pub Co* case[490]).

(c) The *degree of proof for fraudulent misrepresentation* is probably in need of definitive statement, although it would appear that the degree of proof ought to be higher and perhaps even reach the criminal standard where the fraud concerned is in fact connected with a criminal offence.[491]

(d) A plaintiff can claim damages for all loss flowing directly from a *fraudulent* misrepresentation *even* in a situation where it has suffered no loss and where, in fact, it might even have made a profit (albeit less of a profit than if it had entered into another still more profitable transaction instead): see the English Court of Appeal decision in the *Clef Aquitaine SARL* case.[492]

485 And see generally the main text accompanying *supra* nn 65–96.
486 *Supra* n 98.
487 And see generally the main text accompanying *supra* nn 97–100.
488 *Supra* n 107.
489 And see generally the main text accompanying *supra* nn 107–108.
490 *Supra* n 109, and see generally the main text accompanying *supra* nn 109–115.
491 And see generally the main text accompanying *supra* nn 116–118.
492 *Supra* n 120, and see generally the main text accompanying *supra* nn 119–124.

(e) The defendant *cannot* apply for a reduction in damages under the (Singapore) Contributory Negligence and Personal Injuries Act, following the reasoning of the House of Lords with respect to the UK Act (on which the local Act was modelled) in the *Standard Chartered Bank* case.[493]

(f) A contracting party *cannot* exclude liability for its *own fraud*. This rule was reaffirmed House of Lords decision in the *HIH Casualty and General Insurance Ltd* case.[494]

(g) It is still *an open question* as to whether or not a contracting party can exclude liability for the *fraud* of its *agent*. The factual matrix in the *HIH Casualty and General Insurance Ltd* case[495] did *not* require a definitive conclusion and different views were expressed. It would appear, however, that even if such liability could be excluded in law, very clear and unmistakeable language must be utilised in the contract itself.[496]

(h) The measure of damages under *s 2(1)* of the Misrepresentation Act would still appear to be the *fraud* measure which obtains in the *tortious* context. This basis, whilst still heavily criticised, may, however, now be modified somewhat if we accept Rix J's proposition to the effect that "where there is room for an exercise of judgment, a misrepresentation should not be too easily found".[497]

(i) It now appears settled that where the right to rescission has been barred, there is *no* right to *damages* under *s 2(2)* of the Misrepresentation Act (see, for example, the English High Court decisions in the *Government of Zanzibar* and *Floods of Queensferry Limited* cases[498]).

(j) The various propositions of law that were affirmed in the recent Singapore Court of Appeal in the *Raffles Town Club* case[499] might be usefully noted.[500]

493 *Supra* n 125, and see generally the main text accompanying *supra* nn 125–127.
494 *Supra* n 128, and see generally the main text accompanying *supra* nn 128–141.
495 *Supra* n 128.
496 And see generally the main text accompanying *supra* n 131.
497 See *supra* n 147, and see generally the main text accompanying *supra* nn 142–147.
498 See *supra* nn 154 and 158 respectively, and see generally the main text accompanying *supra* nn 148–160.
499 *Supra* n 161.
500 And see generally the main text accompanying *supra* nn 161–174.

170 In so far as the law relating to *economic duress* is concerned:

(a) The central difficulty – not, unfortunately, peculiar to the law relating to economic duress – is that of *line-drawing*: in particular, distinguishing between mere commercial pressure on the one hand and illegitimate pressure (which constitutes economic duress) on the other. This difficulty – particularly in the sphere of *application* – is illustrated once again in the recent Singapore High Court decision in the *Sharon Global Solutions* case,[501] where the court adopted the best possible practical approach which constituted a holistic process that involved examining the material facts from the perspectives of both the plaintiff *and* the defendant.[502] Reference may also be made in this regard to the New Zealand Privy Council decision of *Attorney-General of England and Wales v R*.[503]

(b) It has also been reaffirmed that, generally speaking, a threat to enforce one's *legal* rights does not amount to duress – at least where it is made in good faith and not manifestly frivolous or vexatious (see, generally, *Lee Kuan Yew v Chee Soon Juan*[504] and *Goh Chok Tong v Chee Soon Juan*[505]).[506]

171 In so far as the law relating to *undue influence* is concerned:

(a) The leading decision is now that of the House of Lords in the *Etridge* case.[507] Many significant points were in fact laid down in this case including the emphasis on the *evidential* nature of presumed (or Class 2) undue influence. Unfortunately, perhaps, such an approach does *blur the line* between actual (or Class 1) and Class 2 undue influence – in particular, between Class 1 and Class *2B* undue influence.[508]

(b) The *Etridge* case also *retains* the requirement of manifest disadvantage for Class 2 undue influence, this requirement having already been abolished for Class 1 undue influence in the

501 *Supra* n 184.
502 And see generally the main text accompanying *supra* n 187.
503 *Supra* n 198, and see generally the main text accompanying *supra* nn 198–200.
504 *Supra* n 191.
505 *Supra* n 191.
506 And see generally the main text accompanying *supra* nn 191–193.
507 *Supra* n 5.
508 And see generally the main text accompanying *supra* nn 203–212.

Pitt case.[509] This requirement now performs a *sifting* function – in particular, it serves as a catalyst for the operation of the presumption of undue influence and, looked at in this light, its role has been greatly reduced. I have, however, argued that there are good reasons – both on principle and in history – why the requirement of manifest disadvantage ought to be abolished.[510]

(c) The *Etridge* case also considered the nature of constructive notice and laid down a number of reasonable steps to be followed by banks as well as a "core minimum" that had to be contained within the legal advice given to the surety. Such steps required of both banks and solicitors do not appear to be burdensome and should adequately protect the surety in *most* transactions, although difficulties remain where it is specifically pleaded that the bank or solicitor has had something drawn to its attention that arouses suspicion that the surety's will has been overborne (and this is particularly so with regard to interlocutory appeals).[511]

(d) On the *local* front, there have been a few pronouncements in the case law which support the argument that there are close linkages amongst the doctrines of economic duress, undue influence and unconscionability – a point considered in more detail in this article under the topic of unconscionability.[512] There is also a very recent case where the *Etridge* case was *distinguished*: see the *Bank of East Asia Ltd* case.[513]

172 In so far as the law relating to *unconscionability* is concerned:

(a) I raised, once again, the argument that the doctrines of economic duress, undue influence and unconscionability should (given the many linkages within and amongst these various doctrines) be subsumed under a broader "umbrella doctrine" of unconscionability. Despite the less favourable "environment" presently existing under English (and, presumably, Singapore) law, there is case law support in Canada and (despite the signs of a possible "retreat") in Australia as well. Further, some

509 *Supra* n 213.
510 And see generally the main text accompanying *supra* nn 213–231.
511 And see generally the main text accompanying *supra* nn 232–239.
512 See *supra* n 242, and see generally the main text accompanying *supra* nn 242–243.
513 *Supra* n 244, and see generally the main text accompanying *supra* nn 244–250.

pronouncements with respect to an ostensibly narrower concept of the doctrine of unconscionability in the English context are susceptible of natural "expansion" in a more full-blown "umbrella doctrine".[514]

173 In so far as the law relating to *illegality and public policy* is concerned:

(a) It would conduce towards more clarity in analysis if the distinction between contracts illegal as formed and contracts illegal as performed is – despite its relatively established status – discarded.[515]

(b) Although the traditional distinctions between statutory and common law illegality as well as between express and implied prohibition are well established, a further formulation (focusing on the concepts of unilateral and bilateral prohibition of the parties) was introduced by Kerr LJ in the English Court of Appeal decision in the *Phoenix General Insurance* case.[516] I have argued that – quite apart from being *obiter dicta* – this new formulation (which focuses on the parties rather than on the contract) is both confusing and difficult to justify on grounds of principle and logic.[517] The traditional distinctions just mentioned should therefore continue to be utilised instead – a point that appears to have the support of the recent English Court of Appeal decision in the *P & B (Run-Off) Ltd* case.[518]

(c) In so far as *gaming and wagering contracts* are concerned, it is well-established that a *loan* for gaming or wagering that is *valid* by the law of the place where the loan was made is generally recoverable. As a result, the *characterisation* of the transaction concerned becomes of first importance.[519]

(d) Still on the topic of *gaming and wagering contracts*, the very recent Singapore Court of Appeal decisions in the *Star City* and *Liao Eng Kiat* cases[520] should be noted. The former case

514 And see generally the main text accompanying *supra* nn 251–270.
515 And see generally the main text accompanying *supra* nn 276–278.
516 *Supra* n 279.
517 And see generally the main text accompanying *supra* nn 279–289.
518 *Supra* n 288.
519 And see generally the main text accompanying *supra* nn 301–303.
520 See *supra* nn 294 and 311 respectively.

emphasised that s 5(2) of the Civil Law Act is procedural – as opposed to substantive – in nature and therefore applied to *all* transactions as the law of the forum (with no contracting out by the parties being permitted). In particular, the court held that whilst gaming and wagering were recognised in Singapore within strict limits, the courts could *not* be used by casinos to enforce gambling debts that were "disguised in the 'form' of loans".[521] *However*, in the *Liao Eng Kiat* case,[522] the court held that where the plaintiff had obtained *a foreign judgment* pursuant to the (Singapore) Reciprocal Enforcement of Commonwealth Judgments Act, registration of the judgment pursuant to the Act would *not* be set aside on grounds of public policy under s 3(2)(*f*) of the Act (the plaintiff in this case being a casino which operated a casino in Perth, Western Australia, and which obtained judgment against the defendant on a dishonoured cheque in the District Court of Western Australia). In particular, the court was of the view that "[s]ection 3(2)(f) of [the Act] requires a higher threshold of public policy to be met in order for registration of a foreign judgment to be refused".[523] Of interest, too, was the court's general reference to a possible change in societal attitudes in Singapore towards gambling.[524]

(e) In so far as the *common law* is concerned, there have been very persuasive suggestions (not least in two recent articles[525] as well as developments in other jurisdictions such as the United Kingdom) to the effect that the law relating to *contingency fee arrangements* should be changed and a less stringent approach be adopted in order to better facilitate access to justice.[526]

(f) There have also been developments in the area of *restraint of trade*, one of which concerns a device utilised by employers in order to "neutralise" the employee during his or her notice period – colloquially known as "garden leave".[527]

521 See the main text accompanying *supra* nn 306–308, and see also, generally, the main text accompanying *supra* nn 304–308.
522 *Supra* n 311.
523 See *supra* n 318.
524 And see generally the main text accompanying *supra* nn 330–333.
525 See *supra* n 335.
526 And see generally the main text accompanying *supra* nn 334–370.
527 And see generally the main text accompanying *supra* n 373.

(g) Recent case law, in the context of *restraint of trade*, reminds us once again that construction of restraint of trade clauses ought to be effected with *good common sense*: see, for example, the discussion of the English Court of Appeal decision in the *Hollis & Co* case.[528]

(h) Again, in the context of *restraint of trade*, the recent English Court of Appeal of decision in the *Dranez Anstalt* case[529] is a welcome exception to the general trend (under English law) to conflate the two-pronged test enunciated by Lord Macnaghten in the seminal House of Lords decision in the *Nordenfelt* case[530] to the effect that a restraint of trade clause must (in order to pass muster under the law) be reasonable in the interest of the parties *and* in the interests of the public. In this regard, Singapore law has long been ahead of the English law.[531]

(i) The artificiality of the argument that in order for the *restraint of trade* doctrine to apply, the covenantor must have given up some freedom or right which it would otherwise have had prior to entry into the *solus agreement* concerned has been recently considered in the Australian context but without, apparently, any definitive resolution. The Singapore position appears, once again, to be somewhat ahead of the times, with at least one decision throwing doubt on the argument just mentioned and proposing a much broader and open-ended view proposed by Lord Wilberforce in the *Esso Petroleum* case[532] instead.[533]

(j) In so far as the *consequences* of illegality are concerned, the House of Lords decision in *Tinsley v Milligan*[534] (which distinguished the situation of a resulting trust from that of one that had, in addition, a presumption of advancement in the context of recovery under an independent cause of action) continues – despite criticism – to be good law, although it should be noted that a recent Singapore decision did set out the

528 See *supra* n 374, and see generally the main text accompanying *supra* nn 374–376.
529 *Supra* n 377.
530 *Supra* n 378.
531 See *supra* n 379, and see generally the main text accompanying *supra* nn 377–381.
532 *Supra* n 382.
533 See *supra* n 385, and see generally the main text accompanying *supra* nn 382–396.
534 *Supra* n 399.

weaknesses in *Tinsley v Milligan*, with signs of a possible departure in the perhaps not too distant future.[535]

(k) The exception to recovery under an independent cause of action, as embodied within the observations of du Parcq LJ in the leading English decision of *Bowmakers Ltd v Barnet Instruments Ltd*,[536] were explored in recent English cases and may be limited to a more narrow compass by virtue of (and so as not to stifle) the decision in *Tinsley v Milligan*.[537]

(l) The Canadian Supreme Court has very recently affirmed the concept of "notional severance" over the more traditional "blue pencil test" in the context of *severance* – but only by a bare majority of four to three: see *New Solutions Financial Corporation v Transport North American Express Inc*.[538] This is a relatively radical approach and all the judgments repay careful reading and certainly give much "legal food for thought" in the context of the operation of the "blue pencil test" in the Singapore context.[539]

(m) There is also the issue of *reform*, having regard (in particular) to developments in both the United Kingdom as well as in Singapore. The Singapore *Report* contains a draft Act and attempts to integrate what appears to be the best in the New Zealand Contracts Act 1970, the proposals in the UK *Consultation Paper* as well as the draft British Columbia Contract Law Reform Act.[540]

174 Turning now to the requirement of *justice and fairness*, it is the *spirit* of the law which gives "life", as it were, to the structure of the law itself. It is also true, however, that the concept of mere justice and fairness in the abstract is too disembodied and impractical without there existing a doctrinal structure which both impacts upon – and is impacted by – the requirement of justice and fairness. In this regard, it is important to emphasise – in so far as this last-mentioned requirement – is concerned that:

535 And see generally the main text accompanying *supra* nn 409–413.
536 See *supra* n 415.
537 And see generally the main text accompanying *supra* nn 414–426.
538 *Supra* n 431.
539 And see generally the main text accompanying *supra* nn 427–443.
540 And see generally the main text accompanying *supra* nn 444–463.

(a) Absolute values underlie that law and are, indeed, both necessary as well as logical. Any argument to the contrary is incoherent, self-refuting and leads to disrespect for the law and consequent chaos – the very antithesis of the ideals and purposes underlying the enterprise of the law itself.[541]

(b) While the precise source of justification of these values remains somewhat controversial, there is (as has been argued) a great commonality of rules and principles within the complex mesh of case law that presently exists and which continues to develop apace. This commonality is, indeed, displayed in an intuitive sense of justice that is felt by all judges and lawyers, regardless of whether they hail from the common law tradition or the civil law tradition. It is also true, though, that courts need to be sensitive to specific rules and principles that have developed in response to the unique needs of a particular jurisdiction.[542]

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541 And see generally the main text accompanying *supra* nn 464–467.
542 And see generally the main text accompanying *supra* nn 468–475.