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CONTRACT LAW IN COMMONWEALTH COUNTRIES: UNIFORMITY OR DIVERGENCE?

The present article examines – through a consideration of developments in the most recent and most topical areas of contract law – whether and in what areas the contract law of various Commonwealth jurisdictions has diverged (in the main, from English law) and, more importantly, why such divergence has occurred. It also considers areas where there has been both flux and divergence in the sense that there is both uncertainty in development as well as divergence between jurisdictions (notably, in discharge by breach of contract, unconscionability as well as emerging categories of contractual damages). The article also attempts, in explaining why the respective areas developed in the way they did, to draw out some normative threads that might simultaneously furnish Commonwealth courts with legal methodology as well as tools for developing the law in their respective jurisdictions (bearing in mind the fact that these normative threads do not (and cannot) operate in a mechanistic fashion).

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I. Introduction

1 The present article was presented (in much shorter form) at a conference celebrating the 30th anniversary of the *Journal of Contract Law*[1] ("the Journal"). In contrast with another article (also by the present authors) which, in conjunction with the same celebration, analyses the

1 Held at Sydney on 27 July 2018. All views expressed in this article are personal only and do not reflect in any way the views of either the Supreme Court of Singapore or the Singapore Management University. We would also like to express our deepest appreciation to Ms Ho Jiayun, Mr Kenneth Wang Ye and Mr Torsten Cheong, Justices' Law Clerks, Supreme Court of Singapore for their very helpful comments and suggestions. However, all errors remain ours alone.

influence of the Journal in the context of the contract law of the Commonwealth (which analysis is necessarily rough and ready, and more *quantitative* in nature),[2] this article, on the other hand, is a *qualitative* analysis of Commonwealth contract law – in particular, whether and in what areas the contract law of various Commonwealth jurisdictions has *diverged* and, more importantly, perhaps, *why* such divergence has occurred. A closely related point is whether a shift back towards *uniformity* is desirable.

2 At the outset, we should note that *the concepts* of uniformity and divergence are themselves *relative*. For example, whilst a particular Commonwealth court could decide to diverge from English law as at a particular point in time, this might be because that court chose to adhere to English law as it had previously been. Considered in that particular light, that court would have preferred to maintain uniformity with English law as it had been. Or a particular Commonwealth court might decide to diverge from *not only* English law as it is *but also* the English law as it was. In doing so, it might decide to follow the law of *another* Commonwealth court and, to that extent, there would be uniformity with the law of that court. Or a particular Commonwealth court might decide to *diverge* not only from English law as it is and as it was, but also from the law of *all other Commonwealth* jurisdictions – in effect, striking out on *a wholly new and unique legal path* in relation to a particular area of the common law of contract. It is therefore important to bear in mind the various ways in which uniformity and divergence can operate, conceptually. What is clear is that, where a particular Commonwealth court chooses to strike out on a new path, that would clearly constitute divergence in *the fullest sense* of that concept. What we will see, however, is that when we speak of *divergence*, this tends to relate more to divergence from *English law*. This is not surprising for, as we will explain below, English law was the starting point for all the Commonwealth jurisdictions that were former colonies of England. To that extent, there was a kind of *"forced" uniformity* at the beginning; hence, any change was likely to be a divergence from English law more than any other law. Hence, when we speak of "divergence" in this article, this will be the *primary sense* in which the concept of "divergence" will be used.

3 However, as we shall see, there is yet a third situation where the contract law in a particular area appears to be in a state of flux. A situation of flux could conceivably coincide with a situation of divergence. The issue that arises in such a situation is *how* the law in each jurisdiction ought to develop. In this regard, we would suggest that

2 See Goh Yihan & Andrew Phang, "A Statistical Analysis of the Influence of the *Journal of Contract Law* in Commonwealth Court Decisions" (2018) 35 JCL 14.

courts ought always to be sensitive to (and even utilise, wherever appropriate) the *relevant case law from other jurisdictions*.[3] Put simply, especially in novel or developing areas of contract law, courts ought to search across all common law jurisdictions for the *principles* that are most appropriate to the jurisdiction concerned from the perspectives of both logic *and* local conditions. To put it even more simply, courts engage in *the search for* ***principle***.[4] Looked at in this light, comparative analysis is of the first importance,[5] and this is, in our view, common to the development of Commonwealth contract law generally. This also ensures that *there ought not to be autochthonous or indigenous development (here, of the domestic law of contract) merely for its own sake (for this would be mere parochialism), and that due regard ought to be paid to developments in other jurisdictions*. As we will point out below, such an approach is not only relevant to the development of the law when it is in a state of flux. Indeed, we would argue that it is *also* the *primary or dominant approach* adopted by Commonwealth courts when deciding whether or not there ought to be uniformity or divergence in a particular area of the common law of contract and it is characterised by many of the *central threads* which we consider below.

4 A moment's reflection will reveal that this is a mammoth project – one that would require a book-length study (or perhaps even a multi-volume study). We hope that we will have the opportunity to elaborate on it in a more extended study in the future (hopefully, with the assistance of colleagues across the Commonwealth). In the meantime, though, we present it as a more modest contribution that, we hope, will generate more legal food for thought. Most importantly, we thought that this was appropriate for the present Conference which not only celebrates the 30th anniversary of the Journal but also examines, as the central theme of the conference itself, how contract law will meet the challenges of the 21st century.

5 It would be appropriate at this juncture to turn to an outline of what we propose to accomplish in the present article.

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3 See Andrew Phang, "Recent Developments in Singapore Contract Law – The Search for Principle" (2011) 28 JCL 1.

4 Borrowing (albeit in a somewhat different context) the title of Lord Goff of Chieveley's justly famous Maccabaean Lecture in Jurisprudence: see Robert Goff, "The Search for Principle" (1983) 69 *Proceedings of the British Academy* 169 (reprinted in *The Search for Principle – Essays in Honour of Lord Goff of Chieveley* (William Swadling & Gareth Jones eds) (Oxford University Press, 1999) at pp 313–329).

5 See Andrew Phang, "The Law of Remedies – The Importance of Comparative and Integrated Analysis" (2016) 28 SAcLJ 746 at 751–765 (in relation to the specific context of remedies) and 748–751.

II. An outline

A. General

6 We commence by considering briefly the state of Commonwealth contract law at the founding of the Commonwealth. Not surprisingly, there was uniformity due to the fact that every Commonwealth jurisdiction applied the law of its colonial master, *viz*, English law.

7 However, such uniformity could not last indefinitely as more and more Commonwealth countries became independent nations in their own right. This entailed the need in each country to develop an independent legal system that was sensitive to, and reflective of, her needs. Whilst uniformity in the context of *contract and commercial law* (as opposed to, say, constitutional and administrative law) would have been (and arguably continues to be) desirable, there was always the need to ensure that the development of contract and commercial law was appropriate to the circumstances of that particular country – at least in so far as it related to its *domestic sphere*.

8 It is not possible, within the modest confines of the present article, to cover such divergence with regard to *all* the areas of Commonwealth contract law. We will therefore confine ourselves to a consideration of the most recent and most topical areas. We will first examine areas of *divergence*, commencing with an examination of developments in relation to *implied terms* (with a focus on the Judicial Committee of the Privy Council decision (on appeal from the Court of Appeal of Belize) of *Attorney-General of Belize v Belize Telecom Ltd*[6] ("*Belize*"), where there has been divergence both within as well as outside English law.

9 We then turn to consider the law relating to *common mistake*. In this area, there is clear *divergence* in at least three jurisdictions, *viz*, England, Singapore and Australia. Indeed, the law in Australia is quite different from that in England and Singapore with regard to the very *existence* of a doctrine of common mistake, at least at *common law*, whilst, as between England and Singapore, there is a difference in the view that is taken with regard to the issue as to whether or not there is a doctrine of common mistake in *equity*.

10 We also consider another area of intense topical interest, inherent controversy and divergence, which is the recent UK Supreme

6 [2009] 1 WLR 1988.

Court decision on *contractual illegality* in *Patel v Mirza*,[7] and the reasons why the Singapore Court of Appeal in the more recent decision of *Ochroid Trading Ltd v Chua Siok Lui*[8] declined to follow it.

11 Another area of Commonwealth contract law where there has been divergence relates to *remoteness of damage* in contract law. Here, the focus will be on the House of Lords decision in *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)*[9] ("*The Achilleas*"). The decision in this case has not been followed uniformly across the Commonwealth – reference may be made in this regard to the Singapore Court of Appeal decisions of *MFM Restaurants Pte Ltd v Fish & Co Restaurants Pte Ltd*[10] ("*MFM Restaurants*") and *Out of the Box Pte Ltd v Wanin Industries Pte Ltd*[11] ("*Out of the Box*").

12 We will then turn to consider areas of Commonwealth contract law that are characterised by *both flux and divergence*. One such area is the law relating to *discharge by breach of contract*.

13 We also consider areas of Commonwealth contract law which are in a state of *relatively greater flux*. In particular, we will touch on two developing areas. The first is the doctrine of *unconscionability* (including its relationship to the more established doctrines of duress and undue influence). As we shall see, England, Australia, Canada and Singapore adopt somewhat different approaches and it is anyone's guess whether uniformity or divergence will ultimately result. Our preliminary analysis suggests that it is probably the latter rather than the former. The second area relates to *possible new categories of damages in contract law* (in particular, punitive damages, *Wrotham Park* damages,[12] and *AG v Blake* damages).[13]

14 In order to go beyond merely describing the areas of Commonwealth contract law briefly referred to above, it is necessary to draw out some *normative threads* that might explain *why* the respective areas developed in the way they did. This might simultaneously furnish Commonwealth courts with *legal methodology as well as tools* for developing the law in their respective jurisdictions. We should qualify that these normative threads do not (and cannot) operate in a

7 [2017] AC 467.
8 [2018] 1 SLR 363.
9 [2009] 1 AC 61.
10 [2011] 1 SLR 150.
11 [2013] 2 SLR 363.
12 Based on the leading English High Court decision of *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798.
13 Based on the leading House of Lords decision of *Attorney General v Blake* [2001] 1 AC 268.

mechanistic or unilinear fashion. Some may at times not be relevant at all whilst, on other occasions, may operate in an *interactive fashion*. We can go no further than this because the possible fact situations are myriad and, indeed, life itself is too complex to admit of a reductionist list of methodological factors that can furnish the court with an immediate and clear answer in all situations. That is the very essence of the discipline of common law itself – that it requires lawyers to make the necessary arguments pursuant to an adversarial system and judges to arrive at a just and fair decision after applying the law to the facts in the best way they can. Nevertheless, we are of the view that the delineation of normative threads is helpful in providing a structure around which such arguments and analysis as well as decision-making can take place.

B. Some central threads

15 The first central thread is that where there has been divergence, the courts concerned have been concerned primarily with the *legal reasoning and policy* in arriving at the decision which effects such divergence. Our reference to "policy" here not only is to "public policy" but also encompasses *attitudes towards established legal categories* (for example, towards the relationship between common law and equity as well as the relationship between and amongst various contractual doctrines). It should also be noted that while this is the most important thread, it must be considered together with the subsequent threads (in particular, the third and fourth) which are closely related and, in fact, *support or aid* the courts in their consideration of the relevant legal reasoning and policy. However, first, we should consider a second central thread which is as important as and complements this first central thread.

16 The second central thread is that it is clear that, in arriving at their respective decisions, the courts concerned do consider that the rules and principles, which constitute the *doctrine of the law*, are not ends in themselves but are, rather, the means through which the courts arrive at *substantively fair outcomes* in the cases before them in each and every area of the law of contract.[14] Neither doctrine nor fairness takes paramount importance. Instead, doctrine and fairness ought to be viewed as an *interactive* process, although the attainment of a fair result in each case is the ultimate aim of the court. We should note that this particular thread is, by its very nature, *always pervasive but seldom obtrusive* and, as a result, may not be discussed *expressly* even if it may be evident in the analysis. This is perhaps understandable by the *complex and interactive* nature of the central thread itself. However,

14 See generally Andrew Phang, "Doctrine and Fairness in the Law of Contract" (2009) 29 LS 534.

a close examination of the various cases will reveal that courts in fact employ the *doctrine* of the law in the manner just stated – if nothing else, because *it is the task of every court to arrive at a substantively fair outcome in the case at hand in the most principled way possible*. And to the extent that reasonable judges may from time to time, and indeed, from jurisdiction to jurisdiction, disagree on what is substantively fair, divergence in legal principle is likely to emerge.

17 The third central thread is that in arriving at their respective decisions on whether or not to diverge from the prevailing (predominantly English) law, Commonwealth courts generally consider the relevant case law from other jurisdictions. This evinces an appetite for *comparative analysis* which is, in our view, not only desirable but also necessary. We live in an era of increasing internationalisation and it would be unwise for courts not to avail themselves of the developments in the contract laws of other jurisdictions. In what we have termed "the search for principle",[15] it is important to reiterate that such a search ought (especially in novel or developing areas of contract law) to be across all common law jurisdictions for the *principles* that are most appropriate to the jurisdiction concerned from the perspectives of both logic *and* local conditions. However, by way of a not unimportant side note, Professor Furmston has pertinently observed that "[i]t is clear that the House of Lords and the Supreme Court of the UK pay relatively less attention to other jurisdictions".[16] This is indeed borne out even by the necessarily cursory survey of a few selected areas in the present article. Again, though, as is the case with the second central thread, this particular central thread may *not* be something which lawyers and the courts are *deliberately conscious of (let alone focused on)*. The extent to which a particular Commonwealth jurisdiction is receptive to *comparative* analysis is to be discerned, in the main, from looking at the specific judgments themselves.

18 The fourth central thread is that Commonwealth courts have often utilised the relevant *scholarly literature* in setting out the basic principles to be followed in future decisions, and that this has been especially the case in novel or developing areas of contract law. Indeed, we would go so far as to state that this ought to be an approach that is *systematically interwoven* into the judicial process.

19 Let us now turn to the main body of the present article in accordance with the outline set out above.

15 See n 4 above.

16 See Michael P Furmston, "A Study of Contract Law in the Major Commonwealth Jurisdictions" (2014) 31 JCL 61 at 67.

III. The beginning

20 It is imperative, in our view, to start at the beginning. We must not forget that all the countries of the Commonwealth inherited the common law from England. English law was therefore not only the *foundation* of each of the respective legal systems but also the *dominant* law, at least initially. This is not surprising given that each jurisdiction was once a British colony. *In theory*, it was recognised from the beginning in these jurisdictions that English law would not be applied if unsuitable to the local circumstances of the colony concerned, or it might be modified to suit the local circumstances of the same.[17] However, the *reality* was, we submit, quite different. There appeared, instead, to be a strict adherence to English law. In one sense, this is not surprising, given that the laws of a former colony can only be expected to resemble the laws of its master in the early stages. The key concern was that this *initial (indeed, "forced") uniformity* should give way to autochthonous or indigenous development in a manner that accurately reflects the needs and circumstances of the particular legal system – bearing in mind, as we have pointed out above, that there should not be change for its own sake and that legal parochialism should be assiduously avoided. This point is of especial importance in light of increasing internationalisation and also because uniformity is desirable in so far as it enhances certainty and predictability, which are central to business and commerce. Having said that, it is clear, at least in the area of contract law, that Commonwealth jurisdictions have not been overly diffident and have departed or diverged from English law where *autochthonous or indigenous development* of the relevant law was indeed necessary in order to more accurately reflect the needs and circumstances of their respective legal systems.

21 Consistent with the need for an autochthonous or indigenous development of the local law in general and the local contract law in particular, application of the doctrine of *stare decisis* or binding precedent has necessarily undergone transformation in various Commonwealth jurisdictions. For example, whereas it was initially thought that decisions of the House of Lords and/or the Judicial Committee of the Privy Council were binding on local courts, this is no longer the case. In the Australian context, the most famous decision is that of the High Court of Australia in *Parker v The Queen*.[18] It did not concern the law of contract but, rather, the law of homicide, and it was

17 See, for example, in relation to the Singapore legal system, Andrew Phang Boon Leong, *From Foundation to Legacy: The Second Charter of Justice* (Singapore Academy of Law, 2006) at pp 22–26.

18 (1962–1963) 111 CLR 610.

in this decision that Dixon CJ made the following path-breaking observations:[19]

> Hitherto I have thought that we ought to follow decisions of the House of Lords, at the expense of our own opinions and cases decided here, but having carefully studied *Smith's Case* I think that we cannot adhere to that view or policy. There are propositions laid down in the judgment which I believe to be misconceived and wrong. They are fundamental and they are propositions which I could never bring myself to accept. … I shall not depart from the law on the matter as we had long since laid it down in this Court and I think *Smith's Case* should not be used as authority in Australia at all.

22 And, in another oft-cited decision of the Privy Council (on appeal from the High Court of Australia), *Australian Consolidated Press Ltd v Thomas Uren*,[20] it was acknowledged that there could be divergent development of the common law (particularly in situations of domestic or internal significance and where the law concerned was settled with no development via faulty reasoning and was not founded upon misconceptions). However, another Privy Council decision (on appeal from Hong Kong), *Ernest Ferdinand Perez de Lasala v Hannelore de Lasala*,[21] appeared to suggest that House of Lords decisions on recent common legislation were practically binding on Hong Kong courts (and, by implication, other Commonwealth courts). It is significant to note, though, that this particular decision has been the subject of much trenchant critique.[22]

23 In any event, the Privy Council has since ceased to be the highest appellate court in most Commonwealth jurisdictions. The fact of the matter is that Commonwealth courts no longer consider themselves fettered by English decisions, although due consideration

19 *Parker v The Queen* (1962–1963) 111 CLR 610 at 632–633. See also generally Michael Kirby, "Legal Obligations. Legal Revolutions" (2018) 134 LQR 43.

20 [1969] 1 AC 590. The Privy Council affirmed the High Court of Australia's refusal to follow the more limited categories for the award of punitive damages in the tortious context as laid down in the House of Lords decision in *Rookes v Barnard* [1964] AC 1129. Significantly, approximately half a century later, the Singapore Court of Appeal adopted the same approach as the High Court of Australia: see *ACB v Thomson Medical Pte Ltd* [2017] 1 SLR 918.

21 [1980] AC 546.

22 See, for example, Andrew Phang, "'Overseas Fetters': Myth or Reality?" [1983] 2 MLJ cxxxix at cxlvii–cxlix; Peter Wesley-Smith, "The Effect of *De Lasala* in Hong Kong" (1986) 28 Mal LR 50; and Robert C Beckman, "Divergent Development of the Common Law in Jurisdictions which Retain Appeals to the Privy Council" (1987) 29 Mal LR 254 at 265–267.

will be given to them.[23] For example, the Singapore Court of Appeal released a practice statement in 1994 that stated:[24]

> … it is proper that the Court of Appeal should not hold itself bound by any previous decisions of its own or of the Privy Council, which by the rules of precedent prevailing prior to 8 April 1994 were binding on it, in any case where adherence to such prior decisions would cause injustice in a particular case or constrain the development of the law in conformity with the circumstances of Singapore.

24 This article focuses, within the constraints of space and relevance, on the departures and divergences of Commonwealth jurisprudence, particularly Singapore law, from English law in the area of contract law, and it is on this note that we turn to the first topic on the doctrine of implied terms.

IV. Divergence

A. Implied terms

25 The first example of divergence we cover in this article is the law on implication of terms in fact. Preliminarily, however, we observe that as a result of recent developments, the previous divergence may have been *reduced*, if not *reversed*. This was what we had referred to earlier, when we said that there has been divergence both within as well as outside English law. Indeed, this is a good example of the first central trend of divergence, because here we can see divergence first between the English and Singapore courts, and then later within the English courts. In both instances, the divergence was caused by differences in legal reasoning and policy, as well as the interaction of theory and practice.

(1) The English position in Belize

26 We start by referring to the Privy Council decision of *Belize*,[25] in which Lord Hoffmann said that the test for the implication of

23 And see, for example, the recent Singapore Court of Appeal decision in *Public Prosecutor v Lam Leng Hung* [2018] 1 SLR 659 at [66], where it was observed that "Singapore courts are not bound by Privy Council decisions on appeal from other jurisdictions, even if the decision in question considers a statutory provision that is *in pari materia* with the relevant Singapore provision" and that "[s]uch a decision may be persuasive, but the decision whether to follow it will depend on whether it is compelling, principled and in conformity with the circumstances of Singapore". Reference may also be made to the (also) Singapore Court of Appeal decision in *Au Wai Pang v Attorney-General* [2016] 1 SLR 992 at [20].

24 *Practice Statement (Judicial Precedent)* [1994] 2 SLR 689.

25 See para 8 above.

terms in fact is "what the instrument, read as a whole against the relevant background, would reasonably be understood to mean".[26] Lord Hoffmann's brief elaboration of implication premised on interpretation went on to spur the publication of a good number of academic commentaries debating the implications of his Lordship's speech.[27] Indeed, some of the highest appellate courts in several Commonwealth jurisdictions have also expressed either ambivalence[28] or disagreement[29] with the supposedly refined test for implication.

27 In *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd*[30] ("*Marks and Spencer*"), the UK Supreme Court has seemingly disagreed with Lord Hoffmann's view in *Belize*. Lord Neuberger, with whom Lords Sumption and Hodge agreed, all but said that Lord Hoffmann's attempt to recast implication as interpretation is wrong, and was a development that his Lordship labelled "a characteristically inspired discussion rather than authoritative guidance on the law of implied terms".[31] There are at least two reasons to regard Lord Neuberger as having rejected the *Belize* test of implication. First, Lord Neuberger endorsed two Singapore Court of Appeal decisions – itself a rare occasion since the English courts seldom refer to foreign cases – both of which rejected the *Belize* test: *Foo Jong Peng v Phua Kiah Mai*[32] ("*Foo Jong Peng*") and *Sembcorp Marine Ltd v*

26 *Attorney General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988 at [21].

27 See, for example, John W Carter, "The Implication of Contractual Terms: Problems with *Belize Telecom*" (2013) 27(3) CLQ 3; John W Carter & Wayne Courtney, "*Belize Telecom*: A Reply to Professor McLauchlan" [2015] LMCLQ 245; Wayne Courtney & John W Carter, "Implied Terms: What *Is* the Role of Construction" (2014) 31 JCL 151; Paul S Davies, "Recent Developments in the Law of Implied Terms" [2010] LMCLQ 140, Lord Grabiner QC, "The Iterative Process of Contractual Interpretation" (2012) 128 LQR 41; Richard Hooley, "Implied Terms after *Belize Telecom*" (2014) 73(2) Camb LJ 315; Brandon Kain, "The Implication of Contractual Terms in the New Millennium" (2011) 51 Can Bus LJ 170; Kelvin F K Low & Kelry C F Loi, "The Many 'Tests' for Terms Implied in Fact: Welcome Clarity" (2009) 125 LQR 561; Elizabeth MacDonald, "Casting Aside 'Officious Bystanders' and 'Business Efficacy'?" (2009) 26 JCL 97; John McCaughran QC, "Implied Terms: The Journey of the Man on the Clapham Omnibus" (2011) 70(3) Camb LJ 607; David McLauchlan, "Construction and Implication: In Defence of *Belize Telecom*" [2014] LMCLQ 203; M H Ogilvie, "Reconsidering the Interpretation and Implication Rules in the Law of Contract: An English-Canadian Comparison and a Proposal for a New Unified Rule" (2013) 28 BFLR 187; and Chris Peters, "The Implication of Terms in Fact" (2009) 68(3) Camb LJ 513.

28 See, for example, *Mineralogy Pty Ltd v Sino Iron Pty Ltd* [2013] WASC 194.

29 See, for example, *Foo Jong Peng v Phua Kiah Mai* [2012] 2 SLR 1267 and *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193.

30 [2016] AC 742.

31 *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2016] AC 742 at [31].

32 [2012] 4 SLR 1267.

PPL Holdings Pte Ltd[33] ("*Sembcorp Marine*"). In particular, in the latter case, the Singapore Court of Appeal not only "reaffirmed [its] disagreement" with the *Belize* test, but also held that reasonableness is a necessary but insufficient condition for the implication of terms.[34] By referring to these Singapore decisions that rejected *Belize*, Lord Neuberger must be taken to have disagreed with the *Belize* test. Second, Lord Neuberger expressly disagreed with Lord Hoffmann that implication should be seen as a process of interpretation.[35] His Lordship drew a further distinction between interpretation and implication, questioning whether it is ever helpful to conflate the two rather different processes[36] given that "it would seem logically to follow that, until the express terms of a contract have been construed, it is … not normally sensibly possible to decide whether a further term should be implied".[37]

28 While Lords Carnwath and Clarke did not go as far as to say that *Belize* was wrongly decided, both of their Lordships thought that *Belize* did not depart from the traditional tests of implication. The result, therefore, is that whichever view one agreed with, all their Lordships in *Marks and Spencer* endorsed the *traditional* tests for implication, rather than Lord Hoffmann's recasting of implication as a facet of interpretation. Given this, the way forward under English law must surely be to abandon the fixation about what Lord Hoffmann meant in *Belize* and develop the traditional tests to fit with the practicalities of implication.

(2) The Singapore approach

29 As already mentioned, the Singapore Court of Appeal has consistently rejected the *Belize* test. The Court of Appeal's principal disagreement with the *Belize* test – elaborated first in *Foo Jong Peng* and later in *Sembcorp Marine* – is premised on two key reasons. The first is the view that the process of implication should be kept separate from that of interpretation. Indeed, there would be unnecessary practical confusion should the boundary between the two doctrines be blurred, with practitioners and judges being unable to tell the two processes apart. In *Foo Jong Peng*, the Court of Appeal explained that this conflation had occurred after *Belize* because the test of interpretation

33 [2013] 4 SLR 193.

34 *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [82].

35 *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2016] AC 742 at [25]. Lord Clarke also shared in Lord Neuberger's view on this point: see [2016] AC 742 at [76].

36 *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2016] AC 742 at [26] and [29].

37 *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2016] AC 742 at [28].

became premised on the concept of the reasonable man.[38] The court pointed out that Lord Hoffmann had in fact mooted the concept of the reasonable man in the context of implied terms in his extra-judicial writings more than a decade ago.[39] Indeed, this is consistent with the approach taken by the High Court of Australia in *Commonwealth Bank of Australia v Barker*,[40] in which various members of the court emphasised the need for "necessity" before a term could be implied in fact. For example, French CJ, and Bell and Keane JJ said that both terms implied in fact and by law:

> … tend in practice to 'merge imperceptibly into each other'. … They fall within the limiting criterion of 'necessity' … The requirement that a term implied in fact be necessary 'to give business efficacy' to the contract in which it is implied can be regarded as a specific application of the criterion of necessity. The present case concerns an implied term in law where broad considerations are in play, which are not at large but are not constrained by a search for what 'the contract actually means'. In *Byrne v Australian Airlines Ltd*, McHugh and Gummow JJ emphasised that the 'necessity' which will support an implied term in law is demonstrated where, absent the implication, 'the enjoyment of the rights conferred by the contract would or could be rendered nugatory, worthless, or, perhaps, be seriously undermined' or the contract would be 'deprived of its substance, seriously undermined or drastically devalued'.[41]

Gageler J also alluded to the need for necessity, albeit slightly differently:[42]

> [C]ouching the ultimate evaluation in terms of necessity serves usefully to emphasise this and no more: that a court should not imply a new term other than by reference to considerations that are compelling.

30 The second reason is the lack of practical guidance afforded by the *Belize* test as to when a particular term ought to be implied. The test of "interpretation" is simply too vague to offer any practical guidance as to when a term should be implied. It does not offer, in and of itself, a viably applicable test for practitioners or judges. In this regard, the Court of Appeal in *Foo Jong Peng* stated that the process of implication "necessarily involves a situation where it is precisely because the *express* term(s) are *missing* that the court is compelled to ascertain the

38 *Foo Jong Peng v Phua Kiah Mai* [2012] 4 SLR 1267 at [31].

39 *Foo Jong Peng v Phua Kiah Mai* [2012] 4 SLR 1267 at [32], citing Lord Hoffmann, "Anthropomorphic Justice: The Reasonable Man and His Friends" (1995) 29 *The Law Teacher* 127 and "A Conversation with Lord Hoffmann" (2010) 4 *Law and Financial Markets Review* 242 at 243.

40 (2014) 253 CLR 169.

41 *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169 at [28]–[29].

42 *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169 at [114].

presumed intention of the parties" [emphasis in original].[43] As such, it would be difficult to apply the process of "interpretation", which is premised on the meaning of express terms, to determine whether any term should be implied.

31 As a result of these various objections, the Court of Appeal in *Foo Jong Peng* and *Sembcorp Marine* preferred the traditional "business efficacy" and "officious bystander" tests. But more than that, the court in *Sembcorp Marine* prescribed a three-step process to guide the implication of terms in fact under Singapore law. The first step requires the court to ascertain that a gap in the contract had arisen because the parties had not contemplated that gap; it is only in such a situation that a term can be implied. Next, the court is to consider whether "it is necessary in the business or commercial sense to imply *a term* in order to give the contract efficacy" [emphasis added].[44] Finally, the court is to consider "the *specific* term to be implied" [emphasis added].[45] A term is only to be implied if it passes the "officious bystander" test, that is, the contracting parties, having regard to the need for business efficacy, would have responded positively to the suggestion of the term to be implied. This three-step process, founded on the traditional "business efficacy" and "officious bystander" tests and making no mention of the process of interpretation, is necessarily premised on a rejection of the *Belize* test. It is also intended, contrary to a broad "test" of "interpretation", to provide a structured and practically applicable process for the implication of terms in fact.

(3) Discussion

32 The divergence between the English and Singapore courts in this area can (prior to *Marks and Spencer*) be explained by a preference on the part of the latter for more precise tests. Practically, the lack of precision in the applicable test has led to English courts misunderstanding *Belize* prior to *Marks and Spencer*. For example, some cases purported to endorse *Belize*, but ended up citing authorities that undermine the reasoning within. One example is *Mediterranean Salvage & Towage Ltd v Seamar Trading & Commerce Inc (The Reborn)*,[46] where Lord Clarke MR endorsed the *Belize* test but approved of Sir Thomas Bingham MR's judgment in *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd*,[47] which, contrary to *Belize*, drew a clear distinction between the interpretation and implication of

43 *Foo Jong Peng v Phua Kiah Mai* [2012] 4 SLR 1267 at [36].
44 *Foo Jong Peng v Phua Kiah Mai* [2012] 4 SLR 1267 at [36].
45 *Foo Jong Peng v Phua Kiah Mai* [2012] 4 SLR 1267 at [36].
46 [2009] EWCA Civ 531; [2010] 1 All ER (Comm) 1.
47 [1995] EMLR 472 481.

terms.[48] It is thus helpful that a majority of their Lordships in *Marks and Spencer* have now stated that interpretation is distinct from implication, and that it must follow, as Lord Neuberger said, that "the express terms of a contract must be interpreted before one can consider any question of implication".[49] This necessarily follows from the view that the implication of terms concerns how a court fills a gap in the contract to give effect to the parties' presumed intention.[50] Whether there is a gap in the first place must be premised on interpreting what the express terms of the contract mean in the first instance. The further process of implication is thus logically consequent to and different from this prior interpretation.[51] This is practically easy to relate to and provides clear guidance to practitioners and courts alike.

33 The precision in the practically applicable test is not only for the convenience of practitioners and courts, but also has conceptual implications. The *Belize* test has, with respect, unfortunately clouded the distinction between implication and interpretation conceptually. Davies has argued that the *Belize* test should be rejected as it wrongly conflates implication and interpretation,[52] and dangerously relaxes the strict criterion of necessity to one of reasonableness.[53] Carter shares this view and has suggested that *Belize* "appears to dispense with the requirement of "necessity".[54] In a subsequent joint article with Courtney, Carter argues that an unembellished version of the *Belize* test must make implied terms much easier to establish.[55] Ultimately, if Lord Hoffmann's words in *Belize* were subjected to the *Investors Compensation Scheme* principles of contextual interpretation (which were also laid down by Lord Hoffmann), it may reasonably be thought that they were intended to substitute the traditional tests of implication with one of reasonableness.[56] In this regard, it is relevant to consider

48 See Paul S Davies, "Recent Developments in the Law of Implied Terms" [2010] LMCLQ 140 at 146, citing *Mediterranean Salvage & Towage Ltd v Seamar Trading & Commerce Inc (The Reborn)* [2009] EWCA Civ 531; [2010] 1 All ER (Comm) 1 at [8] and [17].

49 *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2016] AC 742 at [28].

50 *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [29].

51 *Phillips Electronique Grand Public SA v British Sky Broadcasting Ltd* [1995] EMLR 472 at 480–482.

52 See Paul S Davies, "Recent Developments in the Law of Implied Terms" [2010] LMCLQ 140.

53 See Paul S Davies, "Recent Developments in the Law of Implied Terms" [2010] LMCLQ 140 at 143.

54 See John W Carter, "The Implication of Contractual Terms: Problems with *Belize Telecom*" (2013) 27(3) CLQ 3 at 4.

55 See John W Carter & Wayne Courtney, "*Belize Telecom*: A Reply to Professor McLauchlan" [2015] LMCLQ 245 at 262.

56 See Richard Hooley, "Implied Terms after *Belize Telecom*" (2014) 73(2) Camb LJ 315 at 326.

Lord Hoffmann's earlier speech in *The Achilleas*, where his Lordship, seemingly influenced by Kramer's argument,[57] viewed the law of remoteness of damages in contract as based on agreement derived from an interpretation of the contract. Lord Hoffmann's suggestion in *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd*[58] that implication depended on the "construction of the agreement as a whole in its commercial setting" is also relevant.[59] These cases show that Lord Hoffmann had in mind the meaning of the instrument when referring to both remoteness and implication. This fits into Lord Hoffmann's general approach to contract law "when he puts intention of the parties (objectively ascertained) at the very centre of the contractual stage".[60] While it is possible that Lord Hoffmann was using "construction" in a broader sense,[61] Carter and Courtney convincingly demonstrate that Lord Hoffmann did not attach substantive significance to his use of "construction" but instead adopted "the meaning of the instrument" as the controlling concept in *Belize*.[62]

34 Following *Marks and Spencer*, the divergence between the English and Singapore courts has actually narrowed in this area of contract law. The challenge for the future is to ascertain how the traditional tests are to be applied. One question is how the two traditional tests are related to one another. In this regard, Lord Neuberger considered that the judicial pronouncements before *Belize* represented "a clear, consistent and principled approach".[63] The starting point, following Lord Steyn in *Equitable Life Assurance Society v Hyman*,[64] is that the implication of a term is "not critically dependent on proof of an actual intention of the parties".[65] Instead, the correct approach is to consider the hypothetical responses of notional

57 See Adam Kramer, "An Agreement-centred Approach to Remoteness and Contract Damages" in *Comparative Remedies for Breach of Contract* (Nili Cohen & Ewan McKendrick gen eds) (Oxford: Hart Publishing, 2004) at p 249.

58 [1997] AC 191.

59 *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1997] AC 191 at 212.

60 See Richard Hooley, "Implied Terms after *Belize Telecom*" (2014) 73(2) Camb LJ 315 at 326. See also Hugh Collins, "Lord Hoffmann and the Common Law of Contract" (2009) 5 ERCL 474.

61 *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2016] AC 742 at [27] and [76].

62 See John W Carter & Wayne Courtney, "*Belize Telecom*: A Reply to Professor McLauchlan" [2015] LMCLQ 245 249. See also Richard Hooley, "Implied Terms after *Belize Telecom*" (2014) 73(2) Camb LJ 315 at 331, but *cf* David McLauchlan, "Construction and Implication: In Defence of *Belize Telecom*" [2014] LMCLQ 203 at 207.

63 *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2016] AC 742 at [21].

64 [2002] 1 AC 408 at 459.

65 *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2016] AC 742 at [21].

reasonable people in the parties' position at the time of contracting. Lord Neuberger further accepted that the traditional tests of business necessity and obviousness could be alternatives.[66] However, how this might be applied in practice remains to be worked out.

35 In contrast, the Singapore Court of Appeal has viewed the two traditional tests as being complementary, that is to say, the officious bystander test is the *practical mode* by which the business efficacy test is implemented.[67] This relationship is still reflected in the *Sembcorp Marine* test. In this regard, one may also refer to one of the present authors' analysis[68] of the following statement of principle by Scrutton LJ in the English Court of Appeal decision of *Reigate v Union Manufacturing Co (Ramsbottom), Ltd and Elton Cop Dyeing Co, Ltd*:[69]

> A term can only be implied if it is necessary in the business sense to give efficacy to the contract; *that is*, if it is such a term that it can confidently be said that if at the time the contract was being negotiated some one had said to the parties, 'What will happen in such case,' they would both have replied, 'Of course, so and so will happen; we did not trouble to say that; it is too clear.' [emphasis added]

According to one of the present authors, the complementarity of the two tests is made evident by Scrutton LJ's use of the linking phrase "that is" to connect them.[70] Thus, the further test formulated by Scrutton LJ did not substitute, but merely elaborated upon, the business efficacy test.[71] The business efficacy test is "the more general statement of principle which thus serves as the basic theoretical guideline".[72] Support for this view may also be found in Steyn LJ's judgment in *Watts v Aldington*,[73]

66 *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2016] AC 742 ("*Marks and Spencer*") at [21]. Lord Carnwath likewise said that there could be "no doubt as to the continuing significance of the traditional tests, as summarised by Lord Simon". However, Lord Carnwath's opinion is unclear because his Lordship also preferred these tests, as they were understood in *Attorney General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988, whatever that means: *Marks and Spencer* at [73].

67 See also *Forefront Medical Technology (Pte) Ltd v Modern-Pak Pte Ltd* [2006] 1 SLR(R) 927 at [36] and *Chua Choon Cheng v Allgreen Properties* [2009] 3 SLR(R) 724 at [63].

68 See Andrew Phang, "Implied Terms, Business Efficacy and the Officious Bystander – A Modern History" [1998] JBL 1.

69 [1918] 1 KB 592 at 605.

70 See Andrew Phang, "Implied Terms, Business Efficacy and the Officious Bystander – A Modern History" [1998] JBL 1 at 21.

71 See Andrew Phang, "Implied Terms, Business Efficacy and the Officious Bystander – A Modern History" [1998] JBL 1 at 21.

72 See Andrew Phang, "Implied Terms, Business Efficacy and the Officious Bystander – A Modern History" [1998] JBL 1 at 397. *Cf* Jacob Petrus Vorster, "The Bases for the Implication of Contractual Terms" (1988) *Journal of South African Law* 161 at 171.

73 [1999] L & TR 578.

where his Lordship conceived of both the traditional tests as "practical" ones "developed by the courts in order to assess whether the proposed implication is strictly necessary if the reasonable expectations of the parties are not to be defeated";[74] and that there was "no material distinction between the two practical tests".[75] Steyn LJ also stated that there was little sense in having two alternative practical tests if one showed a greater hospitality to implication than the other, for the more generous test would always be preferred by the parties.[76]

36 Whereas the view that the traditional tests are alternatives acknowledges the different situations that will warrant the implication of a term, the view that they are complementary (such that there is really one test) more practically recognises that it will very seldom be the case that the courts will be able to bridge the evidential gap and find what the parties must have meant without express manifestation of their intention. The criterion of business efficacy therefore provides a practical and concrete way of implying a term in such circumstances. Unfortunately, despite rejecting the *Belize* test, *Marks and Spencer* does not resolve the precise relationship between these two traditional tests, save for a tentative statement by Lord Neuberger that they could be regarded as "alternatives in the sense that only one of them needs to be satisfied".[77] This is notwithstanding his Lordship's suspicion that "it would be a rare case where only one of those two requirements would be satisfied".[78] If so, it is preferable for the courts to recognise, as Steyn LJ did, that "there is only one rule". In the final analysis, whichever view is taken, the important task with the rejection of the *Belize* test must now be for the English courts to articulate precisely how the traditional tests are to be applied.

B. Common mistake

37 The law in this area demonstrates significant divergence amongst the English, Australian and Singapore courts. This is due, as we shall see in a moment, to the different views with regard to the respective contractual doctrines as well as (in so far as the English and Singapore courts are concerned) a different view as to the respective roles of common law and equity in the development of the law of

74 *Watts v Aldington* [1999] L & TR 578 at 596.
75 *Watts v Aldington* [1999] L & TR 578 at 596.
76 *Watts v Aldington* [1999] L & TR 578 at 597.
77 *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2016] AC 742 at [21].
78 *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2016] AC 742 at [21].

common mistake. All this, of course, illustrates the first central *thread* which (as we have also noted) is the most important.

(1) The Australian approach

38 The main issue is whether or not a substantive doctrine of common mistake is required in the first place; in particular, it has been argued by some writers (most notably, by Professor Patrick Atiyah) that there is no independent doctrine mistake as such and that it all depends, in the final analysis, upon the construction of the terms (express or implied) of the contract itself.[79] Whilst English and Singapore courts accept the doctrine of common mistake, the Australian courts have endorsed the approach that the substantive effect of the doctrine is a matter of *construction* instead. In this regard, the oft-cited High Court of Australia decision of *McRae v Commonwealth Disposals Commission*[80] ("*McRae*") is the leading case.

39 Whilst the technique of construction is a coherent one, with respect, we do *not* view a substantive doctrine of common mistake (whether at common law or in equity) as being *necessarily* inconsistent with it. Indeed, the doctrine of common mistake has internal coherence of its own. More importantly, perhaps, we see no reason in principle why the court should not have more than one string to its legal bow. We are also of the view that one aspect of construction, applying the doctrine of offer and acceptance, may be obviously more appropriate in *other* areas of the law of contractual mistake, for example, the areas of *unilateral* as well as *mutual* mistake. In particular, in the case of *mutual* mistake, the contract does not come into existence in the first place simply because there has been *no coincidence of offer and acceptance in the first place*.[81] We also note that, whilst the High Court of Australia adopted the technique of construction in *McRae*, there is authority from the same court which appears to endorse a doctrine of common

79 See generally *Chitty on Contracts* (Hugh G Beale gen ed) (Sweet & Maxwell, 32nd Ed, 2015) at pp 610–611. More specifically, see, for example, C J Slade, "The Myth of Mistake in the English Law of Contract" (1954) 70 LQR 385; Kenneth O Shatwell, "The Supposed Doctrine of Mistake in Contract: A Comedy of Errors" (1955) Can Bar Rev 164; Patrick S Atiyah, "*Couturier v Hastie* and the Sale of Non-existent Goods" (1957) 73 LQR 340; Patrick S Atiyah & Francis A R Bennion, "Mistake in the Construction of Contracts" (1961) 24 MLR 421; and J C Smith, "Contracts – Mistake, Frustration and Implied Terms" (1994) 110 LQR 400, amongst other pieces.

80 (1951) 84 CLR 377.

81 And see, for example, the Singapore High Court decision of *Wellmix Organics (International) Pte Ltd v Lau Yu Man* [2006] 2 SLR(R) 117 at [58].

mistake, albeit *not* at common law, but in *equity* instead.[82] Indeed, in *McRae* itself, the court refers more than once to *Solle v Butcher*,[83] which endorsed a substantive doctrine in *equity*, albeit not directly with regard to the equitable doctrine of mistake itself.

(2) The English and Singapore approaches

40 The English and Singapore courts, on the other hand, initially endorsed a substantive doctrine of common mistake both at common law and in equity. However, as alluded to above, whilst the Singapore courts have continued to endorse *both* the doctrine of common mistake at common law *and* in equity, the English Court of Appeal, in *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd*[84] ("*Great Peace Shipping*"), departed from this approach and endorsed *only* the doctrine of common mistake at *common law*. In *Great Peace Shipping*, the court was of the view that its previous decision in *Solle v Butcher* ought *not* to be followed. By contrast, in *Chwee Kin Keong v DigilandMall.com Pte Ltd*[85] ("*Chwee Kin Keong*"), the Singapore Court of Appeal endorsed not only the doctrine of mistake at common law but also the doctrine of mistake in equity. Although *Chwee Kin Keong* concerned, strictly speaking, the doctrine of *unilateral* (as opposed to common) mistake,[86] the *general reasoning* applied *with equal force* to the doctrine of *common* mistake. More specifically, in that case, the court, whilst expressing the

82 See, for example, the oft-cited decisions of *Svanosio v McNamara* (1956) 96 CLR 186 and *Taylor v Johnson* (1983) 151 CLR 422, as well as John W Carter, *Contract Law in Australia* (LexisNexis Butterworths, 6th Ed, 2013) at pp 440–456.

83 [1950] 1 KB 671. *Cf* John Cartwright, "*Solle v Butcher* and the Doctrine of Mistake in Contract" (1987) 103 LQR 594 and Paul Matthews, "A Note on *Cooper v Phibbs*" (1989) 105 LQR 599. But cf, in turn, Catharine McMillan, *Mistakes in Contract Law* (Hart Publishing, 2010) at chs 3 and 9 as well as pp 311–316 (which, however, discerns a quite different mode of equitable intervention compared to that advocated by Lord Denning in *Solle v Butcher* [1950] 1 KB 671).

84 [2003] QB 679. See also the UK Supreme Court decision of *Pitt v Holt* [2013] 3 WLR 1200 at [115]. Not surprisingly, this particular decision has attracted much commentary: see, for example, Francis M B Reynolds, "Reconsider the Contract Textbooks" (2003) 119 LQR 177; Stephen B Midwinter, "*The Great Peace* and Precedent" (2003) 119 LQR 180; Christopher Hare, "Inequitable Mistake" (2003) 62(1) Camb LJ 29; Adrian Chandler, James Devenney & Jill Poole, "Common Mistake: Theoretical Justification and Remedial Inflexibility" [2004] JBL 34; John D McCamus, "Mistaken Assumptions in Equity: Sound Doctrine or Chimera?" (2004) 40 *Can Bus LJ* 46; Kelvin F K Low, "Coming to Terms with *The Great Peace* in Common Mistake" in *Exploring Contract Law* (Jason W Neyers, Richard Bronaugh & Stephen G A Pitel gen eds) (Hart Publishing, 2009) at ch 13; and Andrew Phang, "Controversy in Common Mistake" [2003] Conv 247.

85 [2005] 1 SLR(R) 502.

86 See also the very recent Singapore Court of Appeal decision of *Broadley Construction Pte Ltd v Alacran Design Pte Ltd* [2018] 2 SLR 110, where *Chwee Kin Keong v DigilandMall.com Pte Ltd* [2005] 1 SLR(R) 502 was cited in the context of the doctrine of unilateral mistake in equity.

view that Denning LJ (as he then was) in *Solle v Butcher* might have conflated law with equity,[87] nevertheless acknowledged the fact that it was a decision that had established an equitable jurisdiction in so far as the law of mistake was concerned .This jurisdiction had, in fact, been applied in a number of subsequent cases).[88] Chao Hick Tin JA (as he then was), who delivered the judgment of the court, considered the rejection of the equitable jurisdiction in *Great Peace Shipping*, but was of the view that *Great Peace Shipping* could be distinguished on the basis that it concerned common, and not unilateral, mistake.[89]

41 However, Chao JA was prepared to "go further than that"[90] and recognise the equitable jurisdiction of the courts as well. Hence, although *Chwee Kin Keong* dealt with the doctrine of *unilateral* mistake, the reasoning of the court would seem to apply equally to the doctrine of *common* mistake.[91]

42 In our view, there appears to be no reason in principle why the doctrine of common mistake in *equity* ought not to be retained as well.[92] That said, in the Singapore High Court decision of *Wellmix Organics (International) Pte Ltd v Lau Yu Man*[93] ("*Wellmix Organics*"), it was suggested that the respective doctrines of common mistake at common law and in equity ought, contrary to what was suggested in *Chwee Kin Keong* (which was, in fact, *binding* on the court in *Wellmix Organics*), to be considered one and the *same*. This brings us neatly to the next issue.

87 *Chwee Kin Keong v DigilandMall.com Pte Ltd* [2005] 1 SLR(R) 502 at [58].
88 *Chwee Kin Keong v DigilandMall.com Pte Ltd* [2005] 1 SLR(R) 502 at [60].
89 *Chwee Kin Keong v DigilandMall.com Pte Ltd* [2005] 1 SLR(R) 502 at [74].
90 *Chwee Kin Keong v DigilandMall.com Pte Ltd* [2005] 1 SLR(R) 502 at [74].
91 In fact, a leading contract textbook has stated that the Court of Appeal in *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2005] 1 SLR(R) 502 "hinted" that it might not follow *Great Peace Shipping Ltd v Tsavliris (International) Ltd* [2003] QB 679 in abolishing common mistake in equity: see *Chitty on Contracts* (Hugh G Beale gen ed) (Sweet & Maxwell, 32nd Ed, 2015) at p 634, fn 236; see also Lee Pey Woan, "Unilateral Mistake in Common Law and Equity – *Solle v Butcher* Reinstated" (2006) 22 JCL 81 at 88. Though *cf* the High Court decision of *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2004] 2 SLR(R) 594 at [130], *per* V K Rajah JC (as he then was). Reference may also be made to Andrew Phang, "Contract Formation and Mistake in Cyberspace – The Singapore Experience" (2005) 17 SAcLJ 361 and, by the same author, "Contract Formation and Mistake in Cyberspace" (2005) 21 JCL 197; as well as Yeo Tiong Min, "Unilateral Mistake in Contract: Five Degrees of Fusion of Common Law and Equity" [2004] SingJLS 227 and Kwek Mean Luck, "Law, Fairness and Economics – Unilateral Mistake in *Digilandmall*" (2005) 17 SAcLJ 411.
92 Indeed, this appears to be, as we have seen, the *only* version of common mistake in the Australian context (see para 39 above).
93 [2006] 2 SLR(R) 117.

(3) Discussion

43 Turning to the fourth central thread in this article, *viz*, *the possible role of scholarly literature*, we note that the first-mentioned author of the present article sought to argue – in an article published almost three decades ago – that there ought to be a *merger* of the doctrines of common mistake at common law and common mistake in equity.[94] One primary reason for this proposed merger is that, in *substance*, the respective tests for common mistake at common law and common mistake in equity were *the same* – the *only difference* being the fact that the former doctrine rendered the contract concerned *void*, whereas the latter doctrine rendered the contract concerned *voidable*. This difference in legal *consequences* was material only where *third-party rights* were concerned. It was further suggested in that particular article that the doctrine of common mistake at common law ought to be *merged into (or subsumed within)* the doctrine of common mistake in *equity*, with the *latter* doctrine thereafter constituting a *new* approach. Such a merger was proposed on the basis that the doctrine of common mistake in *equity* was *more flexible* inasmuch as it would also take into account *third-party rights*.

44 To the best of our knowledge, whilst the article mentioned has been noted in the academic literature,[95] it has yet to be considered substantively in the case law.[96] We also note a subsequent article by Professor David Capper.[97] It is an excellent comparative study, although it *differs* from the article just considered inasmuch as it endorses *Great Peace Shipping*. However, the learned author does also propose a reform that is, in *substance*, *quite similar* to that proposed in the aforementioned article inasmuch as it is suggested that the courts ought to be conferred a discretion to declare the contract concerned *voidable* in situations where there is "a fundamental common misassumption of fact, very harsh contractual imbalance, and no allocation of risk to either party".[98]

45 Whether or not the proposed merger referred to in the preceding paragraph materialises in actual court decisions[99] depends

94 See Andrew Phang, "Common Mistake in English Law: The Proposed Merger of Common Law and Equity" (1989) 9 LS 291.

95 See, for example, Neil Andrews, *Contract Law* (Cambridge University Press, 2nd Ed, 2015) at p 261, fn 16; Jonathan Morgan, *Great Debates in Contract Law*, (Palgrave, 2nd Ed, 2015) at p 190, fn 221; as well as Richard Stone & James Devenney, *The Modern Law of Contract* (Routledge, 12th Ed, 2017) at p 529.

96 Though *cf* the *Wellmix Organics (International) Pte Ltd v Lau Yu Man* [2006] 2 SLR(R) 117 at [69]–[73].

97 See David Capper, "Common Mistake in Contract Law" [2009] SingJLS 457.

98 See David Capper, "Common Mistake in Contract Law" [2009] SingJLS 457 at 472.

99 It should, however, be mentioned that there are certain observations by Evans LJ in the English Court of Appeal decision of *William Sindall plc v Cambridgeshire*

(*cont'd on the next page*)

very much upon the view that is taken of the relationship between common law and equity.[100] If the deeply entrenched perception of the rigid demarcation of the substance of common law and equity prevails, then no merger would be possible. Indeed, in so far as England is concerned, such a merger is probably not possible because, since *Great Peace Shipping*, the doctrine of common mistake in equity *no longer exists*. Looked at in this light, in the English context at least, divergence has, in fact, *foreclosed possible further development in the manner just described*. Such development is still, however, open to the Singapore courts.

C. Illegality and public policy

(1) Introduction

46 It comes perhaps as no surprise that the law relating to illegality and public policy represents a significant area of divergence in Commonwealth contract law jurisprudence. This is because, by its very nature, public policy is *generally* different in different countries, given the differences in societal mores. This is the case notwithstanding the fact that the world as we know it has never been more interconnected. There is nothing untoward in all this as there is, in the circumstances, a kind of unity in the rich diversity that marks each society together with its individual cultures as well as societal norms. Hence, from a judicial perspective at least, the *local* court is the *best forum* for determining what conduct ought to result in the contract concerned being declared void and unenforceable as a result of either statutory illegality or illegality at common law. Indeed, this particular area of law

County Council [1994] 1 WLR 1016 that appear to militate against the reform just proposed. In that case, the learned judge, whilst not expressing a concluded view, suggested that the test for common mistake at common law was stricter than that for common mistake in equity (at 1039–1040); curiously, Evans LJ classified the doctrine of common mistake in equity as "mutual mistake", although it is suggested that this difference is merely one of terminology). It is submitted, with respect, that notwithstanding the plausibility of this view, it ought to be weighed against the other arguments briefly canvassed above.

100 Whether or not the rules and principles of the common law and equity ought to be merged or fused is a topic of intense academic controversy – with those who are *against* such merger or fusing dubbing the contrary view "the fusion fallacy". Most writers, however, now adopt a more conciliatory and balanced stance in between both extreme ends of the spectrum. For a sampling of the copious literature on this topic, see, for example, Julie Maxton, "Some Effects of the Intermingling of Common Law and Equity" (1993) 5 Canterbury L Rev 299; Fiona Burns, "The 'Fusion Fallacy' Revisited" (1993) 5 Bond L Rev 151; Andrew Burrows, "We Do This at Common Law but That in Equity" (2002) 22 OxJLS 1; Sarah Worthington, "Integrating Equity and the Common Law" (2002) 55 CLP 223; and Joachim Dietrich, "Attempting Fusion: Professor Worthington's 'Equity' and Its Integration with the Common Law" (2005) 34 Common Law World Rev 62.

illustrates, perhaps in the clearest way, the *first central thread* set out above – and with regard to "*public*" (as opposed to "legal") policy as well.

47 As if the general difficulties briefly outlined in the preceding paragraph are not enough, the topic of illegality and public policy itself is, as one of the present authors has put it, "confused (and confusing)".[101] A key difficulty facing the courts has been the fact that no one legal structure (whether doctrinal or theoretical) can *wholly* eradicate the intractable problems that bedevil this particular area of the common law of contract. In particular, it will be recalled that the *second central thread* in this article related to the need to ensure that the rules and principles that constitute the doctrine of the law result in substantively just and fair outcomes. *However*, where illegality and public policy are concerned, there is a *further overlay* that results in a more complicated legal scenario; put simply, *in situations where the illegality or contravention of public policy is such as to result in actual (or potential) harm to the (wider) public interest, this justifies the court concerned in overriding the parties' individual contractual rights*. At the risk of oversimplification, in such situations, the *community's welfare* ***trumps*** *the contracting parties' individual rights*. At the risk of *further* oversimplification, when the doctrine of illegality and public policy operates, it would appear that *utilitarian* considerations ***trump*** *individual* rights. To that extent, the *second central thread* might not operate in the manner that it usually does in other areas of contract law. Perhaps more importantly, the legal approach adopted by the court concerned becomes of *critical importance*.

48 Before considering the divergences in the various courts' approaches towards the topic of contractual illegality and public policy, it might be useful to note that this particular topic is traditionally classified into two broad areas, *viz*, *statutory* illegality and illegality and public policy at *common law*, respectively. This point is of particular importance because the UK Supreme Court in *Patel v Mirza* was setting out the applicable legal principles *only* in relation to *the common law*, whereas, as we shall see, the Singapore Court of Appeal (which adopted a very different approach in both *Ting Siew May v Boon Lay Choo*[102] ("*Ting Siew May*") and (most recently) *Ochroid Trading Ltd v Chua Siok*

101 See, for example, Andrew Phang, "Of Illegality and Presumptions – Australian Departures and Possible Approaches" (1996) 11 JCL 53 at 53 and, by the same author, "Illegality and Public Policy" in *The Law of Contract in Singapore* (Academy Publishing, 2012) ch 13 at para 13.001.

102 [2014] 3 SLR 609. See also Sandra Annette Booysen, "Contractual Illegality and Flexibility – A Rose by Any Other Name" (2015) 32 JCL 170 and Zhong Xing Tan, "The Anatomy of Contractual Illegality" (2015) 44 Common Law World Rev 99.

Lui[103] ("*Ochroid Trading*")) was concerned with *both* statutory illegality *as well as* illegality and public policy at common law.

(2) Patel v Mirza

49 In *Patel v Mirza*,[104] the plaintiff, Patel, transferred sums totalling £620,000 to the defendant, Mirza, for the purpose of betting on the price of certain shares, using insider information which Mirza expected to obtain from his contacts regarding an anticipated government announcement which would affect the price of the said shares. However, Mirza's expectation of a government announcement proved to be mistaken; hence, the intended betting did not take place. Nevertheless, Mirza failed to repay the money which Patel had transferred to him, despite promises to do so. Patel therefore brought the present claim against Mirza to recover these sums on the grounds of contract *and* unjust enrichment.

50 The trial judge held that Patel could not recover the sums which he had transferred to Mirza because he had to rely upon his own illegality to establish his claim. Although Patel might have been able to effect recovery through the *locus poenitentiae* doctrine, this was not

103 [2018] 1 SLR 363. See also para 10 above. Reference may also now be made to Alexander Loke, "Disagreement over the Illegality Defence" (2018) 35 JCL 169.

104 This decision is an obviously seminal one and, not surprisingly, has been the subject of much academic commentary: see, for example, James Goudkamp, "The End of an Era? Illegality in Private Law in the Supreme Court" (2017) 133 LQR 14; James C Fisher, "The Latest Word on Illegality" [2016] LMCLQ 483; Nicholas Strauss, "The Diminishing Power of the Defendant: Illegality after *Patel v Mirza*" [2016] RLR 145; Emer Murphy, "The *Ex Turpi Causa* Defence in Claims against Professionals" (2016) 32 Professional Negligence 241; Andrew Burrows, "A New Dawn for the Law of Illegality" (2 June 2017) <https://ssrn.com/abstract=2979425> (accessed 5 June 2017) (see now *Illegality after Patel v Mirza* (Sarah Green & Alan Bogg gen eds) (Hart Publishing, 2018) ch 2); Lord Grabiner, "*Patel v Mirza* [2016] UKSC 42 – Illegality and Restitution Explained by the Supreme Court", The Second Distinguished Law Lecture, Queen's College, Cambridge (19 October 2016) <https://www.law.cam.ac.uk/press/events/2016/10/queens-distinguished-lecture-law-patel-v-mirza-illegality-and-restitution> (accessed 19 April 2017); Michael P Furmston, "Recent Developments in Illegal Contracts", lecture at the Journal of Contract Law Conference (18 May 2017), which has since been published as ch 11 of *Essays in Memory of Jill Poole – Coherence, Modernisation and Integration in Contract, Commercial and Corporate Laws* (Rob Merkin & James Devenney gen eds) (Informa Law, 2018); and Graham Virgo, "The Illegality Revolution" in *Revolution and Evolution in Private Law* (Sarah Worthington, Andrew Robertson & Graham Virgo gen eds) (Hart Publishing, 2018). Indeed, Goudkamp went so far as to observe that "*Patel v Mirza* … is a pivotal moment in English private law": James Goudkamp, "The End of an Era? Illegality in Private Law in the Supreme Court" (2017) 133 LQR 14 at 14. See also the very recent collection of essays in *Illegality after Patel v Mirza* (Sarah Green & Alan Bogg gen eds) (Hart Publishing, 2018).

possible on the facts because Patel's attempted withdrawal had *not* been voluntary.

51 On appeal, the English Court of Appeal reversed the decision of the trial judge and found in favour of Patel. Both Rimer and Vos LJJ were of the view that, notwithstanding the fact that Patel's attempted withdrawal had not been voluntary, Patel could still recover the sums that he paid to Mirza because the arrangement between them had *not* been *executed* yet. On the other hand, Gloster LJ arrived at the *same* conclusion as Rimer and Vos LJJ, but on *different reasoning*. In her view, Patel ought to succeed in his claim because, balancing various factors, such recovery was legally justified.

52 On further appeal to the UK Supreme Court, both the majority and minority agreed on the actual result, but arrived at it through *quite different reasoning*. Constraints of space preclude a detailed discussion. The first-mentioned author of the present article has, in fact, dealt with *Patel v Mirza* in a comparative context elsewhere, and the reader is referred to that article for more detailed analysis.[105] It will suffice for present purposes to note that the majority[106] applied a "range of factors approach" whilst the minority applied a rule-based approach. The former approach confers *discretion* on the court to decide whether or not to permit recovery *notwithstanding* an illegal contract. The latter approach does *not* permit recovery pursuant to the illegal contract, but may permit recovery under established exceptions.

(3) The Singapore position

53 The Singapore position is quite different. The latest (and very recent) decision is that of the Singapore Court of Appeal in *Ochroid Trading*. This particular decision in fact affirmed the principles laid down in the court's earlier decision in *Ting Siew May*. The court in *Ochroid Trading* summarised the law relating to illegality and public policy as follows:[107]

105 See Andrew Phang, "The Intractable Problems of Illegality and Public Policy in the Law of Contract – A Comparative Perspective" in *Essays in Memory of Jill Poole – Coherence, Modernisation and Integration in Contract, Commercial and Corporate Laws* (Rob Merkin & James Devenney gen eds) (Informa Law, 2018) ch 12.

106 Although Lord Neuberger of Abbotsbury is considered to be in the majority, we would suggest that his views straddle *both* the majority *and* the minority views. However, reasons of space once again preclude a detailed discussion and the reader is referred to Andrew Phang, "The Intractable Problems of Illegality and Public Policy in the Law of Contract – A Comparative Perspective" in *Essays in Memory of Jill Poole – Coherence, Modernisation and Integration in Contract, Commercial and Corporate Laws* (Rob Merkin & James Devenney gen eds) (Informa Law, 2018) ch 12.

107 See *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363 at [64]–[66].

> The court will first ascertain whether *the contract* is ***prohibited*** either pursuant to a *statute* (expressly or impliedly) and/or *an established head of common law public policy*. This is the ***first*** *stage* of the inquiry and, if the contract is indeed thus prohibited, there can be ***no recovery*** *pursuant to the (illegal) contract*. This is subject to the *caveat* that, in the general common law category of contracts which are not unlawful *per se* but entered into with the object of committing an illegal act (and ***only*** *in this category*), the proportionality principle laid down in *Ting Siew May* ought to be applied to determine if the contract is enforceable.
>
> *However*, that may not be the end to the matter as a party who has transferred benefits pursuant to the illegal contract *might* be able to recover those benefits on a ***restitutionary*** *basis* (*as opposed to* recovery of *full contractual damages*). This is the ***second*** stage of the inquiry. We saw that there were at least *three* possible legal avenues for such recovery – all of which have been summarised above (at [43]–[60]).
>
> The present legal position in Singapore is thus relatively clear – at least in so far as *the legal approach* is concerned. Admittedly, the process of *application* of the relevant legal principles may be problematic but that is an inevitable part of adjudication and is common to all areas of the law. Having said that, and as alluded to above, there are issues which still need to be clarified, particularly the principles governing ***an independent claim in unjust enrichment*** for the recovery of benefits conferred under an illegal contract as well as the ***limits*** of such a claim.
>
> [emphasis in original]

As can be seen, the court in *Ochroid Trading* did *not* follow the approach of the majority in *Patel v Mirza*. It held that the "range of factors" test adopted by the majority in *Patel v Mirza* was *not* part of Singapore law, and the law on the question of whether the contract concerned was prohibited – which arose at the first stage of the inquiry – remained unchanged.[108] In arriving at this holding, the court was of the view that the approach of the majority in *Patel v Mirza* would introduce further uncertainty into the analytical process by superimposing an additional inquiry based on the "range of factors" test across the board to all situations of common law illegality. Such an approach was undesirable as it created an unprincipled distinction between the principles which applied to statutory illegality and those which governed common law illegality (the court in *Patel v Mirza* having laid down the "range of factors" test for situations of common law illegality *only*). The "range of factors" test was also unnecessary to achieve remedial justice in the Singapore context given the flexibility of the principles laid down in

108 See *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363 at [64], reproduced immediately above.

Ting Siew May, which would also allow restitutionary recovery at the second stage[109] of the inquiry.[110]

54 In fact, the court in *Ochroid Trading* had to consider a similar issue to that which faced the UK Supreme Court in *Patel v Mirza* – whether, assuming that (and this was the first issue) the agreements concerned were illegal moneylending contracts that were unenforceable under the Singapore Moneylenders Act[111] ("MLA"), the plaintiffs could nevertheless succeed pursuant to their alternative claim in unjust enrichment for the restitutionary recovery of the principal sums that they had lent (this engaged the *second stage* of the inquiry under present Singapore law).[112] This alternative claim in unjust enrichment concerned the issue of what impact, if any, the illegality of a contract had on an independent claim in unjust enrichment to recover the benefits conferred thereunder, and the position in Singapore on the doctrine of illegality and public policy in the context of unlawful contracts (particularly when viewed in the light of the recent decision in *Patel v Mirza*).

55 The court held that restitutionary recovery of benefits conferred under an illegal contract would, in principle, also be available where the ordinary requirements of an independent claim in unjust enrichment were satisfied, subject to the defence of illegality and public policy in unjust enrichment. Such a claim would not be barred simply because the plaintiff needed to "rely on" his illegality in a formal or procedural manner as the reliance principle, properly understood, was engaged only if the plaintiff sought to enforce or profit from the illegal and prohibited contract. A restitutionary claim would not offend the principle underlying the illegality doctrine, even if it could be said that the plaintiff needed to "rely" on his illegal conduct (in a loose and indirect sense), as the claim would not allow the plaintiff to profit from the illegal contract but would simply put the parties in the position they would have been if they had never entered into the illegal transaction.[113] The defence of illegality and public policy in unjust enrichment, however, *would* bar recovery in unjust enrichment, and that was premised on *the principle of stultification* (taking reference from a seminal article by Professor Peter Birks,[114] and, in the process,

109 See *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363 at [65], reproduced above.

110 See *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363 at [125].

111 Cap 188, 1985 Rev Ed.

112 See *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363 at [65].

113 See *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363 at [128], [129] and [139].

114 See Peter Birks, "Recovering Value Transferred Under an Illegal Contract" (2000) 1 *Theoretical Inquiries in Law* 155.

illustrating the *fourth central thread* in this article), which principle requires the court to determine whether allowing the claim would *undermine the fundamental policy* that rendered the underlying contract void and unenforceable in the first place.[115] In each case, the court must carefully examine the relevant considerations and the policy, be it statutory or the common law, which rendered the contract illegal before considering if that same policy would be undermined or stultified if the claim in unjust enrichment was allowed.

56 In so far as the present case was concerned, the alternative claim in unjust enrichment could not succeed because to permit recovery of even the principal sums would undermine and stultify the fundamental social and public policy against unlicensed moneylending which undergirded the MLA. An examination of the legislative policy underpinning the MLA indicated that unlicensed moneylenders should be precluded from recovering any compensation whatsoever for their illegal loans. Permitting restitution of the principal sums lent would make a nonsense of this policy and render ineffectual the prohibition against illegal moneylending in the MLA, which reflected the strong need to deter such conduct due to its status as a serious social menace in Singapore.[116]

(4) Discussion

57 The current English and Singapore positions represent *clearly divergent (and, indeed, contrasting) models* relating to this particularly thorny topic in the common law of contract,[117] and they reflect an interesting choice as to the possible points of departure for reform in other Commonwealth jurisdictions. However, they do not seem to us to represent radically different *substantive* perspectives on "public policy" as such but, rather, *different legal techniques* that would, in most cases at least, result in the same outcome. That having been said, there is also a sense in which the English and Singapore positions diverge with regard to substantive "public policy" as well. This is particularly the case in relation to the defence of illegality to the independent cause of action in unjust enrichment. In this regard, the Singapore court has endorsed and

115 See *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363 at [143], [145]–[148], [158] and [159]. And on observations on other independent causes of action and the scope of the concept of stultification, see [161]–[168].

116 See *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363 at [219].

117 See also Sir Geoffrey Vos, "Preserving the Integrity of the Common Law", lecture to the Chancery Bar Association (16 April 2018) at paras 17–23 (and dealing with the contrasting positions taken by *Patel v Mirza* [2017] AC 467 on the one hand and *Ochroid Trading v Chua Siok Lui* [2018] 1 SLR 363 on the other) <http://www.chba.org.uk/for-members/library/annual-lectures/preserving-the-integrity-of-the-common-law> (accessed 22 May 2018).

applied in *Ochroid Trading* the concept of stultification – drawing from academic literature. This represents that rarest of occasions when academic scholarship has had a *direct impact on the development of the law by the courts themselves* – thus illustrating the fourth central thread of this article in the most significant way possible.

D. Remoteness of damage

58 The law on remoteness of damages is yet another good illustration of divergence. Of course, the remoteness of damages was never quite so divergent in the past. Almost all Commonwealth jurisdictions followed the *Hadley* test,[118] based on a case decided in the 19th century. Unlike the other areas already discussed, here, ironically, the divergence was started by the English courts, when Lord Hoffmann in the House of Lords proposed to depart from the *Hadley* test. Thus, the courts which chose to continue relying on the *Hadley* test, here exemplified by the Singapore courts, "diverged" in the sense that they preferred the old English approach as a matter of principle.

(1) The English approach

59 In *The Achilleas*,[119] Lord Hoffmann held that contractual losses are too remote if the defendant did not assume responsibility for them, even if those losses were within the reasonable contemplation of the parties as losses not unlikely to occur as a result of breach.[120] Consistent with his Lordship's view of the implication of terms, whether the defendant assumed responsibility is said to be a matter of interpreting the contract. However, *The Achilleas* has been received differently by subsequent decisions in England.

60 For example, in *John Grimes Partnership Ltd v Gubbins*,[121] the English Court of Appeal affirmed the prevailing English approach after *The Achilleas*, which amalgamates the orthodox test for remoteness in *Hadley v Baxendale*[122] ("*Hadley*") and the "assumption of responsibility" test, with the latter operating as an overriding test. Sir David Keene, with whom Tomlinson and Laws LJJ agreed, held that Lord Hoffmann did not depart entirely from the *Hadley* test of remoteness. Instead, the "assumption of responsibility" test was meant to be an overriding test

118 *Hadley v Baxendale* (1854) 9 Exch 341; (1854) 156 ER 145. The two-limb test for contractual remoteness set out in this case shall hereafter be referred to as the "*Hadley* test".

119 See para 11 above.

120 See also, for example, David McLauchlan, "Remoteness Re-invented?" (2009) 9 OUCLJ 109 at 127.

121 [2013] EWCA Civ 37.

122 (1854) 9 Exch 341; (1854) 156 ER 145.

that might displace the result arrived at using the *Hadley* test. If the circumstances demonstrated that the defendant could not have assumed responsibility for a particular type of loss, then that loss would be too remote, even if the *Hadley* test yielded a different result.[123] Put this way, there was still a role for the *Hadley* test, even if its importance has diminished.

61 Accordingly, the English approach can be seen as a two-stage approach. The first is the application of the *Hadley* test. Normally, the result reached by this first stage would apply, unless – and this is the second stage – the background facts demonstrate that that result is not reflective of a type of loss that the defendant had assumed responsibility for. This accords with Toulson LJ's (as he then was) view in *Supershield Ltd v Siemens Building Technologies FE Ltd*[124] that the *Hadley* test has been rationalised on the basis that it reflects the expectation to be imputed to the parties in the ordinary case, and would be departed from only if the background reflected otherwise.[125] The broader implication is that Lord Hoffmann's "assumption of responsibility" test has not substantively changed the primary rule relating to remoteness, but has only rationalised it on a different basis.[126]

(2) The Singapore approach

62 Viewed this way, the divergence between the English and Singapore approaches is actually not that wide, in as much as the *Hadley* test is still relevant. There is still divergence, in the sense that *The Achilleas* imposed an *additional* step. But, if we were to regard *The Achilleas* as departing wholly from the *Hadley* test, then the Singapore courts have certainly departed from it.

63 In recent times, the Singapore Court of Appeal has in three cases strongly reaffirmed the applicability of the *Hadley* test in Singapore. The first case – decided shortly before *The Achilleas* – was

123 *John Grimes Partnership Ltd v Gubbins* [2013] EWCA Civ 37 at [20].

124 [2010] EWCA Civ 7; [2010] 1 Lloyd's Rep 349.

125 *Supershield Ltd v Siemens Building Technologies FE Ltd* [2010] 1 Lloyd's Rep 349; [2010] EWCA Civ 7 at [43].

126 *Supershield Ltd v Siemens Building Technologies FE Ltd* [2010] 1 Lloyd's Rep 349; [2010] EWCA Civ 7 at [43]. See also *The Amer Energy* [2009] 1 Lloyd's Rep 293 at [17]–[18]; *Borealis AB v Geogas Trading SA* [2010] EWHC 2789 (Comm) at [48]; *The Sylvia* [2010] EWHC 542 (Comm); [2010] 2 Lloyd's Rep 81 at [40]–[48]; *Ispat Indurstries Ltd v Western Bulk Pte Ltd* [2011] EWHC 93 (Comm) at [53]; and *Jayesh Shah, Shaleetha Mahabeer v HSBC Private Bank (UK) Ltd* [2012] EWHC 1283 (QB) at [232]. *Cf Nicholas G Jones v Environcom Ltd, Environcom England Ltd* [2010] EWHC 759 (Comm) at [109].

Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd[127] ("*Robertson Quay*"). The court in that case stated that there was a "strong rational basis" based on first principles for the existence and retention of the *Hadley* test.[128] *Robertson Quay* was followed by *MFM Restaurants*,[129] which was decided after *The Achilleas*, and which presented the court with the first real opportunity to consider Lord Hoffmann's "assumption of responsibility" test. The court decided not to adopt the test in *The Achilleas* for several reasons. First, the court pointed out the difficulties of the "assumption of responsibility" test itself:

> (a) It is difficult to discern the *ratio decidendi* of *The Achilleas*.[130]
>
> (b) The test suffered from various conceptual and theoretical difficulties by nullifying the role of remoteness as an external inhibitor of damages claimable.[131]
>
> (c) The test was uncertain in its application since it was difficult to ascertain accurately what contracting parties – who most likely contemplated performance and not breach – were assuming responsibility for in the event of breach.[132]

64 Second, having pointed out the difficulties with the assumption of responsibility test, the court explained why the *Hadley* test ought to be preferred (and hence retained), restating several of the reasons it previously gave in *Robertson Quay*. The court, however, retained assumption of responsibility as a concept to explain the *Hadley* test. To that extent, it expressly accepted Lord Hoffmann's approach in *The Achilleas* in so far as the concept of assumption of responsibility is already incorporated or embodied in both limbs of the *Hadley* test.[133]

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127 [2008] 2 SLR(R) 623, noted in Yihan Goh, "Case Comment: *Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd*" (2009) 9 OUCLJ 101.

128 *Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd* [2008] 2 SLR(R) 623 at [69].

129 Noted in Yihan Goh, "Explaining Contractual Remoteness in Singapore" [2011] JBL 282.

130 *MFM Restaurants Pte Ltd v Fish & Co Restaurants Pte Ltd* [2011] 1 SLR 150 at [90]–[91]; cf Paul C K Wee, "Contractual Interpretation and Remoteness" [2010] LMCLQ 150 at 157.

131 *MFM Restaurants Pte Ltd v Fish & Co Restaurants Pte Ltd* [2011] 1 SLR 150 at [92]–[93].

132 *MFM Restaurants Pte Ltd v Fish & Co Restaurants Pte Ltd* [2011] 1 SLR 150 at [94]–[97].

133 *MFM Restaurants Pte Ltd v Fish & Co Restaurants Pte Ltd* [2011] 1 SLR 150 at [140].

65 The Singapore Court of Appeal more recently reaffirmed the applicability of the *Hadley* test in *Out of the Box*.[134] In doing so, it drew a clear distinction between interpretation and remoteness. In its view, it is important to distinguish between cases that concern the interpretation of a contract in order to identify the specific nature of the obligation undertaken, and cases that are concerned with matters of remoteness.[135] Having decided that the applicable test to determine remoteness was still the *Hadley* test, the court proceeded to make two points in relation to its application. The first is that there is "a substantial degree of fact sensitivity that is necessarily embedded within the analysis of whether the claimed damages are too remote".[136] In the court's view, by focusing on the specific facts of each case, a court can address the concerns that informed Lord Hoffmann's approach in *The Achilleas* within adopting the conventional analysis in *Hadley*.[137] The second point of application was the provision of an analytical framework for questions of remoteness. The framework applies the *Hadley* test in a way which emphasises the defendant's knowledge and the circumstances in which that knowledge arose:[138]

> (a) First, what are the specific damages that have been claimed?
>
> (b) Second, what are the facts that would have had a bearing on whether these damages would have been within the reasonable contemplation of the parties had they considered this at the time of the contract?
>
> (c) Third, what are the facts that have been pleaded and proved either to have in fact been known or to be taken to have been known by the defendant at the time of the contract?
>
> (d) Fourth, what are the circumstances in which those facts were brought home to the defendant?
>
> (e) Finally, in the light of the defendant's knowledge and the circumstances in which that knowledge arose, would the damages in question have been considered by a reasonable person in the situation of the defendant at the time of the contract to be foreseeable as a not unlikely consequence that he should be liable for?

134 See para 11 above.

135 *Out of the Box Pte Ltd v Wanin Industries Pte Ltd* [2013] 2 SLR 363 at [29].

136 *Out of the Box Pte Ltd v Wanin Industries Pte Ltd* [2013] 2 SLR 363 at [37]; see *Satef-Huttenes Albertus SpA v Paloma Tercera Shipping Co SA (The Pegase)* [1981] 1 Lloyd's Rep 175.

137 *Out of the Box Pte Ltd v Wanin Industries Pte Ltd* [2013] 2 SLR 363 at [38].

138 *Out of the Box Pte Ltd v Wanin Industries Pte Ltd* [2013] 2 SLR 363 at [47].

(3) Discussion

66 From the preceding account, it is clear that the Singapore approach contemplates a "pure" application of the *Hadley* test, whereas the English approach amalgamates the "assumption of responsibility" test with the *Hadley* test (or, to take Lord Hoffmann's speech in *The Achilleas* at face value, applies the "assumption of responsibility" test wholly). We suggest that the Singapore approach is preferable for two reasons. First, the English cases after *The Achilleas*, typified by *John Grimes Partnership*, have not clarified just how the "assumption of responsibility" test is to be applied in conjunction with the *Hadley* test. For example, *Chitty on Contracts* notes that it is "not wholly clear" whether the "assumption of responsibility" test is an aspect of the *Hadley* test or a separate rule.[139] This generates uncertainty, which is not helpful in commercial cases. Secondly, the "assumption of responsibility" test, with respect, adds nothing to the traditional *Hadley* test. Thus, the uncertainty generated by the unclear relationship between the *Hadley* test and the "assumption of responsibility" test is an *unnecessary* one. It is best avoided by returning to a pure application of the *Hadley* test.

67 A pure application of the *Hadley* test would result in the same outcome as the "assumption of responsibility" test, whether or not the latter is applied independently or as an addendum to the *Hadley* test. This can be illustrated by the facts in *The Achilleas* itself. In that case, the common assumption in the trade that the liability of a charterer for late delivery of a ship was limited to the difference between the market rate and the charter rate for the period of the overrun could be analysed within the *Hadley* test. Since the charterer could not have known of the unusually volatile market conditions, it would only be liable for the commonly assumed loss that it knew of. There was no need to refer to any "assumption of responsibility". The *Hadley* test is therefore well capable of functioning on its own, and *The Achilleas* – while supposedly changing the law – makes no difference to the outcome.

68 In contrast, the Singapore approach – which envisages the *Hadley* test as an external control on liability rather than a function of the parties' intentions – better deals with the situation where parties have not expressly provided for questions of remoteness. The "assumption of responsibility" test, premised on an interpretation of the contract, asks what the parties assumed responsibility for in such a situation. However, this approach stretches the ambit of "interpretation" too far, since the parties may not have contemplated this question, especially as they would have expected performance instead of breach.

139 See *Chitty on Contracts* (Hugh G Beale gen ed) (Sweet & Maxwell, 32nd Ed, 2015) at p 80.

The *Hadley* test, on the other hand, being an *external or default* rule, acts adequately as a gap-filler for situations (as would be common) where parties have not considered who should bear the type of loss in question.[140] Where there is no express agreement on the remoteness of damage, the *Hadley* test operates as an *external or default* test for the courts to decide whether to hold the particular type of loss as not being too remote, with the relevant context in mind.

69 Ultimately, it would often be artificial to search within the contract for any assumption of responsibility simply because the parties had made no provision in this regard. The danger with using "interpretation" as a technique to ascertain whether parties had assumed responsibility for certain types of damages is that it exposes the judge concerned to an over-extensive judicial imputation of intention.[141]

70 More broadly, the use of the *Hadley* test may also better distinguish between the concepts of interpretation and remoteness if remoteness is to be governed by an external test. The Singapore Court of Appeal in *Out of the Box* alluded to this idea by referring to the hypothetical case of the taxi driver tasked to get his passenger to a particular destination by a certain time. The question in that particular hypothetical is whether the taxi driver who fails to make it to the destination in time should be made liable for the passenger's loss of the profit that would have materialised had the driver made it to the destination in time. The court noted that the hypothetical concerned the prior question of interpreting the contract to ascertain the obligations undertaken by the taxi driver.[142] Thus, if the taxi driver knew that there was a time limit and the reason for that limit, and decided to charge a higher fare, then it might be concluded, as a matter of interpretation, that the driver had undertaken an obligation to reach the destination by a particular time. However, the ascertainment of the taxi driver's obligations under the contract did not answer the separate question of whether he should be responsible for the damages that resulted from the breach of those obligations. The latter question was to be determined by reference to the rules on the remoteness of contractual damages.[143] Accordingly, the court thought that framing the issue of remoteness in terms of "assumption of responsibility" or "interpretation" risks

140 See generally Andrew Robertson, "The Basis of the Remoteness Rule in Contract" (2008) 28 LS 172.

141 Although this concern was hinted at in *Out of the Box Pte Ltd v Wanin Industries Pte Ltd* [2013] 2 SLR 363 at [46], the court's reasoning did not really illustrate the distinction between interpretation and remoteness as it ultimately rested on an express term concerning the contract sum. *Cf* Brian Coote, "Contract As Assumption and Remoteness of Damage" (2010) 26 JCL 211.

142 *Out of the Box Pte Ltd v Wanin Industries Pte Ltd* [2013] 2 SLR 363 at [33].

143 *Out of the Box Pte Ltd v Wanin Industries Pte Ltd* [2013] 2 SLR 363 at [34].

conflating the two separate questions of ascertaining the parties' obligations and the claimable damages.[144]

71 Ultimately, the *Hadley* test embodies an *external or default* rule of law that allows the courts to fill in gaps in the contract without over-stretching the concept of "interpretation" within the realm of remoteness. It may therefore be useful, as the Singapore Court of Appeal said in *Out of the Box*, to distinguish interpretation from the question of remoteness and to focus on the parties' knowledge as the basis for liability in relation to the remoteness question. The question of interpretation concerns the relevant context for the first limb of the *Hadley* test, and also whether the defendant had validly excluded or limited his liability. The continued rejection in Singapore of the "assumption of responsibility" test in determining the remoteness of damages in contract affords a useful contrast to the continued refinement of the test in England. While the *Hadley* test is not without its problems,[145] the application of a different approach (or an addendum to the existing test) should only be applied *if it adds something new* to the existing law. In our view, the *Hadley* test is capable on its own to deal with supposedly exceptional cases which the "assumption of responsibility" test was devised to resolve.

V. Flux and divergence

A. Discharge by breach of contract[146]

72 From divergence we move now to flux and divergence, where there is both uncertainty in development as well as divergence between jurisdictions. A good example of this is the law relating to the discharge by breach of contract.

(1) The English approach

73 Whether a breach of contract will allow for termination has hitherto been governed by the seminal English Court of Appeal decision

144 *Out of the Box Pte Ltd v Wanin Industries Pte Ltd* [2013] 2 SLR 363 at [35]–[36].

145 See, for example, Andrew Tettenborn, "*Hadley v Baxendale* Foreseeability: A Principle Beyond Its Sell-by Date?" (2007) 23 JCL 120 and Max Harris, "Fairness and Remoteness of Damage in Contract Law: A Lexical Ordering Approach" (2011) 28 JCL 122.

146 Though *cf* the difficulties a writer has had with such terminology: see Frederick Wilmot-Smith, "Termination after Breach" (2018) 134 LQR 307. With respect, however, whilst the arguments contained in this article are *theoretically* interesting as well as provocative, they do not really grapple with the various difficulties which we deal with in this part of the article (particularly from a *practical* perspective).

in *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd*[147] ("*Hongkong Fir*"). The *Hongkong Fir* approach requires an analysis of the effect of the breach of contract. Another view, which was described as being "equally sustainable",[148] is that *Hongkong Fir* introduced a third type of term, *viz*, the "intermediate" or "innominate"[149] term, which in actuality reduces to a consideration of the effect of the breach although phrased in terms of the condition-warranty approach. There is, ultimately, no one illuminatingly clear answer to the question. Indeed, despite the preponderance of these possible answers, little has been said about the *relationship* between the approaches canvassed, which have hitherto been regarded as providing for distinct approaches towards the termination upon breach question. The lack of integration, explanation and rationalisation has contributed to the perception that this is a "confused and confusing area of contract law".[150]

(2) The Singapore approach

74 The Singapore Court of Appeal has, in *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd*[151] ("*RDC Concrete*"), held that rather than view the condition-warranty approach and the *Hongkong Fir* approach as being discrete, they should now be combined in an integrated approach, designed to achieve certainty and, above all, justice and fairness[152] (hereafter referred to as "the integrated approach"). With respect, the court's integrated approach is to be welcomed in so far as it heralds a consistent approach to the breach and termination of contracts at

147 [1962] 2 QB 26, noted by Michael P Furmston, "The Classification of Contractual Terms" (1962) 25 MLR 584.

148 See Francis M B Reynolds, "Discharge of Contract by Breach" (1976) 92 LQR 17.

149 While the expression "innominate term" certainly did not originate from *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26 itself, two different pieces of work have attributed its origin to different sources. Jack Beatson in *Anson's Law of Contract* (Oxford: Oxford University Press, 28th Ed, 2002) at p 135 attributes it to have been first used by John C Smith and Joseph A C Thomas in *A Casebook on Contract* (London: Sweet & Maxwell, 4th Ed, 1969). On the other hand, John W Carter, Gregory J Tolhurst and Elisabeth Peden in "Developing the Intermediate Term Concept" (2006) 22 JCL 268 at 271 attribute it to Michael P Furmston, "The Classification of Contractual Terms" (1962) 25 MLR 584. See also Kanaga Dharmananda & Anthony Papamatheos, "Termination and the Third Term: Discharge and Repudiation" (2008) 124 LQR 373 at 375.

150 See the *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* [2007] 4 SLR 413 at [88].

151 [2007] 4 SLR(R) 413; and also reported at (2008) 115 Con LR 154. See also John W Carter, "Intermediate Terms Arrive in Australia and Singapore" (2008) 24 JCL 226 at 243. Reference may also be made to the later decision of the same court in *Man Financial (S) Pte Ltd v Wong Bark Chuan David* [2008] 1 SLR(R) 663 at [159]–[174] which explained the relevant factors in ascertaining whether or not a given contractual term is a condition.

152 *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* [2007] 4 SLR(R) 413 at [109].

common law. Such an approach recognises that there is a place for *both* the condition-warranty approach and the *Hongkong Fir* approach in an analytical framework for deciding when an innocent party can terminate the contract for breach at common law. In this respect, then, the approach taken in *RDC Concrete* also clears up the confusion evident in the mixed perspectives taken of the relationship between the condition-warranty approach and the *Hongkong Fir* approach.

75 In *obiter* comments, the court articulated its views on the general legal position with respect to a breach of contract at common law.[153] It held that there are two broad categories under which, in the event of a breach of contract, an innocent party is entitled to elect to terminate the contract at common law.[154] The first category comprises one situation only: where a contract clearly and unambiguously provided for the events pursuant to which a party was entitled to terminate the contract, the innocent party might elect to do so.[155] The second category involves situations where the contract did not provide as such.[156] Here, the innocent party might elect to terminate the contract in three situations: first, where a party, by his words or conduct, clearly conveyed to the other party that it would not perform its contractual obligations at all;[157] secondly, where there was a breach of a term which the parties had designated as so important that any breach of it would entitle the innocent party to terminate the contract;[158] and thirdly, where the breach in question would deprive the innocent party of substantially the whole benefit of the contract it was intended the innocent party should receive.[159] The court, somewhat unusually, presented this also by way of a table:

SITUATION	**CIRCUMSTANCES IN WHICH TERMINATION IS LEGALLY JUSTIFIED**	**RELATIONSHIP TO OTHER SITUATIONS**
I ***Express*** **Reference** to the Right to Terminate **and** What will Entitle the Innocent Party to Terminate the Contract		
(1)	The contractual term breached clearly states that, on the occurrence of certain events, the innocent party is entitled to terminate the contract.	None – it operates *independently of all other* situations. In other words — Situations (2), (3)(a) and (3)(b) (*ie* all the situations in II, below) are *not* relevant.

153 *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* [2007] 4 SLR(R) 413 at [89]–[114].
154 *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* [2007] 4 SLR(R) 413 at [90].
155 *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* [2007] 4 SLR(R) 413 at [91].
156 *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* [2007] 4 SLR(R) 413 at [92].
157 *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* [2007] 4 SLR(R) 413 at [93].
158 *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* [2007] 4 SLR(R) 413 at [97]–[98].
159 *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* [2007] 4 SLR(R) 413 at [99].

II ***No*** **Express Reference** to the Right to Terminate **and** What will Entitle the Innocent Party to Terminate the Contract		
(2)	Party in breach ***renounces*** the contract by clearly conveying to the innocent party that it ***will not perform*** *its contractual obligations* ***at all***. ***Quaere*** whether the innocent party can terminate the contract if the party in breach *deliberately* chooses to perform its part of the contract in a manner that amounts to a *substantial breach*.	None – it operates *independently* of *all other* situations. In other words — Situation (1) is *not* relevant. Situations (3)(a) and (3)(b) are *not* relevant.
(3)(a)	**Condition-Warranty Approach** – Party in breach has breached a ***condition*** of the contract (as opposed to a *warranty*).	Should be applied ***before*** the *Hongkong Fir* Approach in Situation (3)(b). Situation (1) is *not* relevant. Situation (2) is *not* relevant.
(3)(b)	***Hongkong Fir*** **Approach** – Party in breach has committed a breach, the ***consequences*** of which *will* ***deprive the innocent party of substantially the whole benefit*** *which it was intended that the innocent party should obtain from the contract*.	Should be applied only ***after*** the Condition-Warranty Approach in Situation (3)(a) *and* if the term breached is *not* found to be a *condition*. Situation (1) is *not* relevant. Situation (2) is *not* relevant.

76 The Singapore Court of Appeal subsequently delivered a similar summary in *Man Financial (S) Pte Ltd v Wong Bark Chuan David*.[160]

77 It would be obvious that situations 3(a) and 3(b), to use the court's labels, correspond to the condition-warranty approach and *Hongkong Fir* approach respectively. The interesting aspect of *RDC Concrete* is that the court observed that the two approaches ought to be *integrated*.[161] It is worthwhile to reproduce the material paragraphs stating this approach:[162]

160 *Man Financial (S) Pte Ltd v Wong Bark Chuan David* [2008] 1 SLR(R) 663.
161 *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* [2007] 4 SLR(R) 413 at [102]–[110].
162 *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* [2007] 4 SLR(R) 413 at [106]–[107].

> In determining whether an innocent party is entitled to terminate a contract upon breach, the *foremost* consideration is (and must be) *to give effect to the intentions of the contracting parties*. If so, then the condition-warranty approach must *take precedence* over the *Hongkong Fir* approach because … it is premised on the intentions of the contracting parties themselves. … In such cases, regardless of the consequences of the breach, the innocent party would be entitled to terminate the contract.
>
> If, however, the term breached is a *warranty*, we are of the view that the innocent party is not thereby prevented from terminating the contract (as it would have been entitled so to do if the condition-warranty approach operated *alone*). Considerations of *fairness* demand, in our view, that the *consequences* of the breach should *also* be examined by the court, *even if* the term breached is only a warranty (as opposed to a condition). There would, of course, be no need for the court to examine the consequences of the breach if the term breached was a *condition* since, *ex hypothesi*, the breach of a condition would (as we have just stated) entitle the innocent party to terminate the contract in the first instance. Hence, it is only in a situation where the term breached would otherwise constitute a *warranty* that the court would, as a question of *fairness*, go *further* and examine the *consequences* of the breach as well. In the result, if the consequences of the breach are such as to deprive the innocent party of *substantially the whole benefit* that it was intended that the innocent party should obtain from the contract, then the innocent party *would* be entitled to terminate the contract, *notwithstanding* that it only constitutes a *warranty*. If, however, the consequences of the breach are only *very trivial*, then the innocent party would *not* be entitled to terminate the contract.
>
> [emphasis in original]

78 Accordingly, the integrated approach requires a prior consideration, in the light of the parties' intentions, of whether the term in question is a condition or warranty. If it is a condition, the inquiry ends and the innocent party is allowed to treat the contract as being at an end. However, if the term is a warranty or if the parties' intentions are unclear, the integrated approach then asks whether the nature of the breach is such as to give rise to the right to terminate. If the consequences of the breach are such as to deprive the innocent party of substantially the whole benefit that it was intended the innocent party should obtain from the contract, then the innocent party would be entitled to terminate the contract, notwithstanding that it only constitutes a warranty. If, however, this were not the case, then the innocent party would not be entitled to terminate the contract.

79 In all of this, the court acknowledged that the integrated approach would result in the concept of the warranty being effectively effaced since "there would virtually *never* be a situation in which there

would be a term, the breach of which would *always* result in *only trivial consequences*" [emphasis in original].[163] The issue remains, however, as to whether effect should be given to the intention of the parties when they consciously intended for a term to have the effect of a warranty.[164] It should, however, be pointed out that the court did subsequently consider academic suggestions to similar effect in *Sports Connection Pte Ltd v Deuter Sports GmbH*[165] ("*Sports Connection*"), where the approach laid down in *RDC Concrete* was reaffirmed but subjected to the "extremely limited exception" that the court would give effect to a warranty expressly intended by the parties as such, that is, regardless of the seriousness of the consequences that follow its breach.[166]

(3) Discussion

80 For present purposes, it may be surmised that at least some of the major jurisdictions in the Commonwealth view the condition-warranty and the *Hongkong Fir* approaches as being sequentially (and separately) applied.[167] For such other jurisdictions, there is a clear distinction between the condition-warranty approach and the *Hongkong Fir* approach inasmuch as the analysis of the former does not shade into the latter.

81 The historical development of the condition-warranty and the *Hongkong Fir* approaches goes some way towards explaining the distinction between them. We had suggested that what was in substance what we now know as the *Hongkong Fir* approach was the original approach adopted by the courts in an era when the focus was on the effects or the nature and consequences of the breach (which was due, in part at least, to the focus of the courts on the substantive fairness of transactions, as opposed to the more modern (and objective) will theory of contracts, which focuses on the intentions of the contracting parties). Indeed, in the 1876 decision of *Bettini v Gye*,[168] Blackburn J seems to have suggested that the default rule, in the absence of the parties' express stipulation as to the status of a term, is for the court:[169]

> … to look to the whole contract, … see whether the particular stipulation goes to the root of the matter, so that a failure to perform it

163 *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* [2007] 4 SLR(R) 413 at [108].
164 Reference may also be made to the English High Court decision of *M & J Polymers Ltd v Imerys Minerals Ltd* [2008] EWHC 344 (Comm) at [14]; [2008] 1 Lloyd's Rep 541 at 547.
165 [2009] 3 SLR(R) 883.
166 *Sports Connection Pte Ltd v Deuter Sports GmbH* [2009] 3 SLR(R) 883 at [57].
167 See generally, John W Carter, "Intermediate Terms Arrive in Australia and Singapore" (2008) 24 JCL 226.
168 (1876) 1 QBD 183.
169 *Bettini v Gye* (1876) 1 QBD 183 at 188.

> would render the performance of the rest of the contract by the plaintiff a thing different in substance from what the defendant has stipulated for; or whether it merely partially affects it and may be compensated for in damages.

By the time the Sale of Goods Act[170] was enacted in 1893, the relevant case law had in fact developed in a manner which centred on an examination of the importance the contracting parties placed on the terms concerned. It appeared to embody the (quite different) condition-warranty approach, and it was this particular approach that was incorporated into the Sale of Goods Act – thus marginalising the *Hongkong Fir* approach until it was resurrected once again by Lord Diplock in *Hongkong Fir*.

82 If this is correct, it would explain why the condition-warranty and *Hongkong Fir* approaches were different tests until they were integrated in *Hongkong Fir* itself. With this historical background in mind, we turn to the cases that demonstrate the divergence and flux in this area. In the hitherto leading English decision of *Bunge Corp v Tradax SA*[171] ("*Bunge Corp*"), Lord Wilberforce stated that if the intentions of the parties as shown by the contract so indicated, the courts should hold that a term is a condition, with the consequence that the "'gravity of the breach' approach of the *Hongkong Fir* case … would be unsuitable".[172] Similarly, Lord Scarman said that he regarded *Hongkong Fir* as being concerned with two questions: first, whether, upon the true construction of a term and the contract of which it is part, it is a condition, warranty or intermediate term. If, however, the term concerned is not a condition and breach of it might result in different consequences, it would be intermediate, to which the question would then be whether the consequences of the breach were so serious so as to enable termination.[173] Finally, Lord Roskill concluded that Diplock LJ did not intend in *Hongkong Fir* to "afford an easy escape route from the normal consequence of rescission to a contract breaker who had broken what was, upon its true construction, clearly a condition of the contract by claiming that he had only broken an innominate term". He then clarified that the *Hongkong Fir* approach applied only to terms which are intermediate.[174] Accordingly, the speeches in *Bunge Corp* indicate that the condition-warranty approach would apply in the first instance; only if the term concerned were found *not* to be a condition or warranty

170 c 71 (UK).

171 [1981] 1 WLR 711, noted by Francis M B Reynolds, "Discharge of Contract by Breach" (1981) 91 LQR 541.

172 *Bunge Corp v Tradax SA* [1981] 1 WLR 711 at 716.

173 *Bunge Corp v Tradax SA* [1981] 1 WLR 711 at 717.

174 *Bunge Corp v Tradax SA* [1981] 1 WLR 711 at 725–727. See also 719, *per* Lord Lowry.

would it be an intermediate term, to which the *Hongkong Fir* approach would apply.[175] These statements clearly contemplate the condition-warranty and the *Hongkong Fir* approaches as being applied in some kind of sequential process, with the consequence that the two are not regarded as being conceptually identical.[176] This also reflects the consequence of the historical analysis suggested earlier.

83 However, while the *approach* is (arguably) clear, the reason behind it is not immediately apparent. Why, for instance, should the condition-warranty approach be applied *before* the *Hongkong Fir* approach? Also, why ought the *Hongkong Fir* approach to be applied where the condition-warranty approach fails? Above all, what is the proper conceptual *relationship* between these two approaches? The court in *RDC Concrete*, through its integrated approach, tried to answer some of these questions. The court stated that the condition-warranty approach is itself a manifestation of fairness between the contracting parties by giving effect to the intentions of the parties,[177] thereby *uniting* it with the rationale behind the *Hongkong Fir* approach, which is to achieve a fair result. However, as it will be suggested below, that is not to say that the conception of fairness embodied in the *Hongkong Fir* approach disregards the parties' intentions.

84 Turning first to the condition-warranty approach, it is clear that the courts have always viewed *the parties' intentions* as the foremost consideration. As Professor Carter's leading work on breach puts it, whether a contractual term is a condition or warranty depends on the construction of the contract.[178] Parties can expressly or impliedly

175 See now also the similar approach taken by the High Court of Australia in *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* [2007] HCA 61; (2007) 82 ALJR 345 ("*Koompahtoo*"). Further, Dharmananda and Papamatheos in their case note point out that two lower Australian courts have applied the principles in *Koompahtoo* (Kanaga Dharmananda & Anthony Papamatheos, "Termination and the Third Term: Discharge and Repudiation" (2008) 124 LQR 373 at 378–379), namely, *Vella v Ayshan* [2008] NSWSC 84 and *Corporate Systems Publishing Pty Ltd v Lingard (No 4)* [2008] WASC 21. See also John W Carter, "Intermediate Terms Arrive in Australia and Singapore" (2008) 24 JCL 226 at 243.

176 *Cf* the New Zealand position embodied in s 7(3)(b) read with ss 7(4)(a) and 7(4)(b) of the New Zealand Contractual Remedies Act 1979 (1979 No 11) which arguably treats the condition-warranty approach and the *Hongkong Fir* approach as being alternatives, each one applicable in place of the other. See now s 37(1)(b) read with ss 37(2)(a) and 37(2)(b) of the New Zealand Contract and Commercial Law Act 2017 (2017 No 5). See also ss 131 to 142, especially s 132(3), which provides that whether a stipulation in a contract of sale is a condition or a warranty depends in each case on the construction of the contract.

177 *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* [2007] 4 SLR(R) 413 at [109].

178 See John W Carter, *Carter's Breach of Contract* (LexisNexis Butterworths, 2011) at p 158. As is well known, Lord Hoffmann in *Investors Compensation Scheme v*

(*cont'd on the next page*)

stipulate a term to have the effect of a warranty (as that is commonly understood to be the case under the traditional condition-warranty approach) *even if* the breach is one which results in serious consequences.

85 Therefore, the condition-warranty approach is premised on finding out what the parties intended to accomplish through the contract.[179] The way this is done is through a construction of the contract, and the parties' intentions can be deciphered either expressly or impliedly.[180] The specific conception of fairness given effect to here is respect for the parties' autonomy and the bargain which they have (it is to be presumed) jointly reached.

86 Turning now to the *Hongkong Fir* approach, we likewise suggest that the *Hongkong Fir* approach is premised on the parties' intentions; the difference here is that the emphasis is on the *imputed* (and reasonable) intentions of the parties, as opposed to their *agreed* (and *actual*) intentions. The *Hongkong Fir* approach can be grounded on the court's perception of what the parties' intentions *ought to be*, taking

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West Bromwich Building Society [1998] 1 WLR 896 laid down the applicable principles for the contextual approach towards the interpretation of contracts. However, at the same time, there remain certain interpretative cannons which still operate, but perhaps only after the attempts to objectively ascertain the parties' intentions in light of the context have been exhausted. See also the recent Singapore Court of Appeal decision of *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029. Although see Lord Devlin's comments in "The Treatment of Breach of Contract" (1966) 24(2) Camb LJ 192 at 196 where he alludes to the difficulty of ascertaining the nature of terms.

179 Other examples are too numerous to cite but would include also the Court of Common Pleas decision of *Glaholm v Hays* (1841) 2 M & G 257. In that case, it was stated (at 266) as follows:

> Whether a particular clause in a charter-party shall be held to be a condition, upon the non-performance of which by the other party, the other is at liberty to abandon the contract, and consider it at an end; or whether it amounts to an agreement only, the breach whereof is to be recompensated by an action for damages, must depend upon the intention of the parties to be collected, in each particular case, from the terms of the agreement itself, and from the subject-matter to which it relates …

180 There was some initial concern that Diplock LJ's *dicta* in *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26 at 70 to the effect that "the legal consequences of a breach of such an undertaking, unless provided for expressly in the contract, depend upon the nature of the event to which the breach gives rise", might have limited the condition-warranty approach to instances in which the parties expressly stipulated the term as such. However, in *Bunge Corp v Tradax SA* [1981] 1 WLR 711 at 726, Lord Roskill made it clear that there was no need for such a requirement and Lord Diplock himself in *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 at 849 said that parties may by "express words or by implication of law" stipulate that a breach of a particular term to entitle termination regardless of the nature of the breach.

into account considerations of reasonableness in the circumstances and the context of the contract. This may be contrasted with the condition-warranty approach, which is concerned with the ascertainment of the parties' *agreed* intentions. Some support for this distinction can be found in the decided cases. A clear example is to be found in Lord Scarman's speech in *Bunge Corp*, where his Lordship said:[181]

> … I read the *Hongkong Fir* case as being concerned as much with the construction of the contract as with the consequences and effect of breach. The first question is always, therefore, whether, upon the true construction of a stipulation and the contract of which it is part, it is a condition, an innominate term, or only a warranty. If the stipulation is one, which upon the true construction of the contract the parties have not made a condition, and breach of which may be attended by trivial, minor or very grave consequences, it is innominate, and the court (or an arbitrator) will, in the event of dispute, have the task of deciding whether the breach that has arisen is such as the parties would have said, had they been asked at the time they made their contract: 'it goes without saying that, if that happens, the contract is at an end.'

It can be seen that Lord Diplock referred to the "intention of the parties" when he spoke of the *Hongkong Fir* approach in the context of the two exceptions in which the primary obligation to perform the contract would no longer apply. But what is the "intention" here when the court is effectively conducting an *ex post facto* evaluation of the situation *after* ascertaining that the parties have not intended for the term in question to have the effect of either a condition or warranty?

87 The distinction between the agreed and imputed intentions of the parties is also supported by Diplock LJ's own words in *Hongkong Fir* itself, where he said:[182]

> There are, however, many contractual undertakings of a more complex character which cannot be categorised as being 'conditions' or 'warranties', if the late nineteenth-century meaning adopted in the Sale of Goods Act, 1893, and used by Bowen L.J. in *Bentsen v. Taylor, Sons & Co.* be given to those terms. Of such undertakings all that can be predicated is that some breaches will and others will not give rise to an event which will deprive the party not in default of substantially the whole benefit which it was intended that he should obtain from the contract; and the legal consequences of a breach of such an undertaking, *unless provided for expressly in the contract*, depend upon the nature of the event to which the breach gives rise and do not follow automatically from a prior classification of the undertaking as a 'condition' or a 'warranty'. [emphasis added]

181 *Bunge Corp v Tradax SA* [1981] 1 WLR 711 at 717.
182 [1962] 2 QB 26 at 70.

Here, Diplock LJ's use of the word "expressly"[183] is perhaps hint of his view that the condition-warranty approach is founded on the parties' intentions as objectively ascertained, whether expressly or impliedly, whereas the *Hongkong Fir* approach imputes the intention judicially.

88 Accordingly, as has been suggested, while the condition-warranty and the *Hongkong Fir* approaches can both be grounded upon the contracting parties' intentions, the difference between the approaches is premised on the distinction between the ascertainment of *agreed* intention and the *imputation* of intention. For agreed intention, the *ascertainment* of such intention can be by way of express or implied reading of the contractual terms, prior to the event of breach. In contrast, for an imputation of intention, the concern is with the *imputation* of what the court believes to be reasonable in the circumstances, as an approximation to what the parties *ought to* have intended. The *Hongkong Fir* approach is thus *a fallback rule* after attempts at ascertaining the parties' agreed intentions, whether express or implied, have failed.[184] This approach is only adopted where it is not possible to ascertain whether a given term is a condition or warranty, as indicated expressly or impliedly. The condition-warranty approach should be given precedence because that approach gives effect to the parties' intentions in the "*real*" sense. This may account for the integrated approach taken by the Court of Appeal in *RDC Concrete*.

89 It should be noted, moreover, that the Singapore Court of Appeal in *Sports Connection Private Ltd v Deuter Sports GmbH*[185] has

183 See also *Bunge Corp v Tradax SA* [1981] 1 WLR 711 at 716, *per* Lord Wilberforce:

> But I do not doubt that, in suitable cases, the courts should not be reluctant, if the intentions of the parties as shown by the contract so indicate, to hold that an obligation has the force of a condition, and that indeed they should usually do so in the case of time clauses in mercantile contracts. To such cases the 'gravity of the breach' approach of the *Hongkong Fir* case [1962] 2 Q.B. 26 would be unsuitable. I need only add on this point that the word 'expressly' used by Diplock L.J. at p. 70 of his judgment in *Hongkong Fir* should not be read as requiring the actual use of the word 'condition': any term or terms of the contract, which, fairly read, have the effect indicated, are sufficient. Lord Diplock himself has given recognition to this in this House: *Photo Production Ltd. v. Securicor Transport Ltd.* [1980] A.C. 827, 849.

184 See also Roger Brownswood, "General Considerations" in *The Law of Contract* (Michael Furmston ed) (LexisNexis, 6th Ed, 2017) ch 1 at pp 68–69, wherein the learned author draws attention to reasonableness as a supplementary principle, in that the law falls back on this standard in cases where the express terms of the contract (in conjunction with any settled implied terms) fails to offer clear guidance as to the parties' intentions. See also the same book at pp 65–68 for different perceptions of the "reasonableness" concept.

185 [2009] 3 SLR(R) 883. Indeed, in our article analysing the influence of the *Journal of Contract Law* ("the Journal") in Commonwealth courts, we utilise this particular case as an illustration of the influence of the Journal in persuading the court to

(*cont'd on the next page*)

refined the integrated approach further. Whilst it reaffirmed the approach laid down in *RDC Concrete*, it nevertheless *qualified* this approach with an *extremely limited exception* – that where, in fact, the term itself states expressly (as well as clearly and unambiguously) that *any* breach of that particular term, *regardless* of the seriousness of the consequences that follow from that breach, will *never* entitle the innocent party to terminate the contract, then the court *will give effect to that type of term* (which would constitute a *warranty expressly intended* by the parties).

(4) Conclusion

90 In the final analysis, the significance of the integrated approach in *RDC Concrete* is not so much the promulgation of a new approach which represents a normative improvement over the existing condition-warranty and the *Hongkong Fir* approaches, but rather in the bold (and perhaps implicit) proclamation of the *relationship* between both these approaches. The refinement in *Sports Connection* gives, as noted above, and to a certain extent, effect to the suggested rationalisation of the condition-warranty approach and the *Hongkong Fir* approach based on the parties' intentions: whether agreed (and ascertained expressly or implicitly) or imputed by the courts. The question, then, of when at common law a breach of contract enables the innocent party the right to treat the contract as terminated, might now receive an answer more grounded in conceptual clarity and practical utility.

B. Unconscionability[186]

(1) Introduction

91 Over two decades ago, the first-mentioned author of the present article argued[187] that there were linkages *within* the various categories of *undue influence* itself, and also linkages *amongst* the doctrines of undue influence, economic duress and unconscionability. Given these linkages, it was suggested that the doctrines of undue influence and economic duress could be *subsumed under a broader "umbrella" doctrine of unconscionability*. This was and perhaps remains a radical suggestion. But the focus on linkages as a whole raised issues as to the possible

refine its approach towards the law relating to discharge by breach of contract: see Goh Yihan & Andrew Phang, "A Statistical Analysis of the Influence of the *Journal of Contract Law* in Commonwealth Court Decisions" (2018) 35 JCL 14.

186 See generally Rick Bickwood, *Exploitative Contracts* (Oxford University Press, 2003) and Pt III of Nelson Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (Sweet & Maxwell, 2nd Ed, 2012).

187 See Andrew Phang, "Undue Influence – Methodology, Sources and Linkages" [1995] JBL 552.

future of these doctrines – in particular, the doctrine of unconscionability. At this juncture, however, it is important to note that our focus in this part of the article is on unconscionability as a *substantive doctrine* – and one that goes beyond encompassing merely the clearest cases, which are most often classified as "improvident bargains". This is in contrast to unconscionability as a *rationale*.[188]

92 As the focus of this part of the article is on the doctrine of unconscionability (as a substantive doctrine in and of itself), we will not discuss linkages within the doctrine of undue influence in any detail, save to note the essence of the argument made in the article just mentioned.[189] In *summary*, there is a close linkage between Class 1 and Class 2B (presumed) undue influence. Further, the remaining category (relating to Class 2A (presumed) undue influence) could, arguably, be abolished or dealt with by way of legislative definition. Finally, it could be argued that even Class 2B undue influence could be abolished. If so, this would leave us only with Class 1 (or actual) undue influence. This is a result that is buttressed by the very close linkage between both these categories and is, in fact, also achieved (in substance) if there should be a *merger* between Class 1 and Class 2B undue influence.[190] This analysis, if accepted, does impact the doctrine of unconscionability to the extent that it would *facilitate* the *wider* argument that the doctrines of undue influence and economic duress could be subsumed under a broader "umbrella" doctrine of unconscionability since we would be speaking of essentially one (merged) category of undue influence as well.[191]

188 And see Andrew Phang, "The Uses of Unconscionability" (1995) 111 LQR 559 at 561–562. See also Nelson Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (Sweet & Maxwell, 2nd Ed, 2012) at para 15-013. Reference may also be made generally to Charles Rickett, "Unconscionability and Commercial Law" (2005) 24 U Queensland LJ 73.

189 See Andrew Phang, "Undue Influence – Methodology, Sources and Linkages" [1995] JBL 552.

190 For the detailed analysis, see Andrew Phang, "Undue Influence – Methodology, Sources and Linkages" [1995] JBL 552 at 563–565.

191 And see David Capper, "Undue Influence and Unconscionability: A Rationalisation" (1998) 114 LQR 479, where the learned author proposes a similar merger, albeit only as between undue influence and unconscionability – with the former being subsumed within the latter. Reference may also be made to the extra-judicial views of Sir Anthony Mason, "The Place of Equity and Equitable Remedies in the Contemporary Common Law World" (1994) 110 LQR 238, especially at 249. But *cf* Nelson Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (Sweet & Maxwell, 2nd Ed, 2012) at paras 20-009–20-015, where the learned author argues that the doctrines of unconscionability and undue influence are different. *However*, he does concede (at para 20-015) that the arguments for such a merger of doctrines "do not appear far-fetched in some other common law jurisdictions such as Australia". If so, then there is no substantive difference between his approach and that of Professor Capper (and, to a certain extent at least, Andrew Phang, "Undue Influence – Methodology, Sources and Linkages" [1995] JBL 552) inasmuch as *any* argument for merger must *necessarily*

(*cont'd on the next page*)

93 We will similarly also not focus on the doctrine of economic duress save to the extent that this doctrine impacts the *wider* argument (also referred to in the preceding paragraph) of subsuming it under a broader "umbrella" doctrine of unconscionability, and it is to that possible approach that our attention now turns. However, before proceeding to do so, we would like to note the *divergent* approaches toward the doctrine of unconscionability in the Commonwealth.

(2) The doctrine of unconscionability across the Commonwealth

94 The doctrine of unconscionability – particularly under English law – was (and still is to a large extent) an *extremely narrow* one. It is confined to what any reasonable person would consider to be *an extremely egregious case where one party takes unconscionable advantage of another who is in an obviously disadvantageous situation*. As alluded to above, these constitute cases of what the courts have termed "*improvident transactions*".[192] It is understandable why the courts adopted – initially at least – such a conservative and narrow approach towards the doctrine. An expansive doctrine of unconscionability might have led to the excessive exercise of judicial discretion in a *substantive* sense where the aim of achieving fairness in the *individual* case at hand might have led to *uncertainty (and even possible arbitrariness)* in the law. And that is why the courts have, on occasion, drawn a distinction between *procedural* fairness on the one hand and *substantive* fairness on the other.[193] However, the line between procedural fairness and substantive fairness is often *blurred* – especially when we come to the sphere of *application*. This is why, for example, despite its undoubted erudition, a leading article in the field may not, in the final analysis, be as persuasive simply because it has, as its main premise, the aforementioned distinction.[194] That having been said, we also acknowledge the fact that it is difficult, from a conceptual perspective at least, to confine (as a *general principle*) the doctrine of unconscionability only to "improvident transactions" which, as we have seen, are relatively uncontroversial because the relief given by the court in such cases tends to be regarded by the reasonable person as intuitively justified. Here, we

presuppose a *broad* doctrine of unconscionability (along the lines of *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447) as *its starting point*.

192 Oft-cited cases include *Fry v Lane* (1888) 40 Ch D 312 and *Cresswell v Potter* [1978] 1 WLR 255. The earliest cases were classified under the even more specific rubric of "expectant heirs" (see, for example, Nelson Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (Sweet & Maxwell, 2nd Ed, 2012) at paras 15-019–15-029).

193 See, for example, the Privy Council decision (on appeal from the Court of Appeal of New Zealand) of *Thomas Bruce Hart v Joseph O'Connor* [1985] AC 1000 at 1017–1018.

194 See Matthew D J Conaglen, "Duress, Undue Influence, and Unconscionable Bargains – The Theoretical Mesh" (1999) 18 NZULR 509.

confront that perennial tension between *universal* propositions on the one hand and *particular* application on the other. This is the intractable problem of formulating a *general* proposition of at least potentially universal applicability that can *in fact* "capture" all possible *specific* fact situations. Part of the problem, of course, lies in the fact that fact situations are *myriad*. This difficulty is endemic to the law, but it is particularly acute in the context of potentially broad doctrines such as unconscionability. As we will see, it appears that the Commonwealth courts have decided in that context generally to broaden the general in order to capture the specific.

95 Although the general tenor of the *English* law relating to the doctrine of unconscionability continues to remain fairly conservative, there have been isolated observations in the case law that suggest a possibly fuller development.[195] However, the position in Australia is *quite different*. There are clear signs of a *broader development* of the doctrine of unconscionability. The leading decision is the High Court of Australia decision of *Commercial Bank of Australia Ltd v Amadio*[196] ("*Amadio*"). In that decision, Deane J observed as follows:[197]

> The jurisdiction [to relieve against unconscionable dealing] is long established as extending to circumstances in which (i) a party to a transaction was under a special disability in dealing with the other party with the consequence that there was an absence of any reasonable degree of equality between them, and (ii) that disability was sufficiently evident to the stronger party to make it *prima facie* unfair or 'unconscientious' that he procure, or accept, the weaker party's assent to the impugned transaction in the circumstances in which he procured or accepted it. Where such circumstances are shown to have existed, an onus is cast upon the stronger party to show that the transaction was fair, just and reasonable …

96 It should, however, be observed that the (broader) doctrine in *Amadio* is *not* the same as the principle of *inequality of bargaining*

195 See, for example, the English Court of Appeal decision of *Credit Lyonnais Bank Nederland NV v Burch* [1997] 4 All ER 144 at 153; the English High Court decision of *Multiservice Bookbinding Ltd v Marden* [1979] 1 Ch 84 at 110; the English High Court decision of *Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd* [1983] 1 WLR 87 at 94–95; the English Court of Appeal decision of *Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd* [1985] 1 WLR 173 at 182–183 (affirming the last-mentioned decision); and the Privy Council decision of *Boustany v Pigott* (1993) 69 P & CR 298 (on appeal from the Court of Appeal of the Eastern Caribbean Supreme Court (Antigua and Barbuda), especially at 303.

196 (1983) 151 CLR 447. For a recent decision of the same court considering *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, see *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392. See also Nelson Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (Sweet & Maxwell, 2nd Ed, 2012) at paras 20-16–20-20.

197 *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 at 474.

power, which was most famously set out by Lord Denning MR in the English Court of Appeal decision of *Lloyds Bank v Bundy*.[198] Indeed, the doctrine of unconscionability entails – in Professor Bigwood's view, *exploitation*;[199] more specifically, he observes that "in its modern context the gist of the jurisdiction [to set aside unconscionable bargains] lies in the *abuse* of a superior bargaining position and not simply with the notion of inequality of bargaining power" [emphasis in original].[200] That having been said – and acknowledging the fact that we do not have concrete empirical evidence – the doctrine in *Amadio* does not appear to have been very significant in the case law (even in the Australian context from which it originated).

97 In contrast, Singapore courts have clearly endorsed the *narrower* English position embodied in cases such as *Cresswell v Potter*.[201] There has in fact been at least one decision where *Amadio* was cited but there was no substantive discussion or development as such. However, the Singapore High Court decision of *Fong Whye Koon v Chan Ah Thong*[202] suggests a broader approach towards the doctrine of unconscionability, but it did not contain a clear endorsement of such an approach. In *Rajabali Jumabhoy v Ameerali R Jumabhoy*,[203] also a decision of the Singapore High Court, Judith Prakash J (as she then was) expressed difficulty with accepting the broader Australian position as she thought it to be too wide.[204] And in the recent Singapore High Court decision of *E C Investment Holding Pte Ltd v Ridout Residence Pte Ltd*,[205] it was stated that unconscionability as a vitiating factor in contract does *not* form any part of Singapore law, and that its introduction ought to be a matter for Parliament to decide since it would herald too much

198 [1975] QB 326.

199 See Rick Bickwood, *Exploitative Contracts* (Oxford University Press, 2003).

200 See Rick Bickwood, *Exploitative Contracts* (Oxford University Press, 2003) at p 234. Reference may also be made to Nelson Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (Sweet & Maxwell, 2nd Ed, 2012) at para 16-07.

201 [1978] 1 WLR 255 (see also n 192 above). See also, for example, the Singapore High Court decisions of *E C Investment Holding Pte Ltd v Ridout Residence Pte Ltd* [2011] 2 SLR 232 at [63] (affirmed in the Singapore Court of Appeal decision of *E C Investment Holding Pte Ltd v Ridout Residence Pte Ltd* [2012] 1 SLR 32, but where the issue of unconscionability was not raised); *Lim Geok Hian v Lim Guan Chin* [1993] 3 SLR(R) 183; and *Pek Nam Kee v Peh Lam Kong* [1994] 2 SLR(R) 750.

202 [1996] 1 SLR(R) 801.

203 [1997] 2 SLR(R) 296, affirmed by the Singapore Court of Appeal decision of *Rajabali Jumabhoy v Ameerali R Jumabhoy* [1998] 2 SLR(R) 434 (but without any discussion of this particular issue).

204 *Rajabali Jumabhoy v Ameerali R Jumabhoy* [1997] 2 SLR(R) 296 at [198].

205 [2011] 2 SLR 232 (also referred to at n 201 above), affirmed by the Singapore Court of Appeal decision of *E C Investment Holding Pte Ltd v Ridout Residence Pte Ltd* [2012] 1 SLR 32 (but where the issue of unconscionability was not raised).

uncertainty in the law.[206] More recently, in the Singapore High Court case of *BOK v BOL*,[207] which concerned a deed of trust executed in a familial situation, the High Court, after examining the relevant cases, concluded that the Singapore cases have favoured the narrower approach, and rejected the broader approach. The High Court confirmed that an inequality in bargaining power could not, by itself, vitiate a contract as this would undermine the certainty that is much needed in commercial transactions. However, the court, after analysing the *Cresswell v Potter* formulation, held that there were possible grounds to establish unconscionability as Megarry J had referred to other "circumstances of oppression or abuse of confidence which will invoke the aid of equity".[208] The court explained the requirements as follows:[209]

> First, there must be weakness on one side. Such weakness could arise from poverty, ignorance or other circumstances, like acute grief in this case. Lack of independent advice would almost always deepen the weakness. Second, there must be exploitation, extortion or advantage taken of that weakness. A transaction at an undervalue would be a necessary component of this requirement …
>
> Once these two elements are established, it will be for the defendant to show that the transaction was … 'fair, just and reasonable' … If he is unable to do so, then the transaction is liable to be set aside on the ground of unconscionability.

98 The Court of Appeal has now in *BOM v BOK*[210] laid down the approach to be taken in Singapore, in so far as the doctrine of unconscionability is concerned. For completeness, it might be noted that the same court had, in *Chua Chian Ya v Music & Movements (S) Pte Ltd*[211] ("*Chua Chian Ya*"), observed thus in relation to the doctrine of unconscionability:[212]

> 17 Broadly speaking, covenants in restraint of trade are *prima facie* unenforceable unless the contractual provisions are shown to be reasonable, taking into account the interests of both the parties concerned and the public. Specifically, the application of this doctrine to employment contracts is well established (see generally the decision of this court in *Man Financial (S) Pte Ltd v Wong Bark Chuan David* [2008] 1 SLR 663, where the doctrine was examined). This doctrine was applied to contracts between songwriters and music publishers in

206 *E C Investment Holding Pte Ltd v Ridout Residence Pte Ltd* [2011] 2 SLR 232 at [66].
207 [2017] SGHC 316.
208 *Cresswell v Potter* [1978] 1 WLR 255 at 257.
209 *BOK v BOL* [2017] SGHC 316 at [120] and [122].
210 [2019] 1 SLR 349.
211 [2010] 1 SLR 607.
212 *Chua Chian Ya v Music & Movements (S) Pte Ltd* [2010] 1 SLR 607 at [17] and [24].

> the seminal House of Lords decision of *A Schroeder Music Publishing Co Ltd v Macaulay* [1974] 1 WLR 1308 ("*Schroeder Music Publishing*"), a case which Chua relied upon heavily. However, it should be noted, at the outset, that that particular case involved an extremely one-sided contract. Indeed, the case involved such an extreme fact situation that it is often referred to by advocates of a broader (and distinct) doctrine of unconscionability, not least because of Lord Diplock's speech therein (even though such a doctrine has yet to take root in the Commonwealth in general and in Singapore in particular (see, for example, the High Court decision of *Wellmix Organics (International) Pte Ltd v Lau Yu Man* [2006] 2 SLR 117 at [72] and the decision of this court in *Sandar Aung v Parkway Hospitals Singapore Pte Ltd* [2007] 2 SLR 891 at [39]; although *cf* the Australian position as embodied in, for example, the leading High Court of Australia decision of *The Commercial Bank of Australia Limited v Amadio* (1983) 151 CLR 447)).
>
> …
>
> 24 We would respectfully endorse the approach taken by Parker J in [*Panayiotou v Sony Music Entertainment (UK) Limited* [1994] EMLR 229] as briefly outlined above. It is important, however, to emphasise that this does *not* entail the adoption of a broader doctrine of unconscionability – the legal status of which is still in a state of flux in the Commonwealth in general and in Singapore in particular (see above at [17]). In any event, it is unnecessary for the purposes of the present appeal to deal with the question of whether there is (or ought to be) a broader doctrine of unconscionability (although we note that there is local case law endorsing a narrower equitable jurisdiction proscribing specific (and improvident) bargains (see, for example, the High Court decisions of *Lim Geok Hian v Lim Guan Chin* [1994] 1 SLR 203 and *Pek Nam Kee v Peh Lam Kong* [1996] 1 SLR 75; and *cf* the (also) High Court decision of *Fong Whye Koon v Chan Ah Thong* [1996] 2 SLR 706, which demonstrates that the line between a broader doctrine of unconscionability and this (narrower) equitable jurisdiction might be blurred)). This is because the situation in *Panayiotou* was, in fact, precisely the situation which obtains in this appeal. Chua's case did not involve the broader doctrine of unconscionability, but focused instead on the court's common law jurisdiction to declare a contract unenforceable as a restraint of trade. Although Chua sought to invoke *Schroeder Music Publishing* ([17] *supra*) in aid of her case, she relied on that particular precedent from the perspective of the doctrine of restraint of trade only.

99 It is significant that the Court of Appeal had emphasised in *Chua Chian Ya* that it was not adopting a broader doctrine of unconscionability, especially since the applicability of such a broader doctrine had not arisen for decision in that case. In *BOM v BOK* (a decision that was handed down after the paper on which this article is based was delivered), the court has now ruled determinatively that the broader doctrine of unconscionability does not form part of Singapore

law. This is because the broader doctrine afforded the court too much scope to decide on a subjective basis and came dangerously close to the ill-founded principle of inequality of bargaining power as introduced in *Lloyds Bank v Bundy*. Instead, the narrow doctrine, as exemplified by cases such as *Fry v Lane*[213] and *Cresswell v Potter*, applies in Singapore. This narrow doctrine requires the plaintiff to satisfy three elements: first, the plaintiff had to be poor and ignorant; second, the transaction had to have been at a considerable undervalue; and third, the plaintiff must not have had the benefit of independent advice. Upon the satisfaction of these factors, it was for the defendant to prove that the transaction was fair, just and reasonable, failing which the transaction could be set aside on the basis of unconscionability.

100 Although the Court of Appeal held that the narrow doctrine of unconscionability applies in Singapore, it also emphasised that it is slightly different from its origins in *Fry v Lane* and *Creswell v Potter*. To invoke the doctrine, the plaintiff had to show that he was suffering from an infirmity that the other party had exploited in procuring the transaction. In addition to considering if the plaintiff was poor and ignorant, the court would also include situations where the plaintiff was suffering from other forms of infirmities, whether physical, mental and/or emotional in nature. However, not every infirmity would *ipso facto* be sufficient to invoke the narrow doctrine of unconscionability. It must have been of sufficient gravity as to have acutely affected the plaintiff's ability to conserve his interests, and must also have been, or ought to have been, evident to the other party procuring the transaction. Taking a step back, the court also emphasised that this criterion of an infirmity must not be overly broad, lest it amounted to the application of the broader doctrine. Ultimately, the approach in Singapore should be applied through the lens of cases exemplifying the narrow doctrine rather than those embodying the broad doctrine. Such an approach distinguished the narrow doctrine subtly but significantly from the broad doctrine, and represented a middle ground based on practical application rather than theoretical conceptualisation. Upon the satisfaction of an infirmity, the burden was on the defendant to demonstrate that the transaction was fair, just and reasonable. Further, it was not mandatory that the transaction was at a considerable undervalue or that the vendor lacked independent advice. But they would be important factors that the court would take into account.

101 It can therefore be seen that there is *divergence* in the English, Australian and Singapore positions – thus illustrating, of course, the *first* central thread of this article. Let us turn now to a relatively radical – and

213 (1888) 40 Ch D 312.

normative – inquiry as to whether or not there ought to be an "umbrella" doctrine of unconscionability that *subsumes* the doctrines of economic duress *as well as* undue influence.

(3) An "umbrella" doctrine of unconscionability?

(a) The concept and its justification

102 We have already canvassed briefly the linkages amongst the various categories of *undue influence* inasmuch as there could be a *merger* between Class 1 and Class 2B undue influence.

103 Turning from *intra*-linkages within the doctrine of undue influence itself, we now turn to *external* linkages amongst the doctrines of economic duress, undue influence and unconscionability. The detailed argumentation is set out elsewhere[214] and, owing to constraints of space, only a summary of the main points will be set out below.

104 First, *economic duress* and Class 1 (or actual) undue influence are very similar in substance. Class 1 undue influence relates to the *actual* exercise of undue influence of a *dominating* kind, which is very similar to the coercive effect required in economic duress.[215] There is also a very close relationship between the doctrines of *undue influence* and *unconscionability*.[216] Not surprisingly, given the close linkage between (at least Class 1) undue influence and economic duress, there is also a very close relationship between economic duress and unconscionability.[217]

105 Given the numerous linkages, the first-mentioned author of the present article has argued that there is no reason in logic or principle why it is not possible "to subsume all three doctrines [that is, economic duress, undue influence and unconscionability] under one broad heading of unconscionable conduct".[218] However, in *BOM v BOK*, the Court of Appeal opined that, without principled as well as practical legal criteria that would enable an umbrella doctrine of unconscionability to

214 See Andrew Phang, "Undue Influence – Methodology, Sources and Linkages" [1995] JBL 552.

215 See Andrew Phang, "Undue Influence – Methodology, Sources and Linkages" [1995] JBL 552 at 565–566.

216 See Andrew Phang, "Undue Influence – Methodology, Sources and Linkages" [1995] JBL 552 at 566–570.

217 See Andrew Phang, "Undue Influence – Methodology, Sources and Linkages" [1995] JBL 552 at 570, where it is observed that "[a] common thread centres on the element of domination of the will of the innocent party".

218 See Andrew Phang, "Undue Influence – Methodology, Sources and Linkages" [1995] JBL 552 at 570.

function in a coherent as well as practical manner, such a novel and radical shift towards an umbrella doctrine (whilst theoretically elegant) should not be undertaken. Further, the broad doctrine of unconscionability that constituted the premise as well as basis for such an umbrella doctrine was not the law in Singapore[219] and might, in any event, have been historically flawed (inasmuch as it had been developed from a (narrow) doctrine of unconscionability that was, in effect, what we now know as "Class 1" undue influence, although the court in *BOM v BOK* was not prepared to definitively reject the narrow doctrine of unconscionability).

106 We also bear in mind that there is often a tension between theory on the one hand and practice on the other – and that is a point to which we now turn.

(b) On theory and practice

107 The more eagle-eyed reader might have this rather pertinent question – given the views of the present authors (which at least suggest a more positive attitude towards the doctrine of unconscionability in its broader incarnation)[220] – is there then an inconsistency when the first-mentioned author of the present article delivered the views of the Singapore Court of Appeal in *Chua Chian Ya*?[221] We (in particular, the first-mentioned author of the present article) would suggest that there is *no* inconsistency, substantially for the reasons given by Lord Sumption, whose views are set out *in extenso* (for context), as follows:[222]

> *[T]here is no point comparing my lectures with my judgments on these issues and finding inconsistencies between them. Of course they are inconsistent. As a judge, I am not there to expound my own opinion. My job is to say what I think that law is. By comparison, in a public lecture, I am my own master.* I can allow myself the luxury of expressing approval or dismay about the current state of the law. *You might wonder whether, in the highest court of the land, which is bound by no precedent even of its own, there is any difference between my own opinion and my exposition of the law. I have to tell you that there is and that it matters. The personal opinions of the judges in the Supreme Court are only one element in the complex process of decision-making, and not necessarily the most important one.* Statutes bind judges

219 As noted at para 99 above.

220 See Andrew Phang Boon Leong & Goh Yihan, "Duress, Undue Influence and Unconscionability" in *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) ch 12 especially at pp 895–900.

221 *Chua Chian Ya v Music & Movements (S) Pte Ltd* [2010] 1 SLR 607 at [17] and [24], reproduced at para 98 above.

222 See Lord Sumption, "A Response" in *Lord Sumption and the Limits of the Law* (Nicholas W Barber, Richard Ekins & Paul Yowell gen eds) (Hart Publishing, 2016) ch 12 at p 213.

> absolutely, within the limits of interpretative licence. Established principle, reflected in existing case law, may not strictly bind them, but it is of fundamental significance. Even when the Supreme Court changes the law, it ought to do so within the framework of existing principle, unless there are particularly strong reasons for a more radical approach. Moreover, the Supreme Court's decisions are made collectively. Of course, a judge may dissent or he may concur for different reasons. This can be personally satisfying. But it is not much of a service to the public. It can also leave the ratio of the decision unclear, perhaps the worst sin that an appellate court can commit, short of actually getting the answer wrong. [emphasis added]

108 The first-mentioned author would add (consistently with Lord Sumption's observations) this: what appears elegant in *theory* (here, unconscionability as an "umbrella" doctrine) might not work out quite so well in *practice* – from both the setting out of the necessary legal criteria as well as the need to ensure that the *application* of such criteria does not create *unnecessary uncertainty*. That having been said, he would also note that, at the time he wrote the article concerned,[223] he (at least) thought it was a somewhat radical approach to proffer. As it turned out, it was not – at least judging from the subsequent articles that were concerned with broadly the same issues (in particular of the possible merger of duress, undue influence and/or unconscionability).[224] However, there have been no significant articles for almost two decades since. Had the issue died a natural death? It would appear not, and it is to that issue that our attention now turns.

(c) The concept in vogue again?

109 The first-mentioned author (again)[225] was, frankly, somewhat (albeit pleasantly) surprised to come across a very recently published article canvassing the issue of possible merger of duress, undue influence and unconscionability – all the more so not only because it saw print but also because it was published in what many consider to be the leading generalist law journal in the Commonwealth.[226] The reader

223 Andrew Phang, "Undue Influence – Methodology, Sources and Linkages" [1995] JBL 552.

224 See, for example, David Capper, "Undue Influence and Unconscionability: A Rationalisation" (1998) 114 LQR 479 and Matthew D J Conaglen, "Duress, Undue Influence, and Unconscionable Bargains – The Theoretical Mesh" (1999) 18 NZULR 509.

225 And for reasons that are obvious when viewed in the context of the discussion in this part of the article.

226 See Marcus Moore, "Why Does Lord Denning's Lead Balloon Intrigue Us Still? The Prospects of Finding a Unifying Principle for Duress, Undue Influence and Unconscionability" (2018) 134 LQR 257. In the process of posting his thesis, the author does also deal with a number of other related issues that we have considered

(*cont'd on the next page*)

is encouraged to peruse it – not least because it not only summarises the literature in the area but also (and more importantly) contains much legal food for thought. Constraints of space also preclude a detailed rendition. Suffice it to state that the learned author *does* advocate a "unifying principle", which he summarises as follows:[227]

> This paper argues that a common principle does exist – properly articulated as *exploitation of constrained autonomy*. More precisely, each of the doctrines enables a contract to be avoided where the party seeking to uphold it exploited a serious constraint on the other party's free consideration of whether to enter the contract. A unified test should ask: (1) whether such a constraint existed (*e.g.* as a result of pressure, influence, disability or other factors), and if so, (2) whether it was exploited by the other party in that it (actually or constructively) knew of the constraint, and yet formed a contract with the constrained party. [emphasis added]

There is more elaboration later in the article:[228]

> Duress, undue influence, and unconscionability all exist and operate according to the following common principle: A contract may be avoided where it is formed by one party exploiting a severe constraint in the other party's decisional autonomy regarding whether to consent to the contract.

The unified principle allows for a single test. The single test should ask:

> (a) Was the party which seeks to avoid the contract seriously constrained from exercising its autonomy to decide whether to consent to the contract, as a result of pressure (as in duress), influence (as in undue influence), disability (as in unconscionability), or other factors, at the time it gave the consent?
>
> (b) If so, was its seriously constrained autonomy exploited by the other party (as required by all the individual doctrines), through (actually or constructively) knowing of the constraint yet failing to take appropriate steps to ensure the consent received was sheltered from it in forming the contract?

above (for example, the status of the concept of inequality of bargaining power (especially at 263–266)).

227 See Marcus Moore, "Why Does Lord Denning's Lead Balloon Intrigue Us Still? The Prospects of Finding a Unifying Principle for Duress, Undue Influence and Unconscionability" (2018) 134 LQR 257 at 259.

228 See Marcus Moore, "Why Does Lord Denning's Lead Balloon Intrigue Us Still? The Prospects of Finding a Unifying Principle for Duress, Undue Influence and Unconscionability" (2018) 134 LQR 257 at 273–274.

The party seeking to avoid the contract may establish these elements via:

(a) direct proof (as in duress or actual undue influence); or

(b) legal presumption, where (as in unconscionability or presumed undue influence) the party (i) is in a position relative to the other party that the law generally deems or the evidence in the case proves is one where typically a party's autonomy would be constrained and vulnerable to exploitation by the other party; and (ii) proves that the substantive bargain is grossly disproportionate in favour of the other party; unless (iii) the party seeking to uphold the contract proves the contract was not the result of this exploitation.

110 However, this "unifying principle" is, in the author's view, *different* from that mooted by the first-mentioned author[229] as well as others.[230] We caveat the following very brief observations on the unifying principle proposed by Moore with the fact that they are merely tentative and may therefore not do Moore's article the justice it deserves. We note, first, that whilst it does attempt to lay down legal criteria, it looks, in *substance*, very much like *the broader doctrine of unconscionability* (which would, if this observation is accepted, be the same, in *substance*, as the thesis in the article by the first-mentioned author of the present article.[231] And, if it is not, then it is, with respect, pitched at too high a level of abstraction (going beyond even what is presently embodied within the broad doctrine of unconscionability as embodied in *Amadio*). Secondly (and on a closely related note), the concept of "exploitation" that figures so prominently in this article is, in *substance*, very *similar to (if not the same as)* the concept that constitutes the central theme in Professor Bigwood's magisterial work.[232] What *is* clear, however, is that the *scholarly literature* does in fact take centre stage with regard to this particular issue of merging the doctrines into a unifying principle, thus illustrating the fourth central thread of this article. This is not surprising in view of the fact that it involves *normative* questions of possible *reform and development* in the law. However, this does not mean that the case law has stood still.

229 See Andrew Phang, "Undue Influence – Methodology, Sources and Linkages" [1995] JBL 552.

230 See David Capper, "Undue Influence and Unconscionability: A Rationalisation" (1998) 114 LQR 479 and Matthew D J Conaglen, "Duress, Undue Influence, and Unconscionable Bargains – The Theoretical Mesh" (1999) 18 NZULR 509.

231 See Andrew Phang, "Undue Influence – Methodology, Sources and Linkages" [1995] JBL 552.

232 See Rick Bickwood, *Exploitative Contracts* (Oxford University Press, 2003).

111 Turning to recent case law, in the recent High Court of Australia decision of *Thorne v Kennedy*,[233] the court had to consider whether two substantially identical financial agreements, the first a prenuptial agreement and the second a post-nuptial agreement which replaced the former, were voidable for duress, undue influence or unconscionable conduct. In a joint judgment, Keifel CJ, Bell, Gageler, Keane and Edelman JJ held that the agreements were voidable due to both undue influence and unconscionable conduct. In arriving at their decision, the learned judges were of the view that the trial judge need not have considered the doctrine of duress – distinguishing that doctrine from that of undue influence.[234] The principal point of distinction, canvassed as far back as *Amadio* in fact, is one of *perspective* – that the doctrine of duress focuses on pressure exerted by the defendant whereas the doctrine of undue influence focuses, instead, on the plaintiff's lack of free choice. This same point of distinction was also canvassed in so far as the relationship between the doctrine of undue influence and that of unconscionability was concerned.[235] With respect, however, the court ought to look, *holistically*, at the perspectives or standpoints of *all* the parties in the given transaction.[236] Indeed, we submit that the entire process is an *integrated* one and that, to this end, the court has to adopt an *holistic* approach. We do also note, however, that the learned judges did also acknowledge that "the boundaries, particularly between undue influence and duress, are *blurred*" [emphasis added].[237]

112 However, in *Thorne v Kennedy*, Nettle J, who delivered a separate judgment, would have preferred to set aside the agreements in question on the basis of *duress* – but for the decision of the Court of Appeal of the Supreme Court of New South Wales in *Australia & New Zealand Banking Group v Karam*[238] which had held that there could not be illegitimate pressure within the scope of the doctrine of duress if that pressure was exerted by lawful means.[239] We do not propose to examine this last-mentioned point, save to observe that this does not

233 [2017] HCA 49, noted in John Eldridge, "Lawful-Act Duress and Marital Agreeements" (2018) 77(1) Camb LJ 32.

234 *Thorne v Kennedy* [2017] HCA 49 at [16]–[29], especially at [29].

235 *Thorne v Kennedy* [2017] HCA 49 at [39]–[40], and citing the observation of Mason J in *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 at 461.

236 And see Andrew Phang, "Undue Influence – Methodology, Sources and Linkages" [1995] JBL 552, especially at 567–570.

237 *Thorne v Kennedy* [2017] HCA 49 at [30].

238 (2005) 64 NSWLR 149. See also the critique of this decision by Rick Bigwood, "Throwing the Baby out with the Bathwater? Four Questions on the Demise of Lawful-Act Duress in New South Wales" (2008) 27 U Queensland LJ 41. Reference may also be made to John Eldridge, "Lawful-Act Duress and Marital Agreements" (2018) 77(1) Camb LJ 32.

239 *Thorne v Kennedy* [2017] HCA 49, especially at [70].

represent English and (probably) Singapore law at the present time. In the circumstances, the learned judge applied the doctrine of *unconscionability* instead.[240] However, we note that, in doing so, Nettle J must have – at least implicitly, if not explicitly – accepted that there is at least an overlap (or even a coincidence) between the doctrine of duress and that of unconscionability.

113 The remaining judge in *Thorne v Kennedy*, Gordon J, also delivered a separate judgment. He held that the agreements were voidable under the doctrine of unconscionability, but *not* under the doctrine of undue influence.[241] The same distinction from perspectives as that adopted by Kiefel CJ, Bell, Gageler, Keane and Edelman JJ[242] was adopted by the learned judge.[243] This is, of course, subject, with respect, to the same critique which we raised above. Gordon J did, in fact, proceed to observe thus:[244]

> Although [the plaintiff's] independent, informed and voluntary will was not impaired, she was unable, in the circumstances, to make a rational judgment to protect her own interests. In those circumstances, which were evident to and substantially created by [the defendant], it was *unconscionable* for [the defendant] to procure or accept her assent to the agreements. [emphasis added]

114 It is respectfully submitted that to the extent that the defendant in that case had taken advantage of the plaintiff's situation so that she "was unable, in the circumstances, to make a rational judgment to protect her own interests", there was *not only unconscionable* conduct on the part of the defendant in taking advantage of the plaintiff's situation *but also impairment* of the plaintiff's "independent, informed and voluntary will" to the extent that, although she did (literally) know what she was doing and was not hence an automaton, it could not be said that she had entered into the agreements concerned willingly and voluntarily. Indeed, that is also a key ingredient in the doctrine of *duress*, and it is therefore understandable why (as we have already noted) Nettle J would have preferred to rest his decision on the doctrine of *duress* instead. Indeed, the majority and Gordon J also acknowledged, to cite the trial judge's words, that the plaintiff in this case was:[245]

240 *Thorne v Kennedy* [2017] HCA 49 at [74].
241 *Thorne v Kennedy* [2017] HCA 49 at [79].
242 And considered at para 111 above.
243 *Thorne v Kennedy* [2017] HCA 49, especially at [80], [86], [92] and [115]. Gordon J did observe (at [115]) that "the doctrine of unconscionable conduct bears some resemblance to the doctrine of undue influence", although there was "an important difference between the two doctrines".
244 *Thorne v Kennedy* [2017] HCA 49 at [81].
245 *Thorne v Kennedy* [2017] HCA 49 at [62] and [100].

> … in a position of 'powerlessness' which was attributable to her lack of financial equality [and] also to her lack of permanent status in Australia at the time, her reliance on [the defendant] for all things, her emotional connectedness to their relationship and the prospect of motherhood, her emotional preparation for marriage, and the publicness of her upcoming marriage.

There was "[a] belief on [the plaintiff's] part that she had no choice but to sign the agreements if she wanted the relationship to continue".[246] Whilst Gordon J felt that this "[did] not speak to a lack of will or capacity to exercise independent judgment",[247] we would respectfully disagree for the reasons briefly set out above; in our view, it could not meaningfully be said that the plaintiff in this case had in fact exercised "*independent* judgment".

C. Emerging categories of contractual damages

(1) Introduction

115 The various categories of damages under general contract law are well established. These include expectation loss as well as reliance loss. However, there are a few emerging categories of contractual damages. In a number of Commonwealth jurisdictions, these categories are – by their very nature as emerging categories – in a state of *flux*. Constraints of space dictate the briefest of mentions. Brevity is also necessary because of a pending matter on this issue before the first-mentioned author.

(2) Punitive damages in contract law

116 It is axiomatic that contractual damages are – in the main at least – intended to be *compensatory* in nature. It would therefore appear to be the case that *punitive* damages ought *not* to be awarded in a contractual setting. However, this is not the case in Canada. In the Supreme Court of Canada's decision of *Whiten v Pilot Insurance Co*[248] ("*Whiten*"), punitive damages were awarded in a contractual setting. However, the Singapore Court of Appeal's decision of *PH Hydraulics & Engineering Pte Ltd v Airtrust (Hongkong) Ltd*[249] ("*PH Hydraulics*")

246 *Thorne v Kennedy* [2017] HCA 49 at [106].

247 *Thorne v Kennedy* [2017] HCA 49 at [106].

248 (2002) 209 DLR (4th) 257; 2002 SCC 18. Professor McCamus has observed that, *"[a]lone in the common law world, it seems*, Canada has embraced the notion that punitive damages can be awarded for a simple or pure breach of contract" [emphasis added]: see John D McCamus, "The Future of the Canadian Common Law of Contract" (2014) 31 JCL 131 at 141.

249 [2017] 2 SLR 129.

declined to follow *Whiten* and held, instead, that there ought to be a general rule that punitive damages *cannot* be awarded for breach of contract.

117 By way of a brief summary, the court in *PH Hydraulics* first considered the arguments *against* the award of such damages. It was of the view that allowing the courts to punish a party who had breached a contract sits uneasily with the concept of a contract as a set of obligations arising from a voluntary and binding agreement. The courts ought to have but a minimal role in regulating the contracting parties' conduct without regard to their agreement. It would be anomalous or even inappropriate for the court to regulate the contracting parties' conduct by imposing an award of punitive damages on the party in breach by way of what is in effect an external standard. The standard is an external one because, with the award of such damages, the court would be signifying its own outrage at the contract-breaker's conduct and communicating its own view of what proper commercial behaviour should be. Such an external standard might be said to be antithetical to the very nature and function of the law of contract in general and its remedial structure in particular. In contrast, the law of tort affords far more latitude to the courts in regulating conduct between the parties; it imposes standards of normative behaviour between complete strangers.[250] The court was further of the view that the argument based on a "remedial gap" – that it is necessary to have a residual discretion to award punitive damages in contract law because existing remedies are inadequate to punish and deter outrageous behaviour – was neutral at best. If the concepts of punishment and deterrence were inapposite in the context of the common law of contract, there would be no gap in the first place. Such a gap could, in any event, be filled by alternative remedial options, such as "*Wrotham Park* damages", an account of profits for breach of contract or damages for mental distress. These arguably have punitive or deterrent effects even though they remain primarily compensatory in purpose in that they protect a plaintiff's interest in contractual performance.[251] It also held that another argument against recognising the award of punitive damages for breach of contract was the absence of clear criteria by which to determine when punitive damages should be awarded, and the consequent uncertainty this would lead to. The concept of an "outrageous" breach is particularly elusive in the commercial context where self-serving behaviour is an accepted reality. It would be very difficult to identify specific (as well as workable) criteria for ascertaining when a contracting party's conduct

250 *PH Hydraulics & Engineering Pte Ltd v Airtrust (Hongkong) Ltd* [2017] 2 SLR 129 at [68], [71], [72] and [74].

251 *PH Hydraulics & Engineering Pte Ltd v Airtrust (Hongkong) Ltd* [2017] 2 SLR 129 at [78]–[84].

has crossed the line from self- or vested interest into the realm of the "outrageous".[252] The court also held that the weight of case law authority was also against the recognition of the award of such damages although this was not necessarily conclusive of the issue.[253] Finally, *policy considerations* also militated against the award of punitive damages in a purely contractual context. Awarding punitive damages in a purely contractual context might adversely affect the manner in which litigation is conducted inasmuch as it might add to its length, complexity and costs and confer upon plaintiffs an undue advantage in forcing large (or larger) settlements. Further, punitive damages are most commonly awarded in circumstances where there is a heightened risk of recurrent reprehensible conduct, especially where the parties are of unequal bargaining power, such as in insurance, employment and consumer transactions. Such risk would be more appropriately managed by regulation rather than by judicial remedies such as an award of punitive damages.[254]

118 In so far as the arguments in *favour* of an award of punitive damages for breach of contract were concerned, the court in *PH Hydraulics* was of the view that the argument from uniformity – that it would be inconsistent to recognise punitive damages in tort but exclude punitive damages from contract claims – was unpersuasive because the law of tort is qualitatively different from the law of contract.[255] It was also of the view that the Canadian decision of *Whiten*, the key authority relied upon by the court below to justify the award of punitive damages for breach of contract, ought *not* to be followed. In particular, *Whiten* held that punitive damages could be awarded where the conduct complained of constituted the breach of an independently actionable wrong – the breach of a contractual duty of good faith. But there was no reason in principle why a single breach of contract ought not to also justify an award of punitive damages; if it was the egregious nature of the conduct of the party in breach that was being punished, it ought not to matter whether that conduct was the result of a single breach or more than a single breach.[256] The court also noted – adopting the *amicus curiae*'s[257] view – that *Whiten* has been subject to no small

252 *PH Hydraulics & Engineering Pte Ltd v Airtrust (Hongkong) Ltd* [2017] 2 SLR 129 at [85], [86] and [89].

253 *PH Hydraulics & Engineering Pte Ltd v Airtrust (Hongkong) Ltd* [2017] 2 SLR 129 at [101].

254 *PH Hydraulics & Engineering Pte Ltd v Airtrust (Hongkong) Ltd* [2017] 2 SLR 129 at [102], [104] and [106].

255 *PH Hydraulics & Engineering Pte Ltd v Airtrust (Hongkong) Ltd* [2017] 2 SLR 129 at [110] and [111].

256 *PH Hydraulics & Engineering Pte Ltd v Airtrust (Hongkong) Ltd* [2017] 2 SLR 129 at [112], [114] and [115].

257 Associate Professor Lee Pey Woan of the School of Law, Singapore Management University.

measure of criticism (significantly, from a number of eminent academic experts in the field of Canadian contract law, one of whom was of the view that *Whiten* may not be a true authority for the award of punitive damages in a purely contractual context as it involved tortious defamatory conduct as well and there were features of the case not common to ordinary commercial contracts, such as quasi-regulatory interests).[258] The court found the principles in *Whiten* unpersuasive because it was assumed in *Whiten* that there was no difference in principle between awarding punitive damages in tort and doing so in a purely contractual context; the broader issue of principle – why punishment is a legitimate remedial response to a breach of contract – was not really dealt with. The principle of proportionality, which attempts to impose a rational limit on punitive damages awards, did not furnish sufficient guidance and had led in turn to uncertainty.[259] Further, it was not clear whether *Whiten* recognised the availability of punitive damages for all contract breaches or only certain types of contracts where there was a material power imbalance, or more generally contracts where there was a duty of good faith.[260] In any event, the court in *PH Hydraulics* was of the view that the existence of a duty of good faith would not, on its own, justify an award of punitive damages in the event of its breach, although it might help overcome one of the objections in principle to punitive damages for breach of contract: the undesirability of a court imposing on the parties its own normative standard of contractual performance. However, it did not necessarily follow that punitive damages ought to be awarded; the existence of an express or implied duty of good faith was a neutral factor.[261]

119 The court in *PH Hydraulics* then decided that as the arguments against the award of punitive damages for breach of contract *far outweighed* the arguments in favour of such an award, there ought (as already noted above) to be a general rule that punitive damages could not be awarded for breach of contract.[262]

258 *PH Hydraulics & Engineering Pte Ltd v Airtrust (Hongkong) Ltd* [2017] 2 SLR 129 at [117] and [118].

259 *PH Hydraulics & Engineering Pte Ltd v Airtrust (Hongkong) Ltd* [2017] 2 SLR 129 at [121]–[123] and [126].

260 *PH Hydraulics & Engineering Pte Ltd v Airtrust (Hongkong) Ltd* [2017] 2 SLR 129 at [127] and [128].

261 *PH Hydraulics & Engineering Pte Ltd v Airtrust (Hongkong) Ltd* [2017] 2 SLR 129 at [134].

262 *PH Hydraulics & Engineering Pte Ltd v Airtrust (Hongkong) Ltd* [2017] 2 SLR 129 at [135].

120 However, it should be noted that the court in *PH Hydraulics* did not rule out completely the possibility of ever awarding punitive damages for breach of contract, observing as follows:[263]

> Given, however, that the instances in which a breach of contract can occur are manifold, we would not rule out entirely the possibility that a case may one day come before this court, involving a particularly outrageous type of breach, which necessitates a departure from the general rule. As was said in a case concerning punitive damages for negligence, '"never say never" is a sound judicial admonition' (see the Privy Council decision of *A v Bottrill* [2003] 1 AC 449 at [26] *per* Lord Nicholls of Birkenhead). That said, any argument for the award of such damages would need to surmount the many reasons of principle and policy set out in this judgment against doing so. It would therefore take a truly exceptional case to persuade this court that punitive damages should be awarded for breach of contract.

121 At least one commentator has expressed dissatisfaction with the "legal safety valve" embodied in the quotation just set out above.[264] With respect, this misses the point that the general rule proscribing the award of punitive damages for breach of contract is the default rule and that this exception would operate (by its very nature and the terms in which it is phrased) in but the rarest of situations, if at all. This difference in perspectives is also emblematic of the academic's natural tendency towards *theoretical* neatness on the one hand and the judge's need to grapple with the various implications of any rule or principle in the context of *practical* application on the other in what is a fundamentally imperfect as well as complex world.[265] What *is* clear, however, is the fact that any Commonwealth court which needs to decide whether or not to award punitive damages for breach of contract will need to weigh the various arguments – many of which have been set out above. It is also worth noting that, in arriving at its decision, the court in *PH Hydraulics* engaged ***all*** *the central threads* referred to at the outset of the present article.

(3) Wrotham Park *damages*

122 An area of the law of contractual damages that is still in a state of flux concerns the issue as to whether damages of the kind awarded in the leading English High Court decision of *Wrotham Park Estate Co*

263 *PH Hydraulics & Engineering Pte Ltd v Airtrust (Hongkong) Ltd* [2017] 2 SLR 129 at [136].

264 See Samuel J Hickey, "Punitive Damages for Breach of Contract: A Singaporean Perspective" (2017) 46 Common Law World Rev 239.

265 *Cf* Robert Goff, "The Search for Principle" (1983) 69 *Proceedings of the British Academy* 169 (reprinted in *The Search for Principle – Essays in Honour of Lord Goff of Chieveley* (William Swadling & Gareth Jones eds) (Oxford University Press, 1999) at pp 313–329).

Ltd v Parkside Homes Ltd[266] ("*Wrotham Park*") ought to be awarded.[267] In essence, such damages (often termed "*Wrotham Park* damages"[268] after the case just mentioned) are awarded in situations involving a breach of contract where the award of compensation either by way of expectation loss or reliance loss is not possible but where the defendant, by reason of his or her breach of contract, has made a profit by transacting with a third party. Instead, the court concerned awards the plaintiff damage for the lost opportunity to bargain with the defendant (or a third party) for a price for releasing the defendant from its covenant, calculated by way of a reasonable (albeit not the entire) amount of the aforementioned profit made by the defendant. Such a reasonable bargain as just mentioned is necessarily *hypothetical* in nature since, *ex hypothesi*, it never actually took place.

123 The UK Supreme Court very recently handed down its first ever decision on this particular category of damages in *One Step (Support) Ltd v Morris-Garner*[269] ("*One Step*"). The judgment is itself a demonstration of the flux in this area within the UK jurisprudence. Lord Reed (with whom Lady Hale, Lord Wilson and Lord Carnwath agreed) disapproved of the terminology "*Wrotham Park* damages" and preferred the term "negotiating damages" instead.[270] His Lordship traced the development of this category of damages, dividing them into two phases – an earlier period where the award of such damages was based on the exercise of the jurisdiction under the Chancery Amendment Act 1858 (Lord Cairns' Act or "LCA") and a later period "in which [such] awards … were made at common law on *a wider and less certain basis*" [emphasis added].[271] He viewed the House of Lords decision in *Attorney General v Blake*[272] ("*AG v Blake*") as a pivot dividing both these phrases.

124 Having analysed the development of this remedy in the case law, Lord Reed finally set out what he viewed to be the principles governing the availability of what he termed "negotiating damages".[273] His Lordship reasoned that negotiating damages are compatible with the compensatory purpose of an award of contractual damages. Such

266 [1974] 1 WLR 798.

267 See also the seminal article in this area by Robert J Sharpe and Stephen M Waddams, "Damages for Lost Opportunity to Bargain" (1982) 2 OxJLS 290.

268 But *cf* below, n 270.

269 [2018] UKSC 20; [2018] 2 WLR 1353.

270 The latter terminology had been introduced by Neuberger LJ (as he then was) in the English Court of Appeal decision of *Lunn Poly Ltd v Liverpool & Lancashire Properties Ltd* [2006] EWCA Civ 430.

271 *One Step (Support) Ltd v Morris-Garner* [2018] UKSC 20; [2018] 2 WLR 1353 at [48].

272 [2001] 1 AC 268.

273 *One Step (Support) Ltd v Morris-Garner* [2018] UKSC 20; [2018] 2 WLR 1353 at [91]–[94].

damages are awarded in situations when "the loss for which compensation is due is the economic value of the right which has been breached, considered as an asset".[274] The imaginary negotiation is "merely a tool" for arriving at the economic value of the right.[275] This value constitutes the measure of the claimant's loss in circumstances where the claimant has in substance been deprived of a valuable asset. In other words, these are situations where "the defendant has taken something for nothing, for which the claimant was entitled to require payment".[276] Anticipating the objection that any contractual right may be described as an asset or property, Lord Reed confined the contractual right in contemplation to those kinds the breach of which would result in "an identifiable loss equivalent to the economic value of the right, considered as an asset, even in the absence of any pecuniary losses which are measurable in the ordinary way".[277] This was thought to be true of some contractual rights, but not all. While the UK Supreme Court was reluctant to foreclose the possibility, it intimated that it would be difficult to imagine how a hypothetical release fee would be the correct measure in any other circumstances.

125 Accordingly, "*Wrotham Park* damages" (or "negotiation damages") have now been recognised by the UK's highest court in accordance with the principles stated above, which will undoubtedly constitute a legal point of reference for any court considering whether or not to accept such damages within its legal landscape.

126 Since this article was presented at the 30th Journal of Contract Law Conference in Sydney, the Singapore Court of Appeal released its decision of *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua*[278] ("*Turf Club Auto Emporium*"), which contained a detailed discussion of *Wrotham Park* damages in Singapore. In brief, the court largely agreed with the English approach taken by the UK Supreme Court in *One Step*. As a fundamental point, the court recognised *Wrotham Park* damages as a head of damages under Singapore law and which are meant to protect the plaintiff's performance interest. The court then held that the normative basis of such damages is compensatory in nature, since they are aimed at compensating the plaintiff for the loss of his performance interest due to the defendant's breach. Indeed, the reference to the

274 *One Step (Support) Ltd v Morris-Garner* [2018] UKSC 20; [2018] 2 WLR 1353 at [91].
275 *One Step (Support) Ltd v Morris-Garner* [2018] UKSC 20; [2018] 2 WLR 1353 at [91].
276 *One Step (Support) Ltd v Morris-Garner* [2018] UKSC 20; [2018] 2 WLR 1353 at [92].
277 *One Step (Support) Ltd v Morris-Garner* [2018] UKSC 20; [2018] 2 WLR 1353 at [93].
278 [2018] 2 SLR 655.

defendant's gain was merely a method of quantifying the damages rather than the basis of the award. Understood this way, *Wrotham Park* damages apply only in a limited category of cases: where there is a remedial lacuna arising from the unavailability of orthodox compensatory damages or specific relief, but where there is still a need to provide the plaintiff with a remedy to protect his performance interest and where the lacuna could be rationally and sensibly filled by reference to the hypothetical bargain measure.

127 As a practical matter, the Court of Appeal stated that there are three requirements to be satisfied before a court would award *Wrotham Park* damages:

> (a) First, as a threshold matter, orthodox compensatory remedies were unavailable. This would usually arise if the plaintiff had not suffered any financial loss from the defendant's breach and could not claim for specific performance. However, as the court reminded us, this is a difficulty requirement to satisfy. Indeed, the mere difficulty of quantifying compensatory damages cannot be taken to be satisfaction of this requirement.
>
> (b) Second, it must generally be shown that there had been a breach of a negative covenant. This must be a substantive negative covenant, and not simply a positive obligation "dressed up" as a negative covenant.
>
> (c) Third, it must not have been irrational or totally unrealistic to expect the parties to bargain for the release of the relevant covenant, even if this were only hypothetical in nature. Thus, as an example, the hypothetical measure would not apply if the agreement to release the covenant were illegal.

Apart from these requirements, the court also pointed out that *Wrotham Park* damages should not be confined to merely breach of a proprietary right. Neither was there a need to prove that the defendant had committed a deliberate or cynical breach of contract, or that the plaintiff had a legitimate interest in preventing the defendant's profit-making activity in breach of contract. There was further no need to avoid manifest injustice or satisfy similar requirements, as these are built into the three requirements above.

128 The Court of Appeal's approach differs slightly from the UK Supreme Court's approach in *One Step*. First, in terms of the threshold issue of terminology, unlike the UK approach, the court did not see any real prejudice in continuing with the term "*Wrotham Park* damages" (as opposed to "negotiating damages"). In its view, any difference between the two terms is merely a matter of form and so they can be used interchangeably.

129 Second, there are also some differences in relation to the legal requirements for *Wrotham Park* damages at common law. The legal requirement for such damages outlined in *One Step* is different from that set out in *Turf Club Auto Emporium*. In *One Step*, the primary limiting criteria for an award of negotiating damages at common law is that the contractual right breached must be considered to be an economically valuable "asset". However, the Court of Appeal did not think that this should be part of Singapore law for several reasons. For one, it is not clear in what *other circumstances* a contractual right can be considered to be an "asset" and whether negotiating damages can be awarded at common law *only* in situations where the contractual right breached related to the control and use of land, intellectual property or confidential information. Indeed, if the effect of this requirement is to limit *Wrotham Park* damages to such circumstances only, it would unduly narrow the scope of such damages and revive the narrow proprietary conception of the doctrine (which has been rejected). More substantively, it is not clear why it should be any more permissible to expropriate personal rights than it is permissible to expropriate property rights. Furthermore, the requirement of an economically valuable asset causes uncertainty since every contractual right could be described as an asset in some sense.

130 A further difference between the Singapore and UK approaches is the emphasis that the majority in *One Step* placed on the distinction between *Wrotham Park* damages awarded in the exercise of the court's equitable jurisdiction under LCA and those awarded at common law. Lord Reed in *One Step* bifurcated the two categories of cases and suggested that they were governed by different principles and perhaps even different rules of assessment. In contrast, the Court of Appeal, while recognising the equitable roots of damages in lieu of an injunction under LCA, noted that this historical lineage did not justify a sharp distinction between *Wrotham Park* damages awarded under LCA[279] and the same measure of damages awarded at common law. On the contrary, the legal requirements articulated should apply to both categories of cases.

131 Despite these differences, the Court of Appeal accepted that there is much harmony between its approach and the UK approach. In other words, *One Step* does not affect the governing principles adopted in Singapore.

279 In our case, under para 14 of the First Schedule to the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) read with s 18(2) thereof.

(4) AG v Blake *damages*

132 This is yet another relatively new category of contractual damages. It is, as its name suggests, based on the House of Lords decision in a case already noted above, *viz*, *AG v Blake*.[280] *AG v Blake* itself is a very unusual case and may, in fact, have limited application. It was certainly necessary for the House of Lords to arrive at the decision it did in order to achieve substantive justice on the facts of that particular case. However, it could be argued that this was not wholly consistent with the *spirit* underlying the ***second*** *central thread* referred to earlier in this article. As mentioned, in *One Step*, *AG v Blake* was treated as the pivot signalling the wider availability of "negotiating damages" in cases decided under the common law of contract. Lord Reed acknowledged that following *AG v Blake*, in exceptional circumstances, an account of profits can be ordered as a remedy for breach of contract.[281] This proposition was not the subject of appeal in *One Step*. In his Lordship's conclusion, Lord Reed stated that "[c]ommon law damages for breach of contract cannot be awarded merely for the purpose of depriving the defendant of profits made as a result of the breach, other than in exceptional circumstances, following *Attorney General v Blake*".[282]

133 *AG v Blake* has yet to be considered by the Singapore courts, although there are *obiter dicta* that do not appear to cast it in favourable light. In the Singapore Court of Appeal decision of *MFM Restaurants*, it was observed thus (although the issue did not come up for decision):[283]

> … *Blake* itself generated – not surprisingly, perhaps – a learned body of legal literature of a magnitude that has been witnessed only occasionally (in this regard, the account by Prof Graham Virgo in his book, *The Principles of the Law of Restitution* (Oxford University Press, 2nd Ed, 2006) ('*Virgo*') ch 17 furnishes an exceptionally clear and succinct overview of both the relevant case law as well as legal literature). Put very simply, the principles set out in *Blake* permit the court to award damages to the plaintiff (in a situation relating to the breach of a contract) on the basis of the gains or profits made by the defendant even though the plaintiff could not otherwise be awarded

280 *Attorney General v Blake* [2001] 1 AC 268. There is a plethora of literature on this particular decision – including a joint article by the first-mentioned author of the present article published in this journal: see Andrew Phang & Pey-Woan Lee, "Rationalising Restitutionary Damages in Contract Law – An Elusive or Illusory Quest?" (2001) 17 JCL 240.

281 *One Step (Support) Ltd v Morris-Garner* [2018] UKSC 20; [2018] 2 WLR 1353 at [82].

282 *One Step (Support) Ltd v Morris-Garner* [2018] UKSC 20; [2018] 2 WLR 1353 at [95].

283 *MFM Restaurants Pte Ltd v Fish & Co Restaurants Pte Ltd* [2011] 1 SLR 150 at [52]–[55]. But *cf*, in the Canadian context, John D McCamus, "The Future of the Canadian Common Law of Contract" (2014) 31 JCL 131 at 145–146.

any damages based on traditional contractual principles (for example, because there has been no difference in value of the contractual subject matter and, hence, no justification for the award of expectation loss). Such damages would, however, be awarded only in *exceptional* cases. This category of damages has sometimes been termed as "restitutionary damages", although the House in *Blake* preferred to classify such an award on the basis of an account of profits.

Apart from the various conceptual as well as (as referred to at the end of the preceding paragraph) terminological difficulties, there are (concurrent) practical difficulties as well in so far as the award of damages under the principles set out in *Blake* are concerned. In *Blake*, for example, in the leading judgment of Lord Nicholls of Birkenhead, the statement of principle (at 284–285) does not really furnish concrete guidance as to when the power to award such damages will arise. That the award of such damages is (as already noted in the preceding paragraph) exceptional still leaves the (very practical) issue as to *the criteria* which will enable the court to ascertain whether or not a given fact situation is indeed exceptional. Case law developments since *Blake* (see, for example the English Court of Appeal decision of *Experience Hendrix LLC v PPX Enterprises Inc* [2003] 1 All ER (Comm) 830 (noted in Pey-Woan Lee, "Responses to A Breach of Contract" [2003] LMCLQ 301 ('*Lee*'); Martin Graham, "Restitutionary Damages: The Anvil Struck" (2004) 120 LQR 26 ('*Graham*'); and David Campbell and Philip Wylie, "Ain't No Telling (Which Circumstances are Exceptional)" (2003) 62 CLJ 605 ('*Campbell and Wylie*')) have also suggested a *possible alternative* approach that is premised not on a restitutionary basis as such but, rather, on a compensatory one (centring on the much discussed decision by Brightman J in the English High Court decision of *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 ('*Wrotham Park*') (see also Robert J Sharpe and S M Waddams, "Damages for lost opportunity to bargain" (1982) 2 OJLS 290); reference may also be made to the recent Privy Council decision (on appeal from the Court of Appeal of Jersey) of *Pell Frischmann Engineering Limited v Bow Valley Iran Limited* [2010] BLR 73 (especially at [46]–[54])). However, it would appear that the precise contours of this particular head of compensatory loss (as well as its relationship with the established head of expectation loss) have yet to be worked out fully (see, for example, *Virgo* (at pp 490–492) as well as *Lee*; *Graham*; and *Campbell and Wylie*). It might well be a difference of degree rather than kind, at least in so far as the former consists in an attempt to quantify compensatory damages by reference to the defendant's gain (see *Lee* (at 302–303) and, by the same author, 'A New Model of Contractual Compensation' [2006] LMCLQ 452 at 453; *cf* also Samuel Stoljar, 'Restitutionary Relief for Breach of Contract' (1989) 2 JCL 1 at 3–4). To the extent, of course, that both heads are coincident, the head of damages will, in substance, be based on orthodox principles of the common law of contract (which centre on expectation loss).

[emphasis in original]

134 In *Turf Club Auto Emporium*, the Court of Appeal had occasion to comment on such damages. It held that, on a superficial level at least, *AG v Blake* damages are similar to *Wrotham Park* damages in that they both involve the stripping of the gain or profit that has accrued to the defendant as a result of his breach of contract. However, the two are very different normatively. As the court explained, whereas an award of *Wrotham Park* damages involves the stripping of the defendant's gain or profit based on a *hypothetical or objective measure*, an award of *AG v Blake* damages involves stripping *the* ***actual*** gain or profit that has accrued to the defendant.

135 The Court of Appeal reaffirmed that such damages are an exceptional remedy and would be left for a later occasion to decide if they are truly part of Singapore law. The court pointed out that the primary difficulty with recognising *AG v Blake* as part of Singapore law is the uncertainty of the legal criteria to be applied in awarding such damages. Indeed, the criterion of "legitimate interest" is rather general and even vague, and difficult to define. The only possible way of rationalising these damages may perhaps be to say that the law has a ***legitimate basis*** *for* ***punishing*** *the defendant and* ***deterring*** *non-performance because the contract involves* ***a public interest*** *which goes beyond the private interests of the parties themselves*. This would be an ***exceptional*** class of contracts, but the contract between the Government and the intelligence agent in *AG v Blake* provides a classic illustration that this category of cases does exist. However, it bears reiterating that the court was not purporting to conclude this as a part of Singapore law; its views were only tentative, and we must await a future case to see if *AG v Blake* damages are part of Singapore law and, if so, how they are to be awarded.

136 Returning then to the broader point in this section, in our view, it is by no means clear that there will be no divergence in so far as this particular category of damages is concerned. Indeed, a key question is whether or not *AG v Blake* related to such an unusual fact situation that it might well be confined to its own facts. The acid test, so to speak, will come when *AG v Blake* arises for direct consideration once again in a Commonwealth apex court.

VI. Conclusion

137 Some concluding observations are in order, although they are necessarily tentative since the analysis in this article is, as noted at the outset, an extremely tentative one. However, we hope that we have given some legal food for thought and that some of the ideas contained in this article may constitute possible points of departure for further research as well as analysis – even if such further findings are at odds with what we

have suggested. Indeed, this is only to be expected – and even desired – lest the spirit as well as substance of the ideal of legal scholarship be eroded by mere mutual admiration, although we hasten to add that we are not set against a spirit of positivity in legal academia. Far from it. Indeed, as the first-mentioned author of the present article has observed elsewhere:[284]

> It is also clear that the very concept of a 'university' signals (as the very word itself embodies) the need for *unity in diversity*, in order that no one mode of scholarship becomes the dominant one to the exclusion of all others. However, there is a sense in which a purely abstract piece can serve no purpose other than to obfuscate (even it appears to be learned). Even worse is a tightly knit community of legal scholars who speak in a 'language' which is of interest only to themselves and which is of no earthly use beyond the confines of their 'legal commune' – and it would be all the more the pity if these legal scholars actually possessed the innate intelligence to apply their minds to more practical issues. Indeed, by focusing inwards only upon themselves to the exclusion of participation of others would be the very *antithesis* of the need for *unity in diversity* that was just referred to. [emphasis in original]

138 With these caveats in mind, it might be appropriate to commence our tentative concluding observations with the proposition that whilst uniformity is undoubtedly desirable, particularly in the context of contract and commercial law, it may not be as crucial in the context of *domestic* contract law, which also needs to take into account *the appropriate needs and circumstances* of the particular (here, Commonwealth) jurisdiction concerned. Divergence may also be necessary if the process of *legal reasoning* of the case(s) being departed from is felt to be erroneous. However, divergence ought not to be sought for its own sake – not least because we live in an increased (as well as increasingly) interrelated and interconnected world, but also because there are at present numerous cases before international tribunals (both in the arbitral context as well as in international commercial courts).

139 We also note that, from our discussion above, there *are*, in fact, *divergences* in certain areas of the law – for one or both of the reasons briefly alluded to in the preceding paragraph. The reader will recall that we examined a number of areas of the common law of contract. Not surprisingly (and invariably), the *first central thread* is (as we have also noted above) the *most important* one. Indeed, it encompasses much of what has been said in the preceding paragraph. The *second central thread* is also significant although, as we explained at the outset of the present article, it is – by its very nature – pervasive, yet not express (let

284 See Andrew Phang, "The Law of Remedies – The Importance of Comparative and Integrated Analysis" (2016) 28 SAcLJ 746 at 758.

alone obtrusive); however, a close perusal of the cases will reveal that it permeates every case and this is not surprising, for courts are in the "business" of "doing justice" by arriving at the most just as well as fair result in the case at hand. However, this is not a mechanistic process but involves – as the pith and marrow of the second central thread entails – an interaction between doctrine on the one hand and fairness on the other.

140 The divergences are very clear in so far as *implied terms*, *common mistake*, *contractual illegality* and *remoteness of damage* are concerned. It is important to underscore the fact that, in so far as implied terms and remoteness of damage are concerned, it is perhaps somewhat ironic that the divergence concerned was from the *changed (or new) English law*, the (here, Singapore) courts preferring to *retain* the then existing *English law* (albeit with a slight modification in so far as the law relating to contractual illegality is concerned).

141 We also saw that there have been situations of divergence in the context of *flux*. The most significant example perhaps relates to the law concerning *discharge by breach of contract*, in which Singapore adopted an almost unique approach in settling the law for Singapore amidst the continuing uncertainty (and consequent flux) as to whether either of two (at least potentially conflicting) approaches ought to be adopted. A kind of "hybrid" approach has been adopted by the Singapore courts although, in the nature of things, a *complete* integration of the two approaches is impossible.

142 Another example of divergence in the context of flux relates to the doctrine of *unconscionability*. Indeed, as we have seen, the divergence exhibits itself in two sub-areas. The first is a kind of "intra-divergence" inasmuch as there is difference as to the actual *scope* of the doctrine itself. The second relates to the *normative* question of future development or (more accurately) the possible *merger* of the doctrines of duress, undue influence and unconscionability. In regard to this latter question, it bears noting the crucial role which *legal scholarship* can play (thus illustrating the fourth central thread in this article). This is not surprising because the issue in question concerns, *ex hypothesi*, new ideas and concepts that constitute the "bread and butter" of *academic discourse and scholarship*. Indeed, the issue of possible merger of the doctrines just mentioned *also* brings into play the *comparative* approach (which the reader will recall is the third central thread in the present article). In our view, it is *always* relevant. However, it takes on *special* importance in the context of exploring possible ways forward and particularly where the court concerned faces a state of legal

flux but feels that it has come to a legal crossroad of sorts inasmuch as the law concerned ought to be settled for future guidance.[285]

143 What is most needful, in the final analysis, is *humility* which, in turn, ought to be accompanied by an openness to new ideas and/or change.[286] This is especially important in the context of the law of contract, if nothing else because it constitutes the *foundation* of much of the civil law of obligations under the common law. Finally, we would like to return to the genesis of the present article and, in particular, the conference at which it was presented (which conference, it will be recalled, celebrated the 30th Anniversary of the Journal). In this regard, the Journal has played a significant role in fostering comparative understanding and discourse in this vital area of the law and has, in fact, also been influential in helping to develop the law of contract in a practical way in the courts in a multitude of Commonwealth jurisdictions – a topic which we deal with in a separate article.[287] The importance of the Journal can only increase in the years to come.

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285 Another example relates to the award of punitive damages for breach of contract, where we saw a clear divergence between Canada and other Commonwealth jurisdictions (in particular, Singapore): see also John D McCamus, "The Future of the Canadian Common Law of Contract" (2014) 31 JCL 131.

286 See also Andrew Phang, "The Law of Remedies – The Importance of Comparative and Integrated Analysis" (2016) 28 SAcLJ 746.

287 See Goh Yihan & Andrew Phang, "A Statistical Analysis of the Influence of the *Journal of Contract Law* in Commonwealth Court Decisions" (2018) 35 JCL 14.