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Case Note

EVERYTHING EVERYWHERE ALL AT ONCE?

The "Prevention Principle" and the Implied Duty to Co-Operate in Singapore

Ng Koon Yee Mickey v Mah Sau Cheong [2022] 2 SLR 1296

"No person should be permitted to take advantage of his own wrong." This is a legal maxim that traverses a wide variety of legal contexts, including the law of contract in Singapore. In particular, this maxim informs the basis for the common law's development of rules such as the "prevention principle" and the implied duty to co-operate in Singapore. In this case note, the author analyses the Appellate Division of the High Court's decision in *Ng Koon Yee Mickey v Mah Sau Cheong* [2022] 2 SLR 1296, which raises some pertinent questions on the scope and application of the "prevention principle", and the standard for implying terms in law in Singapore.

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I. Introduction

1 It is not often one finds a case that considers at length the juridical bases of both the implied term to co-operate and the so-called "prevention principle". In *Ng Koon Yee Mickey v Mah Sau Cheong*[2] ("*Mickey Ng*"), the Appellate Division of the High Court held that the implied duty to co-operate is an implied term in fact and not in law. It also considered, but left open, whether there are both common law and equitable versions of the "prevention principle". This case note seeks to

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1 The author is grateful to Professor Paul Myburgh for his generous comments. The law is stated as of 1 May 2023. The views expressed in this article, and any errors, are the author's own.
2 [2022] 2 SLR 1296.

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address the Appellate Division's analysis of these issues, which raises interesting yet practical questions for contract and construction lawyers.

II. Facts

2 The plaintiff ("Mah") commenced proceedings against the defendant ("Ng") for sums disbursed to him under three loan agreements. Ng conceded that he was liable for these disbursed sums,[3] but claimed that any liability should be set off against a sum Mah owed to him under a share purchase agreement[4] ("SPA"). Under this SPA, Mah agreed to purchase Ng's shareholding in a company Enersave International (HK) Ltd ("EI") for RMB13m. This sum was payable in three tranches, the third of which remained outstanding.[5] The obligation to pay this third tranche was subject to a clause that EI's subsidiary would enter into an operational agreement ("OA") upon a contractually stipulated deadline.[6] Three days before the deadline lapsed, Mah wrote to Ng stating that if the OA was not signed by this deadline, the SPA would be terminated.[7] That agreement was entered into only five months after the contractual deadline.[8] Relying on this letter, Mah contended that the SPA was validly terminated.

3 In response, Ng advanced the following arguments. First, Mah's letter was invalid as a notice to terminate the SPA since it was issued before the contractual deadline had passed. Second, Ng invoked the "prevention principle", asserting that Mah could not rely on his own breach of duty to co-operate to terminate the SPA. The trial judge allowed Mah's claim in full. He rejected Ng's argument over a notice of requirement as it was not reflected in Ng's pleadings. He also found that on the facts, Mah did not breach the implied duty to co-operate.[9]

III. Decision

4 On appeal, Ng advanced the same arguments as he had before the trial judge below. The Appellate Division (comprising Quentin Loh JAD, See Kee Oon and Chua Lee Ming JJ) allowed Ng's appeal.

3 *Ng Koon Yee Mickey v Mah Sau Cheong* [2022] 2 SLR 1296.
4 *Ng Koon Yee Mickey v Mah Sau Cheong* [2022] 2 SLR 1296 at [2].
5 *Ng Koon Yee Mickey v Mah Sau Cheong* [2022] 2 SLR 1296 at [5]–[8].
6 *Ng Koon Yee Mickey v Mah Sau Cheong* [2022] 2 SLR 1296 at [7].
7 *Ng Koon Yee Mickey v Mah Sau Cheong* [2022] 2 SLR 1296 at [10].
8 *Ng Koon Yee Mickey v Mah Sau Cheong* [2022] 2 SLR 1296 at [20].
9 *Ng Koon Yee Mickey v Mah Sau Cheong* [2022] 2 SLR 1296 at [13]–[16].

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5 On the issue of notice, Ng was not precluded from relying on this argument even though it was not in his pleadings. This was because Ng had raised it in his opening statement for the trial, and Mah was not caught by surprise.[10] As a matter of contractual construction, there was no automatic right to terminate the SPA and a notice of termination must be served.[11] Any such notice given prior to the accrual of a contractual right was premature and ineffectual.

6 The Appellate Division then considered whether Ng could rely on the "prevention principle". It also reviewed the relevant authorities and concluded that the "prevention principle" extended beyond the sphere of building and construction contracts, and can be excluded or modified by the terms of agreement. Therefore, the "prevention principle" was potentially applicable to the case since the SPA contained no express provisions to preclude it.[12]

7 The Appellate Division then considered whether Mah breached an implied duty to co-operate, such that it engaged the "prevention principle". The court held that the implied duty to co-operate was a term implied in fact and not in law, and that this term must accord with the contracting parties' intentions, with its scope being dependent on the contractual terms.[13]

8 As Mah and Ng's common goal was to enter into the OA with Mah playing a crucial role in negotiating it, there was an implied duty requiring Mah to make reasonable efforts to achieve the signing of the OA.[14] The Appellate Division found that Mah therefore breached this duty by fixing the signing of the OA for the date of the then-Prime Minister of Malaysia's visit – which made it impossible for the said agreement to be signed before the deadline.[15] Therefore, the "prevention principle" precluded Mah from relying on the non-fulfilment of the condition to terminate the SPA. Mah was therefore liable to complete the SPA and effect payment for the third tranche. Ng's counterclaim thereby exceeded Mah's claim and as a matter of legal set-off, Mah's claim was dismissed.[16]

10 *Ng Koon Yee Mickey v Mah Sau Cheong* [2022] 2 SLR 1296 at [32].
11 *Ng Koon Yee Mickey v Mah Sau Cheong* [2022] 2 SLR 1296 at [37]–[49].
12 *Ng Koon Yee Mickey v Mah Sau Cheong* [2022] 2 SLR 1296 at [56]–[82].
13 *Ng Koon Yee Mickey v Mah Sau Cheong* [2022] 2 SLR 1296 at [91]–[94].
14 *Ng Koon Yee Mickey v Mah Sau Cheong* [2022] 2 SLR 1296 at [106]–[111].
15 *Ng Koon Yee Mickey v Mah Sau Cheong* [2022] 2 SLR 1296 at [112]–[133].
16 *Ng Koon Yee Mickey v Mah Sau Cheong* [2022] 2 SLR 1296 at [140].

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IV. Analysis

A. The "prevention principle"

9 "*Nullus commodum capere potest de injuria sua propria*".[17] This is a legal maxim founded on basic principles of fairness and is recognised in both common law and equity.[18] It is oft described as a "universal principle" that is influential in various contexts, including contract law.[19] However, as Oliver Wendell Holmes Jr wisely observed, "general propositions do not decide concrete cases".[20] The "prevention principle" is in effect a legal maxim of general application which informs the basis of specific rules in the law of contract.[21] It is therefore crucial to distinguish this fundamental legal proposition of universal legal application from the concrete legal rules at play in this context.

10 In *Mickey Ng*, the Appellate Division correctly identified two different rules which it described as the "prevention principle". The first was the principle commonly applied in construction contracts – which the courts occasionally refer to as the so-called principle in *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd*[22] (hereinafter referred to as the "*Peak* principle").

11 The general position is that a contractor must complete its work by the contractually stipulated deadline. However, this obligation is premised on the fact that the employer will not do anything to impede the contractor's progress.[23]

12 Therefore, the "*Peak* principle" provides that if the employer commits an act that prevents the works from being completed by the stipulated date, two important consequences will be suffered:[24]

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17 A person should not be permitted to take advantage of his own wrong.
18 *CIMB Bank Bhd v Italmatic Tyre & Retreading Equipment (Asia) Pte Ltd* [2021] 4 SLR 883 at [129], citing R H Kersley, *Broom's Legal Maxims* (Sweet & Maxwell, 10th Ed, 1939) at p 191.
19 *Attorney-General v Guardian* [1990] 1 AC 109 at 286, *per* Lord Goff. See also *Rede v Farr* (1817) 6 M&S 121 at 124.
20 *Lochner v New York* (1905) 198 US 45 at 76.
21 *Kensland Realty Ltd v Whale View Investment Ltd* [2001] HKCFA 17.
22 [1970] BLR 111.
23 Chow Kok Fong, *Law and Practice of Construction Contracts* (Sweet & Maxwell, 5th Ed, 2018) ch 9, at para 9.064.
24 *Ser Kim Koi v GTMS Construction Pte Ltd* [2022] SGHC(A) 34 at [90].

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(a) First, the employer loses the right to impose liquidated and ascertained damages.[25] Any claim would be for unascertained damages, which in most cases is more difficult to prove.[26] This is because the employer cannot insist on a condition if it was its own fault that the condition had not been fulfilled.[27] However, the employer is still entitled to sue the contractor for any general law damages which it can prove flow from the contractor's default.[28]

(b) Second, the time for completion remains "at large",[29] and the obligation to complete by the specified date is replaced with an obligation to complete within a reasonable time.[30]

13 The second aspect of the "prevention principle" is a rule of contractual interpretation. Unless there are clear express provisions to the contrary, it is the parties' presumed intentions that they are not entitled to rely on their own breach to avoid the contract or claim a benefit.[31]

14 However, confusion arises when one applies the term "prevention principle" as a shorthand to refer to these two different rules in contract law, rather than a fundamental legal proposition which underlies those rules.

15 In this regard, it is apposite to refer to the Singapore High Court's decision of *Fundamental Investors v Palm Tree Investment Group Pte Ltd*[32] ("*Fundamental Investors*"). In that case, a defendant relied on the "prevention principle" to assert that the time for repaying his loan was "set at large" because the plaintiff had committed acts of prevention. In response, the plaintiff contended that the principle's effect of setting time at large is limited to construction contracts.

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25 *Percy Bilton Ltd v Greater London Council* [1982] 1 WLR 794 at 801C–801E; *Lim Chin San Contractors Pte Ltd v LW Infrastructure Pte Ltd* [2011] 4 SLR 455 at [27].

26 *Lian Soon Construction Pte Ltd v Guan Qian Realty Pte Ltd* [1999] 3 SLR(R) 518 at [18].

27 The Honourable Sir Vivian Ramsey & Stephen Furst QC, *Keating on Construction Contracts* (Sweet & Maxwell, 11th Ed, 2022) ch 8, at para 8-014. See also *Dodd v Churton* [1897] 1 QB 562 at 566, *per* Lord Esher MR.

28 *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd* [1970] BLR 111 at 121, *per* Salmon LJ.

29 *Kwang In Tong Chinese Temple v Fong Choon Hung Construction Pte Ltd* [1997] 1 SLR(R) 907 at [18]; *Lian Soon Construction Pte Ltd v Guan Qian Realty Pte Ltd* [1999] 3 SLR(R) 518 at [18].

30 *Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd (No 2)* [2007] EWHC 447 (TCC) at [48].

31 See *Cheall v Association of Professional Executive Clerical and Computer Staff* [1983] 2 AC 180 at 189, *per* Lord Diplock.

32 [2020] 4 SLR 1328.

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16 Vincent Hoong J rejected the plaintiff's argument, holding that the effect extended to all contractual claims, including claims for repayment of a debt.[33] In doing so, the court relied on several authorities.[34] These included the House of Lords decision in *Alghussein Establishment v Eton College*,[35] the Supreme Court of South Australia's decision in *Nitschke v Foraco Australia Pty Ltd*[36] and the Hong Kong Court of Final Appeal's decision in *Kensland Realty Ltd v Whale View Investment Ltd*.[37] However, these cases only engaged the "*Peak* principle" as a rule of contractual construction rather than a rule to set time at large.

17 In *Fundamental Investors*, Hoong J further justified his Honour's conclusion by referring to the legal maxim of "no man shall take advantage of his own wrong" as being "universally-applicable" and relevant to every contractual context.[38] With respect, this conflates the broad universal principle with the actual rule. Simply because the maxim is framed so broadly does not *per se* justify its extension to a completely different and highly specific context.

18 The confusion over the "*Peak* principle" is more evident when the Appellate Division in *Mickey Ng* considered whether there is an "equitable conception" of the "prevention principle". This issue arose from another High Court decision of *Chua Tian Chu v Chin Bay Ching*[39] ("*Chua Tian Chu*") where Andrew Ang J characterised the "prevention principle" – the "*Peak* principle" – as an "equitable remedy". Such a characterisation has significant implications in practice and merits further scrutiny.

19 If the "*Peak* principle" is an "equitable remedy", then it necessarily raises a question on how an "act of prevention" should be defined. Under the common law rule of construction, an act of prevention is narrowly confined to a prior contractual breach.[40] This appears inconsistent with the broader definition under the "*Peak* principle" in construction law, where an act of prevention is one that operates to prevent, impede or otherwise make it more difficult for a party to perform its obligations

33 *Fundamental Investors Pte Ltd v Palm Tree Investment Group Pte Ltd* [2020] 4 SLR 1328 at [134].
34 *Fundamental Investors Pte Ltd v Palm Tree Investment Group Pte Ltd* [2020] 4 SLR 1328 at [135].
35 [1988] 1 WLR 587.
36 *Nitscheke Realty Ltd v Foraco Australia Pty Ltd* [2014] SASC 88.
37 [2001] 2 HKCFA 17.
38 *Fundamental Investors Pte Ltd v Palm Tree Investment Group Pte Ltd* [2020] 4 SLR 1328 at [134].
39 *Chua Tian Chu v Chin Bay Ching* [2011] SGHC 126.
40 *Evergreat Construction Co Pte Ltd v Presscrete Engineering Pte Ltd* [2006] 1 SLR(R) 634.

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on time, and such actions may not necessarily be in breach of one's contractual obligations.[41]

20 Therefore, if the "*Peak* principle" is truly an equitable remedy, applying the statutory rule in s 6(13) of the Civil Law Act 1909,[42] equity necessarily prevails over the common law's rules. This leads to the bold conclusion that subject to any express contrary terms, any acts preventing a party from performing his or her contractual obligations on time, *even if such acts are legitimate*, will result in the loss of a right to claim liquidated damages, and/or terminate the contract.[43]

21 Was the High Court in *Chua Tian Chu* correct in characterising the "*Peak* principle" as an equitable remedy? In the absence of further arguments, the Appellate Division in *Mickey Ng* declined to answer this question but noted a lack of authority that supported Ang J's characterisation.[44]

22 There are a few possible justifications for why the "*Peak* principle" is an "equitable remedy". First, it may be a manifestation of equity operating to effectively preclude a party from insisting on his or her strict contractual entitlement to liquidated damages at common law.[45] This is somewhat similar to the equitable origins of the law against contractual penalties,[46] which strikes down any liquidated damages clauses which are not genuine pre-estimates of the likely loss which would be suffered.[47] Second, this characterisation may be justified on the basis that equity views time stipulations as not being of the essence. As with specific performance, the effect of setting time at large provides equitable relief in favour of the promisor in spite of his or her failure to meet the contractually stipulated deadline.

23 In this author's view, these justifications do not hold water. With respect to the High Court in *Chua Tian Chu*, it is incorrect to characterise the so-called "*Peak* principle" as an equitable remedy – in other words, there is no "equitable conception" for the "*Peak* principle". There are two reasons for this.

41 See *Yap Boon Keng Sonny v Pacific Prince International Pte Ltd* [2009] 1 SLR(R) 385 at [18].
42 2020 Rev Ed.
43 Goh Yihan SC, Lee Pey Woan & Tham Chee Ho, "Contract Law" (2020) 21 SAL Ann Rev 403.
44 *Ng Koon Yee Mickey v Mah Sau Cheong* [2022] 2 SLR 1296 at [78].
45 Goh Yihan SC, Lee Pey Woan & Tham Chee Ho, "Contract Law" (2020) 21 SAL Ann Rev 403 at para 13.85.
46 See *Philips Hong Kong Ltd v Attorney-General of Hong Kong* [1993] BLR 41 at 55.
47 *Denka Advantech Pte Ltd v Seraya Energy Pte Ltd* [2021] 1 SLR 631 at [185].

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24 First, the so-called "*Peak* principle" was never viewed as an "equitable remedy". Despite referring to the English decisions of *Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd (No 2)*[48] and *North Midland Building Ltd v Cyden Homes Ltd*,[49] the Appellate Division in *Mickey Ng* did not acknowledge that the "*Peak* principle's" setting of time at large operates by replacing the obligation of completing on time with an implied term to complete within a reasonable time, rather than an equitable remedy. This is because it is simply not equity's role to rewrite the parties' contractual obligations so as to replace a fixed contractual stipulation with an implied term.

25 Second, the case of *Holme v Guppy*, which the so-called "*Peak* principle" was derived from, was squarely decided on the principles of common law.[50] The reported judgment clearly states that the claim was in *assumpsit*, which is a form of common law action. There was nothing in that judgment which suggested that the Court of Exchequer was exercising any equitable jurisdiction in deciding that matter. More importantly, there was nothing in that judgment which suggested that the "*Peak* principle" was conceived by the Court of Exchequer then as an equitable remedy.

26 In fact, one may even question whether the so-called "*Peak* principle", in so far as its effect is to set time at large, should be retained in Singapore law. This is given the trenchant criticism by several construction law judges and academics, which our courts have yet to address. It is not this case note's purpose to traverse these arguments in detail, though it remains important to give the reader some flavour of such criticisms.

27 First, the so-called "*Peak* principle's" effect of setting time at large potentially leads to unjust outcomes. The rule, if applied mechanically, could lead to the remarkable consequence of an employer losing the right to liquidated damages simply by making a trivial variation instruction, when there was already a long period of delay caused by the contractor's conduct.[51] Such a result goes far beyond the fundamental proposition that "no man be permitted to take advantage of his own wrong".[52]

48 *Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd (No 2)* [2007] EWHC 447 (TCC).
49 *North Midland Building Ltd v Cyden Homes Ltd* [2018] EWCA Civ 1744.
50 (1838) M&W 3. See Tony Marshall, "The Prevention Principle and Making the Contractor Pay for Employer Delay: Is English Law Departing from its Roots (Part 1) [2020] ICLR 325 at 329–330.
51 *Balfour Beatty Building Ltd v Chestermount Properties Ltd* (1993) 62 BLR 1 at 27.
52 Doug Jones, "Can Prevention be Cured by Time Bars" [2009] ICLR 57 at 73. The learned author, also currently International Judge in the Singapore International Commercial Court has suggested the "prevention principle" be reformulated such

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28 With the advent of specific and expansive time extension provisions in modern standard form construction contracts,[53] the scope for pursuing any "time at large" claims should also be limited.[54] This is because these clauses allow for an extension of contract completion dates when there is a relevant act of prevention. The contractor must then complete his work by the new date or be liable for liquidated damages and any other contractual consequences for late completion.[55]

29 Second, the rule was formulated when the courts treated any liquidated damages clauses as being oppressive and with the greatest dislike.[56] The courts now no longer regard these clauses with such hostility and the "*Peak* principle" is now viewed as being "of some antiquity".[57] Therefore, it is questionable whether the principle should be retained.[58]

30 Third, the cases on which the "*Peak* principle" are based do not necessarily support its application of setting time at large. In an article written extrajudicially,[59] Sir Vivian Ramsey IJ, an eminent construction lawyer and sitting International Judge of the Singapore International Commercial Court, referred to the leading House of Lords decision in *Trollope & Colls v North West Metropolitan Regional Board*.[60] In that case, their Lordships agreed with Lord Denning MR in the Court of Appeal below that the principle's scope was that if a party delays completion, it cannot insist on strict adherence to the time stated, and the party is precluded from claiming liquidated damages.[61] However, their Lordships stopped short of agreeing with Lord Denning that the "*Peak* principle" allowed for the replacement of an express contractual stipulation with an implied obligation that the work must be done within a reasonable time.

that the completion date is retained and liquidated damages be calculable from the original date minus any damages attributable to periods of delay caused by the owner.

53 See *Public Sector Standard Conditions of Contract for Design and Build 2020* (Building and Construction Authority, 7th Ed, 2014) cl 14.2(n) and *REDAS Design and Build Conditions of Main Contract* (Real Estate Developers' Association of Singapore, 4th Ed, 2022) cl 16.1.4.

54 *North Midland Building Limited v Cyden Homes Limited* [2018] EWCA 1744 at [13], *per* Coulson LJ.

55 *Adyard Abu Dhabi v SD Marine Services* [2011] EWHC 848 (Comm) at [243].

56 *Hudson's Building and Engineering Contracts* (Sir Nicholas Dennys QC & Robert Clay gen eds) (Sweet & Maxwell, 14th Ed, 2022) ch 6, at para 6-026.

57 *Bluewater Energy Services BV v Mercon Steel Structures BV* [2014] EWHC 2132 (TCC) at [518].

58 Max Twivy, "The Prevention Principle After *North Midland v Cyden Homes*: Time for Change?" [2019] BLR 375 at 391.

59 Sir Vivian Ramsey, "Construction Law: The English Modern Construction Law" (2022) 75(2) *Arkansas Law Review* 251.

60 *Trollope & Colls v North West Metropolitan Regional Board* [1973] 1 WLR 601.

61 *Trollope & Colls v North West Metropolitan Regional Board* [1973] 1 WLR 601 at 607.

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31 Given the significant concerns expressed amongst construction lawyers on retaining the "*Peak* principle" in its current state, it must therefore be seriously questioned whether this so-called principle should be extended beyond construction and shipbuilding contracts. It bears reminding that the contractor's position is vulnerable in the specific context of construction projects. This is given the heavy reliance on industry standard form contracts, where the allocation of contractual risks is often not tied to the contractor's ability of efficiently managing such risks.[62] Such concerns may not apply to other contractual contexts. Therefore, some clarification from a final appellate court on the scope and operation of the "*Peak* principle" would be welcome.

B. Implied duty to co-operate

32 It is telling that the Appellate Division in *Mickey Ng* recognised that the juridical basis for the implied term to co-operate was "not entirely settled", before eventually concluding that it was an implied term in fact.[63] This author agrees with the Appellate Division's conclusion but respectfully suggests that its reasoning deserves further scrutiny.

33 The implied duty to co-operate is traceable to Lord Blackburn's seminal judgment in *Mackay v Dick* ("*Mackay*"):[64]

> I think I may safely say, as a general rule, that where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect. What is the part of each must depend on circumstances.

34 The duty to co-operate is conceptually similar to an implied duty not to prevent the other party from performing its contractual obligations, The former is framed conceptually as a positive obligation, while the latter is framed as a restriction on particular conduct. That being said, they are actually both sides of the same coin. These two duties are just different facets of the same broad underlying principle that a party is prevented from taking advantage of his own wrong.[65]

62 Matthew Bell, "Scaling the Peak: The Prevention Principle in Australian Construction Contracting" [2006] ICLR 318 at 319–320.
63 *Ng Koon Yee Mickey v Mah Sau Cheong* [2022] 2 SLR 1296 at [87].
64 (1881) 6 App Cas 251 at 263.
65 Trevor Thomas, "The Doctrine of Prevention and the Doctrine of Penalties: Uniformity and Freedom of Contract" [2023] ICLR 45.

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35 We now turn to the well-established distinction between implied terms in fact and implied terms in law.[66] The former is a term implied to give effect to the parties' intentions in a particular contract. The latter is a term implied across a defined category of contracts, based on wider considerations that go beyond the contracting parties' intentions.[67]

36 The implied term in law has three functions.[68] First, to articulate a minimum standard of performance in expressly agreed obligations.[69] Second, to state a rule on how the nature of certain express contractual obligations should be construed. For example, s 13 of the Sale of Goods Act 1979[70] provides for an implied contractual condition that any goods sold shall correspond by their description.[71] Third, to impose certain mandatory obligations which give effect to an assumed consequence in a particular category of contracts.[72]

37 The Appellate Division raised four grounds in support of its conclusion that an implied duty to co-operate is an implied term in fact, which this author now addresses in turn.

38 First, the Appellate Division in *Mickey Ng* held that the implied duty to co-operate did not satisfy the requirement of having a definable category of relationships for which the term can be implied as a "necessary incident".[73] The issue here is really whether it is permissible to imply a narrowly defined duty of co-operation and/or non-prevention in certain categories of contracts such as in construction contracts, which will be further elaborated in this case note.[74]

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66 *Geys v Société Générale, London Branch* [2013] 1 AC 523 at [55].
67 *Scally v Southern Health and Social Services Board* [1992] 1 AC 294 at 307.
68 JW Carter *et al*, "Terms Implied in Law: 'Trust and Confidence' in the High Court of Australia" (2015) 32(3) *Journal of Contract Law* 203 at 223–225.
69 See *Liverpool City Council v Irwin* [1977] AC 239 at 254–255 and *R Manokaran v Chuah Ah Leng* [2022] SGHC 39 at [231]–[236].
70 2020 Rev Ed.
71 Sale of Goods Act 1979 (2020 Rev Ed) s 13(1).
72 *Commonwealth Bank of Australia v Barker* [2014] HCA 32 at [29], *per* French CJ, Bell and Keane JJ.
73 *Ng Koon Yee Mickey v Mah Sau Cheong* [2022] 2 SLR 1296 at [88]–[91].
74 Chow Kok Fong, *Law and Practice of Construction Contracts* (Sweet & Maxwell, 5th Ed, 2018) ch 1, at para 1.130, citing Sundaresh Menon JC's decision in *Jaya Sarana Engineering v GIB Automation Pte Ltd* [2007] SGHC 49 where his Honour held that there was such an implied term of co-operation and tellingly referred to the Court of Appeal's decision in *Jet Holding Ltd v Cooper Cameron (Singapore) Pte Ltd* [2006] 3 SLR(R) 769 – a case which dealt with implied terms in law.

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39 The second ground deserves further elaboration because it concerns the standard for implying terms in law. In reaching its conclusion that the implied duty to co-operate was an implied term in fact, the Appellate Division distinguished the Supreme Court of Victoria's decision in *Adaz Nominees Pty Ltd v Castleway Pte Ltd*[75] ("*Adaz*") which took the opposite view. The Appellate Division pointed out that in *Adaz*, the court rationalised the term as being implied based on "necessity" rather than wider policy considerations.[76] Some clarification is needed for this aspect of the court's reasoning – particularly on the standard for implying terms in law in Singapore.

40 In this author's view, the Appellate Division is not suggesting that implication of terms in law is based on wider policy considerations to the exclusion of a standard of necessity. Its repeated reference to the phrase "necessary incident of a definable category of contractual relationship" as *per* Lord Bridge's decision in *Scally v Southern Health and Social Services Board*[77] ("*Scally*") militates against this conclusion.[78] What the Appellate Division meant is that the concept of necessity in implication for terms in fact is concerned with the parties' presumed intentions, as opposed to the concept of necessity in implied terms in law, which engages broader considerations of policy, fairness and justice.[79]

41 However, the "necessity" criterion in *Scally* was criticised, with Dyson LJ in *Crossley v Faithful & Gould Holdings Ltd* ("*Crossley*") opining that instead of focusing on an "elusive concept of necessity", it is better to recognise that implying terms of law raises questions of reasonableness, fairness and the balancing of competing policy considerations.[80] It is notable that Dyson LJ's observations were consistently cited with approval by the Singapore courts.[81]

75 [2020] VSCA 201.

76 *Ng Koon Yee Mickey v Mah Sau Cheong* [2022] 2 SLR 1296 at [91]; *Adaz Nominees Pty Ltd v Castleway Pte Ltd* [2020] VSCA 201 at [116].

77 *Scally v Southern Health and Social Services Board* [1992] 1 AC 294. Lord Bridge's decision was also applied as a test in *R Manokaran v Chuah Ah Leng* [2022] SGHC 39 at [225].

78 *Ng Koon Yee Mickey v Mah Sau Cheong* [2022] 2 SLR 1296.

79 See *Liverpool City of Council v Irwin* [1977] 2 AC 239 where Lord Wilberforce at 254G explained "necessity" is one where "the nature of the contract implicitly requires and is determined having regard to the circumstances".

80 Teo Keang Sood, "Implication of Terms in Law in Singapore" (2014) 1 Sing JLS 151 at 166.

81 See, *eg*, *Forefront Medical Technology v Modern-Pak Pte Ltd* [2006] 1 SLR(R) 927 at [44] and *Jet Holding Ltd v Cooper Cameron (Singapore) Pte Ltd* [2006] 3 SLR(R) 769 at [86]–[90].

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42 In this author's view, it remains correct for the Appellate Division in *Mickey Ng* to apply the "necessity" criterion. Dyson LJ's decision in *Crossley* should not be seen as jettisoning the standard of necessity, since his Lordship was bound by the House of Lords' decisions in *Liverpool City Council v Irwin*[82] and *Scally*. To construe it otherwise would mean the *Crossley* decision was made *per incuriam*. The Singapore decisions may have referred to *Crossley* with approval, but none have explicitly rejected "necessity" as the standard for implying terms in law.

43 Professor Teo Keang Sood suggests that even without the language of "necessity", the courts would be slow and careful to imply a term in law because it establishes precedents for future contracts.[83] This, with respect, seems overly optimistic. Applying the broad language of "wider policy considerations, fairness and justice" as a test is just as elusive as the concept of necessity. It also risks reducing the legal enquiry into a question over whether it is desirable for the court to imply a term.[84] For instance, in *Malik v Bank of Credit and Commerce International SA*,[85] the House of Lords held that the implied term of mutual trust and confidence in employment contracts was an implied term in law on the basis that it was a social "fact" that was "workable in practice" and "welcomed in academic writings".[86] This decision has since attracted controversy and trenchant criticism both in Singapore and Australia.[87] The retention of the language of "necessity" at the very least serves as a clear indication that any implication, particularly on the basis of policy, must be kept within the limits of the judicial function.[88]

82 [1977] AC 239 at 254–255.

83 Teo Keang Sood, "Implication of Terms in Law in Singapore" (2014) 1 S Sing JLS 151 at 166.

84 Kah-Wai Tan, "Dismantling the Trojan Horse in Singapore: A Critical Evaluation of the Implied Term of Mutual Trust and Confidence" (2020) 36(3) *International Journal of Comparative Labour Law and Industrial Relations* 239 at 260.

85 [1998] AC 20.

86 *Malik v Bank of Credit and Commerce International SA* [1998] AC 20 at 46E, *per* Lord Steyn.

87 See *Kallivalap Praveen Nair v Glaxosmithkline Consumer Health Care Pte Ltd* [2022] SGHC 261 where the High Court rejected this term, aligning itself with the High Court of Australia's decision in *Commonwealth Bank of Australia v Barker* (2014) 312 ALR 356. The position in Singapore, however, remains open: see *The One Suites Pte Ltd v Pacific Motor Credit (Pte) Ltd* [2015] 3 SLR 695 and *Dong Wei v Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 at [82]. See also Kah-Wai Tan, "Dismantling the Trojan Horse in Singapore: A Critical Evaluation of the Implied Term of Mutual Trust and Confidence" (2020) 36(3) *International Journal of Comparative Labour Law and Industrial Relations* 239.

88 *Byrne v Australian Airlines Ltd* (1995) 131 ALR 422 at 450.

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44 Third, Lord Blackburn's statement of a "general rule" in *Mackay* only identifies the general features for implying a duty, rather than setting out a default duty to co-operate across all contracts.[89] The court's reasoning here is correct, and is supported by the subsequent sentences in Lord Blackburn's statement following his Lordship's description of the "general rule" itself.[90] It is also supported by the fact that English lawyers often use the terms "interpretation" and "construction" interchangeably.[91]

45 Finally, the Appellate Division recognised the Court of Appeal's caution in *Ng Giap Hon v Westcomb Securities Pte Ltd*[92] that terms implied in law should only be implied with circumspection.[93] It also noted the uncertainties of how the implied duty to co-operate interacts with the doctrine of good faith. It is beyond the scope of this note to address the ongoing academic debate on the doctrine of good faith, but it suffices to say that the Appellate Division's approach reflects the Singapore courts' conservative approach thus far on this issue.

46 At the heart of its analysis, the Appellate Division in *Mickey Ng* had to address one fundamental question – whether it is necessary to impose a default duty to co-operate across all share sale and purchase agreements of the same ilk? The concept of necessity being informed by not just by the implicit nature of these contracts but also in terms of policy, fairness and justice. As the Appellate Division in *Mickey Ng* correctly concluded, the answer must be in the negative. This is because there is nothing in the specific context of these contracts which justifies the superimposition of a general duty to co-operate, especially when these contracts are often detailed and appear complete on their face.

V. Conclusion

47 The Appellate Division's decision in *Mickey Ng* has posed interesting questions over the so-called "*Peak* principle" and the implied duty to co-operate. It is hoped that our courts will have the opportunity

89 *Ng Koon Yee Mickey v Mah Sau Cheong* [2022] 2 SLR 1296 at [93], citing with approval the observations by Edwin Peel, *Treitel on the Law of Contract* (Sweet & Maxwell, 15th Ed, 2020) ch 6, at para 6-065.
90 *Mackay v Dick* (1881) 6 App Cas 251 at 263.
91 Richard Hooley, "Implied Terms After *Belize Telecom*" (2014) 73(3) *Cambridge Law Journal* 315 at 331. *Cf*, Menon CJ in *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [31]–[32] who explained that "construction" is a composite process encompassing interpretation and implication.
92 [2009] 3 SLR(R) 518.
93 *Ng Koon Yee Mickey v Mah Sau Cheong* [2022] 2 SLR 1296 at [94].

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to reconsider the issues raised therein and clarify the legal position in Singapore.

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