SUBSTANTIVE LEGITIMATE EXPECTATIONS

The Singapore Reception

In *Chiu Teng @ Kallang Pte Ltd v Singapore Land Authority* [2014] 1 SLR 1047, the doctrine of substantive legitimate expectations was recognised as a stand-alone head of judicial review in Singaporean administrative law. This is a novel development. In this article, a careful review of the development in English judicial thought in relation to the substantive legitimate expectation doctrine since 1969 is undertaken, and the Australian and Canadian positions are summarily examined. In the light of this study, the *Chiu Teng* development is then closely analysed, and comments are proffered in relation to how the jurisprudence can better develop hereon.

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I. Introduction

1 Substantive review appears to have captured the imagination of parties interested in administrative law in Singapore of late. Towards the close of 2013, two major contributions occurred in the field. The first is an article by Daniel Tan analysing the development of the law of substantive review of administrative actions in Singapore,[1] and the second is the Singapore High Court decision of *Chiu Teng @ Kallang Pte Ltd v Singapore Land Authority*[2] ("*Chiu Teng*"). In *Chiu Teng*, Tay Yong Kwang J explicitly expanded the scope of substantive review available in Singapore through the introduction of the doctrine of substantive legitimate expectations as a stand-alone head of judicial review in

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1 Daniel Tan, "An Analysis of Substantive Review in Singaporean Administrative Law" (2013) 25 SAcLJ 296.

2 [2014] 1 SLR 1047.

Singapore law.[3] This development to the law in Singapore is novel and merits close examination. This article attempts this.

2 The focus of this article is the doctrine of substantive legitimate expectations. As observed by Tan, judicial review of administrative acts for procedural matters is largely uncontroversial.[4] However, the extent to which courts may interfere with administrative decisions on *substantive* grounds is less settled. This is because judicial review "is premised on the orthodoxy that it is review on the basis of the *legality* of a decision rather than its *merits*"[5] [emphasis in original]. Under the doctrine of substantive legitimate expectations, expectations with *substantive* qualities created by public bodies may be enforced by private persons. Interestingly enough, though this doctrine has hitherto been accepted in English law, it has been rejected in both Australia and Canada. Tay J's decision in *Chiu Teng* coheres with the English jurisprudential path.

3 This article is structured as follows. As a holistic understanding of a rule demands an appreciation of the rule's provenance, the article begins with examining the evolution of the doctrine of substantive legitimate expectations in English law. In recognition of their contributions, the Australian and Canadian perspectives on the doctrine will then be reviewed. Finally, the focus will return to Singapore, and three key observations in relation to the *Chiu Teng* development will be set out for the reader's consideration.

II. Development of the English position

A. The early cases

(1) Schmidt *(1969),* Ng Yuen Shiu *(1983) and* GCHQ *(1985)*

4 The notion of "legitimate expectations" existing in relation to private individuals' dealings with public authorities – and the corollary idea that such "expectations" warrant legal protection – first arose in the context of the protection of procedural rights. As observed by Tay J in *Chiu Teng*,[6] the term "legitimate expectation" was first used by Lord Denning MR in *Schmidt v Secretary of State for Home Affairs*[7] ("*Schmidt*"), where, in the light of a decision of the Home Secretary to

3 *Chiu Teng @ Kallang Pte Ltd v Singapore Land Authority* [2014] 1 SLR 1047 at [119].

4 Daniel Tan, "An Analysis of Substantive Review in Singaporean Administrative Law" (2013) 25 SAcLJ 296.

5 Daniel Tan, "An Analysis of Substantive Review in Singaporean Administrative Law" (2013) 25 SAcLJ 296 at 297.

6 *Chiu Teng @ Kallang Pte Ltd v Singapore Land Authority* [2014] 1 SLR 1047 at [73].

7 [1969] 2 Ch 149.

refuse extension of a foreign student's temporary permit to stay in the UK without granting the student a hearing, his Lordship observed:[8]

> It all depends on whether he has some right or interest, or, I would add, *some legitimate expectation*, of which it would not be fair to deprive him without hearing what he has to say. [emphasis added]

5 Not much more was said in relation to the legitimate expectation concept in *Schmidt* or in the cases in the immediate years following it, and its scope or basis was not examined.[9] Eight years after *Schmidt* in 1977, however, a strident criticism of Lord Denning MR's concept arose in a judgment of Barwick CJ of the High Court of Australia. In *Salemi v MacKellar (No 2)*[10] ("*Salemi*"), Barwick CJ said:[11]

> It is … necessary to examine the eloquent phrase 'legitimate expectation' derived as it is from the reasons for judgment of the Master of Rolls in *Schmidt v Secretary of State for Home Affairs*. I am bound to say that I appreciate its literary quality better than I perceive its precise meaning and the perimeter of its application. But, no matter how far the phrase may have been intended to reach, at its centre is the concept of legality, that is to say, it is a lawful expectation which is in mind. I cannot attribute any other meaning in the language of a lawyer to the word 'legitimate' than a meaning which expresses the concept of entitlement or recognition by law. So understood, the expression probably adds little, if anything, to the concept of a right.

6 The Privy Council responded to this criticism six years after in 1983 by introducing the vocabulary of "reasonableness" to assist in explaining the meaning of the word "legitimate". In *Attorney-General of Hong Kong v Ng Yuen Shiu*[12] ("*Ng Yuen Shiu*"), the Privy Council disagreed with the opinion of the Australian Chief Justice in *Salemi* and held that the word "legitimate" in the expression "legitimate expectations" should be read as meaning "reasonable".[13] The relevant portion of the judgment of the Board delivered by Lord Fraser of Tullybelton is reproduced:[14]

> The … proposition for which the applicant contended was that a person is entitled to a fair hearing before a decision adversely affecting his interests is made by a public official or body, if he has 'a legitimate expectation' of being accorded such a hearing. The phrase 'legitimate expectation' in this context originated in the judgment of

8 *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch 149 at 170.
9 See *De Smith's Judicial Review* (Rt Hon Lord Harry Woolf *et al* eds) (Sweet & Maxwell, 7th Ed, 2013) at p 663.
10 (1977) 137 CLR 396.
11 *Salemi v MacKellar (No 2)* (1977) 137 CLR 396 at 404.
12 [1983] 2 AC 629.
13 *Attorney-General of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629 at 636.
14 *Attorney-General of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629 at 636.

> Lord Denning MR in *Schmidt v Secretary of State of Home Affairs* [1969] 2 Ch 149, 170. It is many ways an apt one to express the underlying principle, though it is somewhat lacking in precision. In *Salemi v MacKellar (No 2)* (1977) 137 CLR 396, 404, Barwick CJ construed the word 'legitimate' as expressing the concept of 'entitlement or recognition by law'. So understood, the expression (as Barwick CJ rightly observed) 'adds little, if anything, to the concept of a right'. *With great respect to Barwick CJ, their Lordships consider that the word 'legitimate' in that expression falls to be read as meaning 'reasonable'. Accordingly 'legitimate expectations' in this context are capable of including expectations which go beyond enforceable legal rights, provided they have some reasonable basis.* [emphasis added]

7 Even though what the applicant in *Ng Yuen Shiu* contended for was a procedural matter (*ie*, a "fair hearing"), the Privy Council's reading of the meaning of "legitimate" as meaning "reasonable" was a radical development which immensely expanded the ambit of the "legitimate expectation" idea. In the absence of any articulated limitation then, it meant that expectations could conceivably be protected so long as they were backed by *some reasonable basis*.

8 In *Council of Civil Service Unions v Minister for the Civil Service*[15] ("*GCHQ*"), two years after *Ng Yuen Shiu*, the House of Lords continued to apply the vocabulary of "reasonableness" to construing legitimate expectations. However, the expansive approach taken by the Privy Council in *Ng Yuen Shiu* that "legitimate" meant "reasonable" was retracted somewhat. In *GCHQ*, Lord Diplock opined that equating the word "legitimate" with the word "reasonable" could lead to confusion as the phraseology of "reasonable expectation" could connote a lack of legal consequences.[16] Furthermore, Lord Diplock observed that the word "reasonable" could bear different shades of meaning depending on the context in which it is being used.[17] Lord Fraser of Tullybelton, who wrote the Privy Council's judgment in *Ng Yuen Shiu*, concurred with Lord Diplock's observations above and explained that the word "reasonable" was intended to be only exegetical (*ie*, explanatory) of "legitimate".[18]

9 It would not be too far-fetched to suppose that it was the grafting of the concept of "reasonableness" onto the idea of "legitimate expectations" in *Ng Yuen Shiu* that paved the way for the latter expansion of the doctrine in England to cover the protection of substantive rights. After the concept of "reasonableness" was expressly

15 [1985] AC 374.

16 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 408–409.

17 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 409.

18 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 401.

adopted in *Ng Yuen Shiu*, it was a very natural step for Lord Fraser of Tullybelton to set the foundation for substantive relief by stating in *GCHQ* that:[19]

> Legitimate, *or reasonable*, expectation may arise either from an express promise or from the existence of a regular practice which the claimant can reasonably expect to continue. [emphasis added]

10 In Australia, by sharp contrast, the idea that substantive relief can be sought on the basis of legitimate expectations never took root. This must be viewed to stem from the fact that in Australia, the concept "legitimate, or reasonable, expectations" outside of defined legal entitlements was never accepted into the jurisprudence of judicial review.[20] The focus there was firmly on strict *legality*.[21] The importance of this jurisprudential fork cannot be downplayed – *Ng Yuen Shiu* was the fulcrum upon which the entire doctrine of substantive legitimate expectations was latter constructed. If one reads "legitimate expectations" in the sense construed by Barwick CJ, the natural conclusion is that only expectations based on rights *in esse* should be protected. Besides legal rights, this is likely to cover only procedural rights based on natural justice principles. This was the jurisprudential path taken by Australia. If, however, one reads "legitimate expectations" in the sense set out by Lord Fraser of Tullybelton (*ie*, allowing for considerations of *reasonableness* generally), room exists for the doctrine of substantive legitimate expectations.

11 It is recognised, speaking from a standpoint of morality, that there is always a case for protecting expectations that are founded upon reasonable bases. That is not denied. But, to adapt the words of Lord Diplock, if one were to allow open-textured *reasonable* expectations (*ie*, substantive review) to be the basis of *judicial review*, one would be according public law legal consequences to situations where there were previously none.[22] Should the Singapore Court of Appeal have the opportunity to evaluate *Chiu Teng*, the *Ng Yuen Shiu* jurisprudential fork must be fully evaluated, and the query must be made as to whether judicial review is the right avenue for the protection of *reasonable* (as opposed to the strictly *legal*) expectations of public individuals *vis-à-vis* public bodies.

19 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 401.
20 *Salemi v MacKellar (No 2)* (1977) 137 CLR 396 at 404.
21 See generally Jeffrey Goldsworthy, "Australia: Devotion to Legalism" in *Interpreting Constitutions: A Comparative Study* (Jeffrey Goldsworthy ed) (Oxford University Press, 2007) at p 106.
22 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 408–409.

B. The birth of substantive review

(1) Coughlan *(2000)*

12 After *GCHQ*, the doctrine of *substantive* legitimate expectations first appears to have properly crystallised in England in its Court of Appeal decision of *R v North and East Devon Health Authority, ex parte Coughlan*[23] ("*Coughlan*"). *Coughlan* represented a major development to the law of judicial review because in it, the English Court of Appeal drew a clear distinction between procedural review and substantive legitimate expectations, and expressly articulated the availability of curial remedies with respect to deviations from the latter. The court did this through setting out a three-scenario framework. In relation to private individuals having legitimate expectations of public bodies, the court said:[24]

> There are at least three possible outcomes. (a) The court may decide that the public authority is only required to bear in mind its previous policy or other representation, giving it the weight it thinks right, but no more, before deciding whether to change course. Here, the court is confined to reviewing the decision on *Wednesbury grounds (Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223). This has been held to be the effect of changes of policy in cases involving the early release of prisoners: see *In re Findlay* [1985] AC 318; *R v Secretary of State for the Home Department, Ex p Hargreaves* [1997] 1 WLR 906. (b) On the other hand the court may decide that the promise or practice induces a legitimate expectation of, for example, being consulted before a particular decision is taken. Here it is uncontentious that the court itself will require the opportunity for consultation to be given unless there is an overriding reason to resile from it (see *Attorney General of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629) in which case the court will itself judge the adequacy of the reasons advanced for the change of policy, taking into account what fairness requires. (c) Where the court considers that a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive, not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy.

13 Under this framework, scenario (a) covers situations where judicial review is rejected except on *Wednesbury* grounds, scenario (b) allows effect to be given to procedural legitimate expectations, and

23 [2001] QB 213; [2000] 2 WLR 622.

24 *R v North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213 at [57]; [2000] 2 WLR 622 at [57].

scenario (c) allows effect to be given to substantive legitimate expectations. It is scenario (c) that this article is concerned with. In relation to this scenario, the court observed that "the court has when necessary to determine whether there is sufficient overriding interest to justify a departure from what has been previously promised".[25]

14 It will be observed that the theoretical basis underlying the Court of Appeal's formulation of scenario (c) is the idea of "abuse of power"[26] – it was, in short, based on this concept that the court justified curial intervention to prevent the frustration of substantive legitimate expectations. The court drew upon the reasoning of Lord Scarman in *Ex parte Preston*[27] ("*Preston*") as the basis for this. In *Preston*, Lord Scarman had advanced the proposition that "unfairness in the purported exercise of a power can be such that it is an abuse or excess of power", thus tying together the concepts of "fairness" and "abuse of power".[28] Based on this, the Court of Appeal in *Coughlan* considered that abuse of power can arise upon the rather "unfair" situation of a decision-making authority "reneging without adequate justification, by an otherwise lawful decision, on a lawful promise or practice adopted towards a limited number of individuals".[29]

15 In such situations, the Court of Appeal considered, for the concept of "fairness" to mean anything, it has to include "fairness of outcome".[30] This, the court considered, justified the extension of the doctrine of legitimate expectations to cover not just procedural but also substantive matters.[31]

16 Whilst observing that the limits to the doctrine of legitimate expectations were yet uncertain,[32] the court in *Coughlan* considered the

25 *R v North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213 at [58]; [2000] 2 WLR 622 at [58].
26 *R v North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213 at [57]; [2000] 2 WLR 622 at [57].
27 [1985] AC 835.
28 *R v North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213 at [67]; [2000] 2 WLR 622 at [67].
29 *R v North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213 at [69]; [2000] 2 WLR 622 at [69].
30 *R v North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213 at [71]; [2000] 2 WLR 622 at [71].
31 *R v North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213 at [71]; [2000] 2 WLR 622 at [71].
32 *R v North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213 at [71]; [2000] 2 WLR 622 at [71].

following passage of Simon Brown LJ in *Ex parte Unilever plc*[33] to be a useful reconciliation of the various jurisprudential strands:[34]

> 'Unfairness amounting to an abuse of power' as … in Preston and the other revenue cases is *unlawful not because it involves conduct such as would offend some equivalent private law principle, not principally indeed because it breaches a legitimate expectation that some different substantive decision will be taken, but rather because it is illogical or immoral or both for a public authority to act with conspicuous unfairness and in that sense abuse its power*. [emphasis added]

17 It is clear thus that at the time of *Coughlan*, substantive legitimate expectations did not exist as a stand-alone head of judicial review, but rather as a derivative of the idea that "unfairness in the purported exercise of power can amount to an abuse or excess of power" which should give rise to the availability of judicial review.[35]

C. Early articulations and justifications

(1) Begbie *(2000)*

18 Just a month after the decision of *Coughlan* was laid down, the English Court of Appeal added a refinement to the doctrine of legitimate expectations in *R v Secretary of State for Education and Employment, ex parte Bebgie*[36] ("*Begbie*"). In *Begbie*, Laws LJ observed that "[a]buse of power has become, or is fast becoming, the root concept which governs and conditions our general principles of public law",[37] and appeared to express some consternation at the manner of its articulation with respect to legitimate expectations in *Coughlan*. Laws LJ said:[38]

> The difficulty, and at once therefore the challenge, in translating this root concept or first principle into hard clear law is to be found in this question, to which the court addressed itself in the *Coughlan* case: where a breach of a legitimate expectation is established, how may the breach be justified to this court? In the first of the three categories

33 [1996] STC 681.

34 *R v North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213 at [80]; [2000] 2 WLR 622 at [80]; *Ex parte Unilever plc* [1996] STC 681 at 695.

35 See *R v North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213 at [79]; [2000] 2 WLR 622 at [79], citing W Wade & C Forsyth, *Administrative Law* (Clarendon Press, 7th Ed, 1994) at p 419. See also *R v North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213 at [67]–[68]; [2000] 2 WLR 622 at [67]–[68] and *Ex parte Preston* [1985] AC 835 at 851 and 862.

36 [2000] 1 WLR 1115.

37 *R v Secretary of State for Education and Employment, ex parte Bebgie* [2000] 1 WLR 1115 at 1129.

38 *R v Secretary of State for Education and Employment, ex parte Bebgie* [2000] 1 WLR 1115 at 1129–1130.

> given in *Ex parte Coughlan*, the test is limited to the *Wednesbury* principle. But in the third (where there is a legitimate expectation of a substantive benefit) the court must decide 'whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power'. … However the first category may also involve deprivation of a substantive benefit. What marks the true difference between the two?

19 Laws LJ expressed a measure of doubt, in short, over why the consideration of "fairness" should be applicable in relation to the third category of case in *Coughlan*, but not to the first. His Lordship explained:[39]

> Fairness and reasonableness (and their contraries) are objective concepts; otherwise there would be no public law, or if there were it would be palm tree justice. But each is a spectrum, not a single point, and they shade into one another.

20 Whilst it appeared that the first category of case in *Coughlan* "covered expectations involving policies or promises of wide or general application"[40] while the third category (warranting substantive review) "involved specific promises to one or only a few people",[41] Laws LJ doubted that the categories could be "hermetically sealed".[42] His Lordship considered that it would be more coherent for the law to not draw sharp delineations between expectations of wide or general application (which allow review only on *Wednesbury* grounds (*Coughlan*'s first category)) and expectations of narrow application (which permit review on substantive fairness considerations (*Coughlan*'s third category), but rather recognise that varying levels of review may be warranted. His Lordship explained:[43]

> The more the decision challenged lies in what may inelegantly be called the macro-political field, the less intrusive will be the court's supervision. More than this: in that field, true abuse of power is less likely to be found, since within it changes of policy, fuelled by broad conceptions of the public interest, may more readily be accepted as taking precedence over the interests of groups which enjoyed expectations generated by an earlier policy.

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39 *R v Secretary of State for Education and Employment, ex parte Bebgie* [2000] 1 WLR 1115 at 1130.

40 See Matthew Groves, "Substantive Legitimate Expectations in Australian Administrative Law" (2008) 32 *Melbourne University Law Review* 470 at 484.

41 See Matthew Groves, "Substantive Legitimate Expectations in Australian Administrative Law" (2008) 32 *Melbourne University Law Review* 470 at 484.

42 *R v Secretary of State for Education and Employment, ex parte Bebgie* [2000] 1 WLR 1115 at 1130.

43 *R v Secretary of State for Education and Employment, ex parte Bebgie* [2000] 1 WLR 1115 at 1131.

(2) Bibi *(2001)*

21 A year later in *R (Bibi) v Newham London Borough Council; R (Al-Nashed) v Newham London Borough Council*[44] ("*Bibi*"), a differently constituted Court of Appeal observed, regarding the phrase "legitimate expectations", that:[45]

> … [t]he case law is replete with words such as 'legitimate' and 'fair', 'abuse of power' and 'inconsistent with good administration'. When reading the judgments care needs to be taken to distinguish analytical tools from conclusions which encapsulate value judgments but do not give any indication of the route to those conclusions.

22 The Court of Appeal then conceptualised a broad practical framework for assessing legitimate expectation cases. It articulated three steps of inquiry:[46]

> In all legitimate expectation cases, whether substantive or procedural, three practical questions arise. The first question is to what has the public authority, whether by practice or promise, committed itself; the second is whether the authority has acted or proposes to act unlawfully in relation to its commitment; the third is what the court should do.

23 The court in *Bibi* recognised, however, that answering the second question may not always be straightforward due to the need to identify the "measuring rods by which it can be objectively determined whether a certain action or inaction is an abuse of power".[47] An interesting point arose because counsel for the governmental authority in *Bibi* submitted that, absent bad faith, "a substantive legitimate expectation can only arise where a situation analogous to a private law wrong, and therefore involving detrimental reliance, exists".[48] A question before the court, then, was whether detrimental reliance should be a requirement for the operation of the doctrine.

24 The court answered in the negative, considering that "the significance of reliance and of consequent detriment is factual, not legal".[49] In its view, "reliance, though potentially relevant in most cases, is

44 [2001] EWCA Civ 607; [2002] 1 WLR 237.

45 *R (Bibi) v Newham London Borough Council; R (Al-Nashed) v Newham London Borough Council* [2001] EWCA Civ 607 at [18]; [2002] 1 WLR 237 at [18].

46 *R (Bibi) v Newham London Borough Council; R (Al-Nashed) v Newham London Borough Council* [2001] EWCA Civ 607 at [19]; [2002] 1 WLR 237 at [19].

47 *R (Bibi) v Newham London Borough Council; R (Al-Nashed) v Newham London Borough Council* [2002] 1 WLR 237 at [22]; [2001] EWCA Civ 607 at [22].

48 *R (Bibi) v Newham London Borough Council; R (Al-Nashed) v Newham London Borough Council* [2002] 1 WLR 237 at [26]; [2001] EWCA Civ 607 at [26].

49 *R (Bibi) v Newham London Borough Council; R (Al-Nashed) v Newham London Borough Council* [2002] 1 WLR 237 at [31]; [2001] EWCA Civ 607 at [31].

not essential".[50] Supporting this, the court cited the proposal of Professor Craig[51] that:[52]

> Where an agency seeks to depart from an established policy in relation to a particular person detrimental reliance should not be required. Consistency of treatment and equality are at stake in such cases, and these values should be protected irrespective of whether there has been any reliance as such.

(3) Nadarajah *(2005)*

25 The next major development in the legitimate expectation jurisprudence arose in the case of *R (Nadarajah) v Secretary of State for the Home Department*[53] ("*Nadarajah*"). In *Nadarajah*, Laws LJ doubted the utility of the concept of "abuse of power" as a foundation for the doctrine of substantive legitimate expectations. His Lordship said:[54]

> Principle is not … supplied by the call to arms of abuse of power. Abuse of power … is a useful name, for it catches the moral impetus of the rule of law … But it goes no distance to tell you, case by case, what is lawful and what is not.

26 Laws LJ considered that instead of "abuse of power", a more appropriate golden thread with which the doctrine of substantive legitimate expectations should be held together would be the principle of good administration. His Lordship said:[55]

> The search for principle surely starts with the theme that is current through all legitimate expectation cases. It may be expressed thus. Where a public authority has issued a promise or adopted a practice which represents how it proposes to act in a given area, the law will require the promise or practice to be honoured unless there is good reason not to do so. What is the principle behind this proposition? It is not far to seek. It is said to be grounded in fairness, and no doubt in general terms that is so. I would prefer to express it rather more broadly as a requirement of good administration, by which public bodies ought to deal straightforwardly and consistently with the

50 *R (Bibi) v Newham London Borough Council; R (Al-Nashed) v Newham London Borough Council* [2002] 1 WLR 237 at [28]; [2001] EWCA Civ 607 at [28]; citing *R v Secretary of State for Education and Employment, ex parte Bebgie* [2000] 1 WLR 1115 at 1123–1124.

51 Paul Craig, *Administrative Law* (Sweet & Maxwell, 4th Ed, 1999) at p 619. Professor Paul Craig's views remain in the current edition of his textbook: see *Administrative Law* (Sweet & Maxwell, 7th Ed, 2012) at p 688.

52 *R (Bibi) v Newham London Borough Council; R (Al-Nashed) v Newham London Borough Council* [2002] 1 WLR 237 at [30]; [2001] EWCA Civ 607 at [30].

53 [2005] EWCA Civ 1363.

54 *R (Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363 at [67].

55 *R (Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363 at [68].

> public. In my judgment this is a legal standard which … takes its place alongside such rights as fair trial, and no punishment without law.

27 Laws LJ then explained how the principle of good administration would operate, and delineated its scope, explicitly introducing to the doctrine the language of "proportionality". His Lordship stated:[56]

> [T]here is every reason to articulate the limits of this requirement – to describe what may count as good reason to depart from it … Accordingly a public body's promise or practice as to future conduct may only be denied … in circumstances where to do so is the public body's legal duty, or is otherwise, to use a now familiar vocabulary, a proportionate response (of which the court is the judge, or the last judge) having regard to a legitimate aim pursued by the public body in the public interest.

28 His Lordship further explained:[57]

> The principle that good administration requires public authorities to be held to their promises would be undermined if the law did not insist that any failure or refusal to comply is objectively justified as a proportionate measure in the circumstances.

29 In the light of this test of proportionality, Laws LJ accepted a list of six non-exhaustive factors proposed by counsel for the public authority in *Nadarajah* which would be of guidance in determining whether expectations should be enforced. The framework comprises:[58] (a) a promise specifically communicated to an individual or a group, which is then ignored (as in *Coughlan*); (b) inquiring into the representation's level of clarity/unambiguity; (c) inquiring whether an individual is singled out from the class of persons affected by the representation who is then treated less favourably in relation to the others; (d) inquiring as to the presence of detrimental reliance; (e) inquiring whether the promise was the result of an honest mistake; and (f) inquiring whether the public authority's communication was tainted by maladministration, verging on bad faith.

30 It should be emphasised that this framework was not couched as a test – the six listed factors are merely relevant considerations in determining whether or not and if so the extent to which a public authority's duty to act proportionately is breached. In this light, the

56 *R (Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363 at [68].

57 *R (Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363 at [68].

58 *R (Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363 at [64] and [69].

inclusion of detrimental reliance within them is not inconsistent with *Bibi*. Laws LJ explained:[59]

> [W]here the representation relied on amounts to an unambiguous promise; where there is detrimental reliance; where the promise is made to an individual or specific group; these are instances where denial of the expectation is likely harder to justify as a proportionate response.

D. Later refinements

(1) Bancoult *(2008)*

31 In *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)*[60] ("*Bancoult*"), the House of Lords had the opportunity to examine the substantive legitimate expectation doctrine. *Bancoult* concerned two 2004 Orders in Council which removed any right of abode and entry entitlement to the islanders of the Chagos Archipelago who had some decades prior been compulsorily removed from their islands because the archipelago's principal island, Diego Garcia, was required for a US military base. The claimant argued, *inter alia*, that these Orders frustrated the islanders' legitimate expectation, which had been raised by a 2000 statement by the Foreign Secretary, that their right of abode would not be taken away, if at all, without prior consultation and the opportunity for parliamentary discussion. The expectation of the islanders, in short, was that they would be permitted to return to the Chagos islands.

32 All five Law Lords recognised the doctrine of substantive legitimate expectations, but the House divided on its application to the facts. Lords Hoffmann, Rodger and Carswell found that the 2000 Foreign Secretary statement did not amount to a clear, unambiguous promise and on that basis held that no legitimate expectation had been created. Lords Bingham and Mance, dissenting, found that the statement was sufficiently unequivocal and did give rise to legitimate expectations that cannot be resiled on by the Government without compelling reason. In individual judgments, Lord Carswell (of the majority, for this issue) and Lord Mance (of the minority, for this issue) set out their respective observations regarding the doctrine of substantive legitimate expectations.

33 It is interesting to note the one key area of divergence between Lord Carswell's and Lord Mance's opinions. Lord Carswell adopted the

59 *R (Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363 at [69].

60 [2008] UKHL 61; [2009] 1 AC 453; [2008] 3 WLR 955.

Coughlan formulation of the foundation of the doctrine of substantive legitimate expectations as being the concepts of "abuse of power" and "unfairness".[61] Lord Mance, in contrast, adopted Laws LJ's view from *Nadarajah* that the doctrine finds its grounding in the "requirement of good administration".[62] This distinction is to be regarded as one of some importance as it affects the colouration of the lens through which one approaches analysing the doctrine – the former characterisation implicitly allows *all the circumstances* of a case to be considered, whereas the latter characterisation narrows somewhat the focus of the relevant inquiry onto the conduct *of the public authority* (and not of the claimant). This subtle but key distinction appears to have been borne out in the respective analyses of Lords Carswell and Mance in relation to the question of "reliance" – Lord Carswell couched the claimant's reliance on the promise or representation and the consideration of whether he has thereby suffered any detriment as very relevant factors that "tend to show" that there has been an abuse of power.[63] Lord Mance, in contrast, made the observation that proving reliance is "not a pre-condition" to the recognition of substantive legitimate expectations.[64] Whilst the positions are not mutually inconsistent, they reflect a difference in the possible jurisprudential starting points one may take in considering the idea of judicial review – should judicial review be more concerned with general (moral) conceptualisations of fairness and fair dealing? Or should judicial review be concerned more narrowly with the legality of the actions of public authorities?

34 *Chiu Teng* did not consider *Bancoult*. In addition, it is notable that in incorporating the doctrine of substantive legitimate expectations into Singapore law, Tay J did not adopt or articulate either of the possible principles (*ie*, "golden-threads") underlying the doctrine. In characterising the first five requirements of his Honour's six-stage inquiry[65] as being matters mandatory for claimants to prove, however, and, crucially, in expressly including the *claimant-centric* requirements (d) and (e),[66] it appears that his Honour ruled as he did based more on the

61 *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61 at [135]; [2009] 1 AC 453 at [135]; [2008] 3 WLR 955 at [135].

62 *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61 at [182]; [2009] 1 AC 453 at [182]; [2008] 3 WLR 955 at [182].

63 *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61 at [135]; [2009] 1 AC 453 at [135]; [2008] 3 WLR 955 at [135].

64 *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61 at [179]; [2009] 1 AC 453 at [179]; [2008] 3 WLR 955 at [179].

65 *Chiu Teng @ Kallang Pte Ltd v Singapore Land Authority* [2014] 1 SLR 1047 at [119].

66 *Ie*, that an applicant must prove that it was reasonable for him to rely on the public body's statement or representation in the circumstances of his case, and that the applicant must prove that he did rely on the statement or representation and that he suffered a detriment as a result: see para 58 below, where Tay J's six-stage inquiry is fully set out.

broader concepts of "abuse of power" and "unfairness".[67] Based on the judgment in *Chiu Teng*, the question "should judicial review be concerned with general moral conceptualisations of fairness and fair dealing" appears to have been answered by Tay J in the affirmative. It may be open to argument whether or not this position is legally justified (or justifiable) in Singapore.

35 Two additional points may also be of note in relation to *Bancoult* and the doctrine of substantive legitimate expectations. First, whilst accepting the doctrine in principle, the House of Lords did not deign fit to "express a concluded opinion on the limits of the concept".[68] Second, and relatedly, the House did not express an opinion about "whether it is helpful or appropriate to rationalise the situations in which a departure from a prior decision is justified in terms of proportionality".[69]

36 Despite these doubts, Lord Hoffmann in *Bancoult* set out[70] a summary of the English law position on the doctrine. This summary, which has since been considered useful and applied by the Privy Council in *Francis Paponette v The Attorney General of Trinidad and Tobago*[71] ("*Paponette*"), which we will next turn to, states:[72]

> It is clear that in a case such as the present, a claim to legitimate expectation can be based only upon a promise which is 'clear, unambiguous and devoid of relevant qualification': see Bingham LJ in *R v Inland Revenue Comrs, Ex p MFK Underwriting Agents Ltd* [1990] 1 WLR 1545, 1569. It is not essential that the applicant should have relied upon the promise to his detriment, although this is a relevant consideration in deciding whether the adoption of a policy in conflict with the promise would be an abuse of power and such a change of policy may be justified in the public interest, particularly in the area of what Laws LJ called 'the macro-political field': see *R v Secretary of State for Education and Employment, Ex p Begbie* [2000] 1 WLR 1115, 1131.

67 See *Chiu Teng @ Kallang Pte Ltd v Singapore Land Authority* [2014] 1 SLR 1047 at [119].

68 See *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61 at [133]; [2009] 1 AC 453 at [133]; [2008] 3 WLR 955 at [133], *per* Lord Carswell.

69 See *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61 at [182]; [2009] 1 AC 453 at [182]; [2008] 3 WLR 955 at [182], *per* Lord Mance.

70 *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61 at [60]; [2009] 1 AC 453 at [60]; [2008] 3 WLR 955 at [60].

71 [2010] UKPC 32.

72 *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61 at [60]; [2009] 1 AC 453 at [60]; [2008] 3 WLR 955 at [60]; *Francis Paponette v The Attorney General of Trinidad and Tobago* [2010] UKPC 32 at [28].

(2) Paponette *(2010)*

37 In *Paponette*, as stated, the Privy Council applied the summary of principles set out by Lord Hoffmann in *Bancoult*,[73] lending further credence to the legitimacy of the substantive legitimate expectation doctrine. *Paponette*'s jurisprudential contribution to the doctrine's evolution, however, lay in the issue of burden of proof. The Board held:[74]

> The initial burden lies on the applicant to prove the legitimacy of his expectation. This means that in a claim based on a promise, the applicant must prove the promise and that it was clear and unambiguous and devoid of relevant qualification. If he wishes to reinforce his case by saying that he relied on the promise to his detriment, then obviously he must prove that too. Once the elements have been proved by the applicant, however, the onus shifts to the authority to justify the frustration of the legitimate expectation. It is for the authority to identify any overriding interest on which it relies to justify the frustration of the expectation. It will then be a matter for the court to weigh the requirements of fairness against interest.

(3) Patel *(2013)*

38 Most recently in *R (Patel) v General Medical Council*[75] ("*Patel*"), the English Court of Appeal utilised a six-step framework to determine if substantive relief on the ground of substantive legitimate expectations should be granted. As organised and set out in *Chiu Teng*, this framework is as follows:[76]

> (a) The statement or representation relied upon as giving rise to a legitimate expectation must be 'clear, unambiguous and devoid of relevant qualification' … .[77]
>
> (b) The party seeking to rely on the statement or representation must have placed all his cards on the table … .[78]
>
> (c) While detrimental reliance is not a condition precedent, its presence may be an influential consideration in determining what weight should be given to the legitimate expectation … .[79]
>
> (d) The statement or representation must be pressing and focused. While in theory there is no limit to the number of beneficiaries, in reality the number is likely to be small as:

73 See para 36 above.
74 *Francis Paponette v The Attorney General of Trinidad and Tobago* [2010] UKPC 32 at [37].
75 [2013] 1 WLR 2801.
76 *Chiu Teng @ Kallang Pte Ltd v Singapore Land Authority* [2014] 1 SLR 1047 at [82].
77 *R (Patel) v General Medical Council* [2013] 1 WLR 2801 at [40].
78 *R (Patel) v General Medical Council* [2013] 1 WLR 2801 at [41].
79 *R (Patel) v General Medical Council* [2013] 1 WLR 2801 at [84].

> (i) it is difficult to imagine a case in which the Government will be held legally bound by a representation or undertaking made generally or to a diverse class; and
>
> (ii) the broader the class claiming the benefit of the expectation the more likely it is that a supervening public interest will be held to justify the change of position … .[80]
>
> (e) The burden of proof lies on the applicant to prove the legitimacy of his expectation. Once this is done the onus shifts to the respondent to justify the frustration of the legitimate expectation. It is for the authority to identify any overriding interest on which it relies to justify the frustration of the expectation … .[81]
>
> (f) The court has to decide for itself whether there is a sufficient overriding interest to justify a departure from what has been previously promised …. .[82] In doing so the court must weigh the competing interests. The degree of intensity of review will vary from case to case, depending on the character of the decision challenged … .[83]

39 In the light of the forgoing overview of the development of the doctrine of substantive legitimate expectations in English law since the phrase "legitimate expectation" was first used by Lord Denning MR in *Schmidt* in 1969, it is observed that none of the constituent propositions in the *Patel* framework should, in English law, be the subject of jurisprudential controversy.

40 Across the globe, however, the very existence of the doctrine of substantive legitimate expectations was much doubted – it is to these Australian and Canadian perspectives to which we now turn.

III. Australian and Canadian perspectives

A. The Australian objection

41 The Australian position is generally that "expectations about the exercise of administrative power may only give rise to procedural rights".[84] The emergence of the doctrine of substantive legitimate expectations in the early years of the 21st century in England did not go unnoticed in Australia, however, and became the subject of some academic analysis. The leading commentary appears to be by Matthew

80 *R (Patel) v General Medical Council* [2013] 1 WLR 2801 at [50].
81 *R (Patel) v General Medical Council* [2013] 1 WLR 2801 at [58].
82 *R (Patel) v General Medical Council* [2013] 1 WLR 2801 at [60].
83 *R (Patel) v General Medical Council* [2013] 1 WLR 2801 at [61].
84 Matthew Groves, "Substantive Legitimate Expectations in Australian Administrative Law" (2008) 32 *Melbourne University Law Review* 470 at 471; see also *Chiu Teng @ Kallang Pte Ltd v Singapore Land Authority* [2014] 1 SLR 1047 at [86]–[88].

Groves[85] ("Groves"). In this article, Groves (a) sets out two continuing areas of difficulty in relation to the doctrine of legitimate expectations; (b) rejects the applicability of private law estoppel principles to public law; (c) observes that matters involving different treatment to similarly placed people giving rise to unfairness can be adequately dealt with by existing grounds of review without requiring recourse to the substantive legitimate expectation doctrine; (d) examines the basis for the Australian constitutional objection to the doctrine of substantive legitimate expectations; and (e) observes that the Australian codification of grounds of review in the Administrative Decisions (Judicial Review) Act 1977[86] (and its related state legislation) practically forecloses "innovative developments" to the jurisprudence of judicial review in Australia. The fourth and fifth of these areas, despite their strong Australian jurisprudential focus, may provide useful analysis in relation to determining the place of the doctrine of substantive legitimate expectations in the Singaporean constitutional context. Space constraints here, however, limit their examination in this article. The first three of these matters, of general relevance to principles of administrative law, will be the focus of this section.

(1) Two areas of difficulty in relation to legitimate expectations generally

42 At the outset, Groves identifies two areas of the doctrine of legitimate expectations that lack clarity. The first is whether there should be a requirement that an expectation be reasonable.[87] He observes that having a requirement of "reasonableness" would provide a useful limit to the doctrine by "precluding the recognition of expectations that were somehow unrealistic or inappropriate".[88] However, if recognised, Groves also observes that it is unclear whether a subjective or an objective standard should apply.[89]

43 Second, Groves notes the uncertainty over whether one who raises a legitimate expectation need also prove reliance upon it.[90] Groves notes that the concept of "reliance" is one imported from considerations of estoppel, and indicates a concern that incorporating such a concept

85 Matthew Groves, "Substantive Legitimate Expectations in Australian Administrative Law" (2008) 32 *Melbourne University Law Review* 470.

86 Act No 59 of 1977 (Cth).

87 Matthew Groves, "Substantive Legitimate Expectations in Australian Administrative Law" (2008) 32 *Melbourne University Law Review* 470 at 473–474.

88 Matthew Groves, "Substantive Legitimate Expectations in Australian Administrative Law" (2008) 32 *Melbourne University Law Review* 470 at 474.

89 Matthew Groves, "Substantive Legitimate Expectations in Australian Administrative Law" (2008) 32 *Melbourne University Law Review* 470 at 474.

90 Matthew Groves, "Substantive Legitimate Expectations in Australian Administrative Law" (2008) 32 *Melbourne University Law Review* 470 at 474.

into public law may lead to theoretical incoherence in the latter.[91] This is because there are "crucial aspects of private law, particularly the right to damages" that do not ordinarily extend to public law.[92]

44 This is an interesting point made because in England, it will be recalled, the current position is that detrimental reliance, though influential, is not an essential condition to the operation of the doctrine of substantive legitimate expectations. In Tay J's formulation of the doctrine in *Chiu Teng*,[93] however, requirements (d) and (e) render, respectively, proof of reasonable reliance and detrimental reliance essential for the doctrine to be enlivened.[94] The articulation of these requirements, it can be said, imports private law concepts into public law. It is furthermore observed that in *Chiu Teng*, no theoretical analysis of the propriety of having the concepts of reasonable reliance and detrimental reliance in public law was proffered. This could possibly be the subject of some scrutiny.

(2) Rejection of estoppel principles

45 Groves observes that in Australia, "courts have long held that principles of estoppel cannot and should not apply to government agencies in relation to the exercise of powers which are peculiarly governmental".[95] The primary authority for this is the judgment of Gummow J in the Full Court of the Federal Court of Australia decision of *Minister for Immigration and Ethnic Affairs v Kurtovic*[96] ("*Kurtovic*"). Gummow J said:[97]

> [I]n a case of discretion, there is a duty under the statute to exercise a free and unhindered discretion and an estoppel cannot be raised (any more than a contract might be relied upon) to prevent or hinder the exercise of the discretion; the point is that the legislature intends the discretion to be exercised on the basis of a proper understanding of what is required by the statute, and that the repository of the discretion is not to be held to a decision which mistakes or forecloses that understanding.

91 Matthew Groves, "Substantive Legitimate Expectations in Australian Administrative Law" (2008) 32 *Melbourne University Law Review* 470 at 474.

92 Matthew Groves, "Substantive Legitimate Expectations in Australian Administrative Law" (2008) 32 *Melbourne University Law Review* 470 at 474.

93 *Chiu Teng @ Kallang Pte Ltd v Singapore Land Authority* [2014] 1 SLR 1047 at [119].

94 See para 58 below, where Tay J's formulation of the doctrine is fully set out.

95 Matthew Groves, "Substantive Legitimate Expectations in Australian Administrative Law" (2008) 32 *Melbourne University Law Review* 470 at 501.

96 (1990) 21 FCR 193.

97 *Minister for Immigration and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193 at 210; Matthew Groves, "Substantive Legitimate Expectations in Australian Administrative Law" (2008) 32 *Melbourne University Law Review* 470 at 502.

46 Groves notes that the rejection of estoppel principles in the context of public law judicial review forecloses the substantive legitimate expectation doctrine.[98] This is because, first:[99]

> … it suggests that any form of 'balancing' or weighing of competing interests in judicial review, whether in the form of the test adopted in *Coughlan* or in the weighing of different factors as might be required for a plea of estoppel, is *firmly identified as merits review … [and] lies beyond the scope of judicial review*. [emphasis added]

47 Second:[100]

> … the Court's reference to ultra vires representations makes clear that the effect of any representation will be judged according to the ultra vires doctrine of lawfulness *rather than any wider principle of fairness*. [emphasis added]

48 It is observed that the rejection of "balancing exercises" and principles of "fairness" in Australia appears to reflect the jurisprudential doctrine of "Dixonian legalism", or "formalism", under which "rules with a relatively narrow focus" are preferred to "principles of general application".[101] It is also observed that this rejection is inconsistent with the relevance of proportionality which was adopted in England by Laws LJ in *Nadarajah*, and which appears to have been incorporated into Singapore by Tay J in the sixth consideration of his substantive legitimate expectation framework in *Chiu Teng*.[102]

(3) Unfairness in the form of inconsistent treatment situations

49 Groves also posits that the principle of equality (that similarly placed people should not be treated differently without good reason)[103] should "not provide a bridge to the adoption of the concept of substantive unfairness".[104] Groves makes the distinction between two kinds of inconsistent treatment.

98 Matthew Groves, "Substantive Legitimate Expectations in Australian Administrative Law" (2008) 32 *Melbourne University Law Review* 470 at 503.

99 Matthew Groves, "Substantive Legitimate Expectations in Australian Administrative Law" (2008) 32 *Melbourne University Law Review* 470 at 503.

100 Matthew Groves, "Substantive Legitimate Expectations in Australian Administrative Law" (2008) 32 *Melbourne University Law Review* 470 at 503.

101 Matthew Groves, "Substantive Legitimate Expectations in Australian Administrative Law" (2008) 32 *Melbourne University Law Review* 470 at 500 and 516.

102 *Chiu Teng @ Kallang Pte Ltd v Singapore Land Authority* [2014] 1 SLR 1047 at [119].

103 See generally also Art 12 of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint).

104 Matthew Groves, "Substantive Legitimate Expectations in Australian Administrative Law" (2008) 32 *Melbourne University Law Review* 470 at 504.

50 First, inconsistent treatment can arise "when the same person is treated differently at different points in time".[105] This could conceivably reflect a situation where substantive legitimate expectation is pleaded on the basis of past promises or practice between the public authority and the claimant.[106] Groves indicates that such claims should fail as officials "should not be estopped or fettered from reconsidering the representation or changing the policy".[107]

51 Second, inconsistent treatment can arise where people of similar circumstances are treated differently.[108] In Australia, it has been accepted that, generally speaking, "requirements of fairness could not dictate the adoption or change of a policy by an administrative official".[109] This may, however, be different "when a particular decision involves, not a change in policy brought about by the normal processes of government decision making, but merely the selective application of an existing policy in an individual case".[110]

52 Groves also notes that the concept of judicial deference to administrative decision making may be appropriate particularly in areas that may be "complex or unique".[111] This appears to draw some parallels to the comment by Professor Thio that in Singapore:[112]

> … [c]ourts will decline review in matters where they lack expertise or special knowledge, or where their institutional capacity makes [them] ill-suited to address issues like allocative decisions.

53 In any event, Groves observes that in those instances where judicial review on the basis of unfairness arising out of inconsistent treatment could arise, the doctrine of substantive review does not seem

105 Matthew Groves, "Substantive Legitimate Expectations in Australian Administrative Law" (2008) 32 *Melbourne University Law Review* 470 at 504.

106 See *R v North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213 at [57]; [2000] 2 WLR 622 at [57].

107 Matthew Groves, "Substantive Legitimate Expectations in Australian Administrative Law" (2008) 32 *Melbourne University Law Review* 470 at 504.

108 Matthew Groves, "Substantive Legitimate Expectations in Australian Administrative Law" (2008) 32 *Melbourne University Law Review* 470 at 504.

109 *Attorney-General (NSW) v Quinn* (1990) 170 CLR 1 at 60, *per* Dawson J; Matthew Groves, "Substantive Legitimate Expectations in Australian Administrative Law" (2008) 32 *Melbourne University Law Review* 470 at 504.

110 *Attorney-General (NSW) v Quinn* (1990) 170 CLR 1 at 60, *per* Dawson J; Matthew Groves, "Substantive Legitimate Expectations in Australian Administrative Law" (2008) 32 *Melbourne University Law Review* 470 at 505.

111 Matthew Groves, "Substantive Legitimate Expectations in Australian Administrative Law" (2008) 32 *Melbourne University Law Review* 470 at 505–506, considering *Belinz v Commissioner of Taxation* (1998) 84 FCR 154.

112 Thio Li-ann, *A Treatise on Singapore Constitutional Law* (Academy Publishing, 2012) at para 03.024, cited in *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [109].

necessary in the light of the other public law grounds of review already available. Groves observes that exercises of discretionary power that apply differing standards or policies to similarly placed people without good reason could be easily reviewed on the already existing grounds of: (a) improper purpose (depending on the reason for inconsistent treatment); (b) relevant/irrelevant considerations (depending on what issues led to inconsistent treatment, or what policies or standards were disregarded); (c) considerations of natural justice (depending on whether the person affected was informed of the intended inconsistent treatment and perhaps also given a chance to argue against that course); and/or (d) unreasonableness (depending on whether the ultimate decision was entirely at odds with the evidence before the decision maker).[113]

B. The Canadian position

54 As recognised by Tay J in *Chiu Teng*, the position in Canada is that the concept of legitimate expectations cannot be used as a basis for substantive relief.[114] As set out in a unanimous judgment of the Supreme Court of Canada in *Agraira v Canada (Minister of Public Safety and Emergency Preparedness)*,[115] "[a]n important limit on the doctrine of legitimate expectations is that it cannot give rise to substantive rights".[116] Instead, only procedural remedies can be granted in response to a legitimate expectation.[117] If substantive relief is sought, recourse should be had to the doctrine of estoppel instead.[118] As recognised in *Chiu Teng*, the Supreme Court of Canada decision of *Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services)*[119] ("*Mount Sinai*") is the seminal authority on the issue.

55 In *Mount Sinai*, McLachlin CJC and Binnie J observed that the doctrine of legitimate expectations in England had stretched to embrace:[120]

> … the full gamut of administrative relief from procedural fairness at the low end through 'enhanced' procedural fairness based on conduct,

113 Matthew Groves, "Substantive Legitimate Expectations in Australian Administrative Law" (2008) 32 *Melbourne University Law Review* 470 at 506.

114 *Chiu Teng @ Kallang Pte Ltd v Singapore Land Authority* [2014] 1 SLR 1047 at [90].

115 2013 SCC 36.

116 *Agraira v Canada (Minister of Public Safety and Emergency Preparedness)* 2013 SCC 36; (2013) CarswellNat 1983 at [97].

117 *Agraira v Canada (Minister of Public Safety and Emergency Preparedness)* 2013 SCC 36; (2013) CarswellNat 1983 at [97].

118 *Chiu Teng @ Kallang Pte Ltd v Singapore Land Authority* [2014] 1 SLR 1047 at [90]–[94].

119 [2001] 2 SCR 281.

120 *Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services)* [2001] 2 SCR 281 at [26].

> thence onwards toward estoppel (though it is not to be called that) including substantive relief at the high end.

Administrative relief at the high end (*ie*, relief under the doctrine of substantive legitimate expectations) represents "the greatest intrusion by the courts into public administration".[121] McLachlin CJC and Binnie J opined that subclassifications should be made "to differentiate the situations which warrant highly intrusive relief from those which do not",[122] and continued to say that relief at the high level would represent a level of judicial intervention inappropriate outside a challenge based on constitutional rights.[123] At the highest levels, for example:[124]

> … using a Minister's prior conduct against him as a launching pad for substantive relief may strike the wrong balance between private and public interests, and blur the role of the court with the role of the Minister.

56 In Canada, McLachlin CJC and Binnie J noted, the concepts of procedural fairness and legitimate expectations are differentiated – procedural fairness is concerned with "the nature of the applicant's interest and the nature of the power exercised by the public authority in relation to that interest"[125] whereas legitimate expectations is concerned with "the *conduct* of the public authority in the exercise of [its] power" [emphasis in original].[126] Their Honours then considered that in Canada, the doctrine of legitimate expectations is regarded as "an *extension* of the rules of natural justice and procedural fairness" which may afford "a party affected by the decision of a public official an opportunity to make representations *in circumstances in which there otherwise would be no such opportunity*" [emphasis in original].[127] This justifies under the doctrine procedural relief but not substantive relief.[128] If substantive relief is to be available, more demanding conditions

121 *Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services)* [2001] 2 SCR 281 at [26].
122 *Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services)* [2001] 2 SCR 281 at [27].
123 *Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services)* [2001] 2 SCR 281 at [27].
124 *Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services)* [2001] 2 SCR 281 at [28].
125 *Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services)* [2001] 2 SCR 281 at [29].
126 *Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services)* [2001] 2 SCR 281 at [29].
127 *Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services)* [2001] 2 SCR 281 at [32], citing *Reference re Canada Assistance Plan (BC)* [1991] 2 SCR 525 at 557.
128 *Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services)* [2001] 2 SCR 281 at [32].

precedent ought to be present.[129] These being *absent*, substantive relief may only be had through estoppel, which is available against public authorities (including Ministers) subject to express statutory powers, restrictions or interests.[130] McLachlin CJC and Binnie J said:[131]

> It is to be emphasized that the requirements of estoppel go well beyond the requirements of the doctrine of legitimate expectations. As mentioned, the doctrine of legitimate expectations does not necessarily, though it may, involve personal knowledge by the applicant of the conduct of the public authority as well as reliance and detriment. Estoppel clearly elevates the evidentiary requirements that must be made by an applicant.

57 In short, in Canada, the doctrine of legitimate expectations can only give rise to procedural remedies. The doctrine, in sum, extends upon the concept of procedural fairness by allowing procedural relief when the conduct of a public authority so justifies. For substantive relief to be available, an applicant has to rely on the doctrine of estoppel, and satisfy its attendant additional requirements of knowledge, reliance and detriment subject to express statutory pronouncements.

IV. Observations on the Singapore development

A. *What* Chiu Teng *decided*

58 *Chiu Teng* explicitly recognised the doctrine of substantive legitimate expectations as a stand-alone head of judicial review in Singapore.[132] To elucidate on its operation, Tay J set out a six-step framework for the operation of the doctrine. This framework states:[133]

> (a) The applicant must prove that the statement or representation made by the public authority was unequivocal and unqualified;
>
> > (i) if the statement or representation is open to more than one natural interpretation, the interpretation applied by the public authority will be adopted; and

129 *Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services)* [2001] 2 SCR 281 at [32].

130 *Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services)* [2001] 2 SCR 281 at [39]–[47].

131 *Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services)* [2001] 2 SCR 281 at [42].

132 *Chiu Teng @ Kallang Pte Ltd v Singapore Land Authority* [2014] 1 SLR 1047 at [119].

133 *Chiu Teng @ Kallang Pte Ltd v Singapore Land Authority* [2014] 1 SLR 1047 at [119].

(ii) the presence of a disclaimer or non-reliance clause would cause the statement or representation to be qualified.

(b) The applicant must prove the statement or representation was made by someone with actual or ostensible authority to do so on behalf of the public authority.

(c) The applicant must prove that the statement or representation was made to him or to a class of persons to which he clearly belongs.

(d) The applicant must prove that it was reasonable for him to rely on the statement or representation in the circumstances of his case:

(i) if the applicant knew that the statement or representation was made in error and chose to capitalise on the error, he will not be entitled to any relief;

(ii) similarly, if he suspected that the statement or representation was made in error and chose not to seek clarification when he could have done so, he will not be entitled to any relief;

(iii) if there is reason and opportunity to make enquiries and the applicant did not, he will not be entitled to any relief.

(e) The applicant must prove that he did rely on the statement or representation and that he suffered a detriment as a result.

(f) Even if all the above requirements are met, the court should nevertheless not grant relief if:

(i) giving effect to the statement or representation will result in a breach of the law or the State's international obligations;

(ii) giving effect to the statement or representation will infringe the accrued rights of some member of the public;

(iii) the public authority can show an overriding national or public interest which justifies the frustration of the applicant's expectation.

59 In short, the six-step approach set out in *Chiu Teng* requires (a) an unequivocal and unqualified representation, (b) made by someone with authority, (c) to the applicant, (d) who has reasonably relied on it, (e) to his detriment, in order to enliven the doctrine of substantive legitimate expectations. Should there then be (f) overriding circumstances applicable, a court should nevertheless refuse relief. The remainder of this article sets out three broad observations in relation to this framework. For convenience, the six-step framework will be referred to as a whole in the remainder of this article as "the *Chiu Teng* framework".

B. Whither estoppel principles

60 The first key observation is that the *Chiu Teng* framework appears to effect an amalgamation between the Canadian and the English positions on the relevance of estoppel principles. We will recall that in Canada, substantive relief can be had against public authorities only under the public law estoppel doctrine.[134] In England, in contrast, estoppel principles are rejected as conditions precedent for the operation of the doctrine of substantive legitimate expectations.[135] In the *Chiu Teng* framework, the concepts of "reasonable reliance" and of "detrimental reliance", estoppel principles, are incorporated into the doctrine of substantive legitimate expectations through requirements (d) and (e). In short, the *Chiu Teng* framework grafts estoppel principles onto the idea of legitimate expectations, adopting a position that neither Canada nor England adopt, but which results in a practical outcome similar to that in Canada – under a different name. This section examines this development.

61 We begin with studying why estoppel concepts are rejected as condition precedents for the doctrine of legitimate expectations in England. In England, after all, an applicant's "reliance" on an expectation created by a public authority is *not* strictly required for the doctrine's operation. Along the entire line of cases on the doctrine in England considered earlier in this article, jurists have consistently rejected the essentiality of any element of reliance, detrimental or reasonable. This rejection appears to have stemmed from the House of Lords decision in *R (Reprotech (Pebsham) Ltd) v East Sussex County Council*[136] ("*Reprotech*"). In *Reprotech*, Lord Hoffmann unequivocally rejected the applicability of private law estoppel concepts in the realm of public law:[137]

> There is of course an analogy between a private law estoppel and the public law concept of a legitimate expectation created by a public authority, the denial of which may amount to an abuse of power: see *Coughlan*. But it is no more than an analogy because remedies against public authorities also have to take into account the interests of the general public which the authority exists to promote. …
>
> It is true that in early cases such as the *Well* case and *Lever Finance*, Lord Denning MR used the language of estoppel in relation to planning law. At that time the public law concepts of abuse of power and legitimate expectations were very undeveloped and no doubt the analogy of estoppel seemed useful. In the *Western Fish* the Court of

134 See paras 54–57 above.
135 See paras 23–24 above and paras 61–64 below.
136 [2003] 1 WLR 348; [2002] 4 All ER 58.
137 *R (Reprotech (Pebsham) Ltd) v East Sussex County Council* [2003] 1 WLR 348 at [34]–[35]; [2002] 4 All ER 58 at [34]–[35].

> Appeal tried its best to reconcile these invocations of estoppel with the general principle that a public authority cannot be estopped from exercising a statutory discretion or performing a public duty. But the results did not give universal satisfaction: see the comments of Dyson J in the *Powergen* case. It seems to be that in this area, public law has already absorbed whatever is useful from the moral values which underlie the private law concept of estoppel and the time has come for it to stand upon its own two feet.

62 The English objection to the essentiality of reliance principles to the substantive legitimate expectation doctrine thus appears to be premised upon the fundamental differences between the aims of public law and private law. Judicial commentary from substantive legitimate expectation cases elaborates. In *Begbie*, for example, Sedley LJ stated that he had no difficulty in accepting that in cases where the *Government* has made representations to the public, the *Government* "may be held to its word irrespective of whether the applicant has been relying specifically on it".[138] Similarly, in *Bibi*, it was held that whilst reliance may be potentially relevant in most cases pertaining to legitimate expectations, it is "not essential"[139] because "consistency of treatment and equality are at stake in such cases, and these values should be protected irrespective of whether there has been any reliance as such".[140] Six years later in 2008, Laws LJ observed in *R (Bhatt Murphy) v Independent Assessor*[141] that the principle of good administration which underpins the doctrine of legitimate expectations[142] and by which "public bodies ought to deal straightforwardly and consistently with the public"[143] "… generally requires that where a public authority has given a plain assurance, it should be held to it".[144] This, Laws LJ said, "… is an objective standard of public decision making on which the courts insist".[145]

63 Current academic commentary echoes the above. In *De Smith's Judicial Review*[146] ("*De Smith*"), it is stated that:

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138 *R v Secretary of State for Education and Employment, ex parte Bebgie* [2000] 1 WLR 1115 at 1133.

139 *R (Bibi) v Newham London Borough Council; R (Al-Nashed) v Newham London Borough Council* [2001] EWCA Civ 607 at [28]; [2002] 1 WLR 237 at [28].

140 Paul Craig, *Administrative Law* (Sweet & Maxwell, 4th Ed, 1999) at 619, cited in *R (Bibi) v Newham London Borough Council; R (Al-Nashed) v Newham London Borough Council* [2001] EWCA Civ 607 at [30]; [2002] 1 WLR 237 at [30].

141 [2008] EWCA Civ 755.

142 *R (Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363 at [68].

143 *R (Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363 at [68].

144 *R (Bhatt Murphy) v Independent Assessor* [2008] EWCA Civ 755 at [30].

145 *R (Bhatt Murphy) v Independent Assessor* [2008] EWCA Civ 755 at [30].

146 *De Smith's Judicial Review* (Rt Hon Lord Harry Woolf *et al* eds) (Sweet & Maxwell, 7th Ed, 2013) at p 683.

> Private law analogies from the field of estoppel are … of limited relevance where a public law principle requires public officials to honour their undertakings and respect legal certainty, irrespective of whether the loss has been incurred by the individual concerned.

64 In the premises, *De Smith* summarises that "it is not normally necessary for a person to have changed his position or to have acted to his detriment in order to qualify as the holder of a legitimate expectation".[147] Similarly, Wade and Forsyth[148] state that one "need not have relied to his detriment upon [the expectation] for that would be to assimilate legitimate expectations to estoppel".

65 Even in Australia, where only procedural legitimate expectations are recognised, the High Court of Australia has expressed that "the notion of legitimate expectations is not dependent upon any principle of estoppel".[149] This is because, although legitimate expectations may "arise from the conduct of a public authority towards an individual",[150] they "[do] not depend upon the knowledge and state of mind of the individual concerned".[151]

66 Over in Canada, the position is different, with substantive relief unavailable under the doctrine of legitimate expectations but available under public law estoppel.[152] This appears to effect a classification process differentiating between situations which warrant intrusive judicial intervention from those which do not. Recalling, no knowledge, reliance or detriment is required in Canada when an applicant seeks merely *procedural relief* through the general doctrine of *legitimate expectations*.[153] Where an applicant seeks *substantive relief*, however, he has to rely on the doctrine of *estoppel* and prove knowledge, reliance and detriment in addition.[154]

67 The Canadian position coheres with the Australian position in so far as applicants may seek *procedural* relief under the general doctrine of legitimate expectations. Recalling, Australia differs from Canada by rejecting the applicability of estoppel principles in the context of public

147 *De Smith's Judicial Review* (Rt Hon Lord Harry Woolf *et al* eds) (Sweet & Maxwell, 7th Ed, 2013) at p 682.

148 W Wade & C Forsyth, *Administrative Law* (Oxford University Press, 10th Ed, 2009) at p 452.

149 *Haoucher v Minister for Immigration, Local Government and Ethnic Affairs* (1990) 19 ALD 577 at 590, *per* Toohey J.

150 *Haoucher v Minister for Immigration, Local Government and Ethnic Affairs* (1990) 19 ALD 577 at 590, *per* Toohey J.

151 *Haoucher v Minister for Immigration, Local Government and Ethnic Affairs* (1990) 19 ALD 577 at 590, *per* Toohey J.

152 See paras 54–57 above.

153 See paras 54–57 above.

154 See paras 54–57 above.

law judicial review[155] – it is this rejection that forecloses applicants in Australia from garnering substantive relief against public bodies for expectations that the latter create.

68 In short, in bringing estoppel principles into the doctrine of legitimate expectations, the *Chiu Teng* formulation (a) coheres with the English position by allowing for substantive relief to be had against public authorities; (b) departs from the English position by rendering as mandatory the elements of reasonable reliance and detrimental reliance for such relief; (c) departs from the Australian position by allowing for substantive relief to be had against public authorities; (d) departs from the Australian position by rendering as mandatory the elements of reasonable reliance and detrimental reliance for such relief; (e) departs from the Canadian position by allowing for substantive relief to be had under the doctrine of legitimate expectations; and (f) imports the Canadian law on public law estoppel into the context of substantive legitimate expectations.

69 It may be said that the *Chiu Teng* formulation is a response to the comment by the Supreme Court of Canada in *Mount Sinai* that "[i]f the court is to give substantive relief, more demanding conditions precedent must be fulfilled than are presently required by the doctrine of legitimate expectation"[156] – the importation of estoppel principles lays out these "more demanding conditions precedent" in the Singapore context. This appears implicit in the words of Tay J when he said that it was under the "safeguards" of the *Chiu Teng* formulation that the doctrine of substantive legitimate expectations can operate effectively and fairly in Singapore.[157] No further explanation, unfortunately, was proffered.

70 It is clear that the *Chiu Teng* formulation's importation of estoppel principles blurs the distinction between the concepts of legitimate expectation and estoppel. Should there be a distinction? The answer from authority is a clear "yes". Since Lord Hoffmann's speech in *Reprotech* in 2002, the English position is that estoppel concepts, a distinctly private law animal, have no place in public law where the principles of good administration and of consistency of treatment take center stage. Australia broadly maintains this distinction, and rejects the place of estoppel principles even in the context of procedural legitimate expectations. In Canada, if estoppel principles are to be regarded to determine the rights of private individuals against public authorities,

155 See paras 45–48 above.

156 *Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services)* [2001] 2 SCR 281 at [32].

157 *Chiu Teng @ Kallang Pte Ltd v Singapore Land Authority* [2014] 1 SLR 1047 at [119].

courts proceed on the basis of what it is – public law estoppel – and not under the guise of "legitimate expectations" with its rather different jurisprudential roots.

71 Justifying a distinction between the concepts of estoppel and legitimate expectation *in principle*, however, is not as easy – and this may be why Tay J ruled as he did. Are the principles of good administration and of consistency of treatment really inconsistent with an importation of the estoppel principles of reasonable reliance and detrimental reliance? More precisely, would deeming as mandatory reasonable reliance and detrimental reliance adversely affect the public law pursuits of the ideals of good administration and consistency of treatment? The following statement by Schiemann LJ in *Bibi* suggests that the answer to this query is "yes":[158]

> [T]o disregard the legitimate expectation because no concrete detriment can be shown would be to place the weakest in society at a particular disadvantage. It would mean that those who have a choice and the means to exercise it in reliance on some official practice or promise would gain a legal toehold inaccessible to those who, lacking any means of escape, are compelled simply to place their trust in what has been represented to them.

72 This analysis of Schiemann LJ is applicable in tandem to the concept of reasonable reliance: If reasonable reliance is something that applicants must establish as a condition precedent for relief under the doctrine of substantive legitimate expectations, those who have the means or capacity to ensure that their conduct in reliance on an expectation created by a public authority complies with some standard of objective "reasonableness" would be able to gain a "legal toehold" inaccessible to those who simply place their trust in what has already been clearly and unequivocally represented to them. This, in short, would mean that different private individuals who have relied in different ways on the *same* clear and unequivocal representation of a public authority could be undesirably treated differently.

73 It may equally be argued, however, that such a result is entirely justifiable. On the basis of fairness, why ought a court award substantive relief when an applicant has not established detriment? Similarly, why ought a court award substantive relief when an applicant's reliance on a public authority's representation is unreasonable in the circumstances? An award of substantive relief giving effect to a public authority's representation *in the absence of detriment* on the part of the applicant is

158 *R (Bibi) v Newham London Borough Council; R (Al-Nashed) v Newham London Borough Council* [2001] EWCA Civ 607 at [31]; [2002] 1 WLR 237 at [31], cited in *De Smith's Judicial Review* (Rt Hon Lord Harry Woolf *et al* eds) (Sweet & Maxwell, 7th Ed, 2013) at p 683.

in short an expectation remedy. In private law, expectation remedies are typically only available in the context of breach of contract where consideration has passed.[159] Does the transition to the public law sphere mean that a pure expectation remedy should be available *even in the absence of a contract*, simply because the relevant expectation was created by a public authority? To effect strict consistency of treatment, perhaps it should. But consistency of treatment is not the only public law concern, and such a rule may not be justifiable in the light of the polycentricity of administrative decision making.

74 Likewise, an award of substantive relief giving effect to a public authority's representation in the absence of reasonableness of reliance on the part of the applicant may operate as a disincentive against private individuals exercising reasonable care in relation to their dealings with public bodies. Why should they if the law does not so require? The *Chiu Teng* formulation's inclusion of reasonable reliance as a condition precedent for relief ensures that only meritorious applicants – and not all and sundry – will have the drastic remedy of substantive relief against a public body open to them.

75 How can principle and authority be reconciled? Authority rejects imposing upon applicants the burden of establishing detrimental reliance and reasonable reliance for substantive relief to be had against public authorities. Practical considerations, however, lay out arguably strong justifications for the inclusion of both reasonable reliance and detrimental reliance as relevant factors to be considered before substantive relief should be awarded. In the light of these considerations, this article will proffer a small proposal for reform: It is suggested that a better balance could conceivably be had between existing authority and principle by retaining the elements of detrimental reliance and reasonable reliance in the *Chiu Teng* formulation, but by *reversing their burden of proof* such that it would then be a *defence* for the public authority against relief if it can establish that the applicant has not suffered detriment in reliance on its representation, or if it can establish that the applicant's reliance on its representation is less than reasonable. The result of this will be that the elements an applicant needs to establish in order to raise a *prima facie* case in substantive legitimate expectations will return to be consistent with the established English position while the considerations of reasonable reliance and detrimental reliance can nevertheless remain to operate as express safeguards militating against the abuse of the doctrine. This position, it is submitted, would represent an incremental step from the English

159 See generally *McGregor on Damages* (Sweet & Maxwell, 18th Ed, 2009) at para 41-029; Edwin Peel, *Trietel on The Law of Contract* (Sweet & Maxwell, 12th Ed, 2007) at para 20-018; and *Wishing Star Ltd v Jurong Town Corp* [2008] 2 SLR(R) 909 at [28].

jurisprudence, rather than the rather more radical leap that the *Chiu Teng* formulation currently amounts to.

C. The question of the appropriate remedy

76 The second key observation pertains to the question of remedies. As Tay J considered in *Chiu Teng* that no substantive legitimate expectation arose on the facts in favour of the claimant due to its reliance on the public authority's representations being less than reasonable, it was unnecessary for his Honour to touch on the question of what would be the appropriate remedy should the doctrine be enlivened. All Tay J thus said was, as a stand-alone head of judicial review, "substantive relief should be granted under the doctrine subject to certain safeguards".[160] In the *Chiu Teng* framework, Tay J defined six such safeguards. His Honour said that a claimant will not be entitled to any relief (a) if he knew that the statement or representation was made in error and chose to capitalise on the error; (b) if he suspected that the statement or representation was made in error and chose not to seek clarification when he could have done so; and (c) if there was reason and opportunity for enquiries to be made but the claimant did not. Similarly, Tay J said that the court should not grant relief if (d) giving effect to the statement or the representation will result in a breach of the law or the State's international obligations; (e) giving effect to the statement or representation will infringe the accrued rights of some member of the public; and/or (f) the public authority can show an overriding national or public interest which justified the frustration of the claimant's expectation.[161]

77 It is observed that these safeguards set out by Tay J are broad exclusory rules that leave open the question of what exactly would appropriate "substantive relief" be should a claimant succeed in establishing his cause of action under the substantive legitimate expectation doctrine. The most obvious remedy is to require the public authority to comply with the expectation.[162] However, such a remedy may not always be workable or appropriate. It has been observed that ordering a public authority to fulfil an expectation could "produce dramatic effects as it forces a public body to use its limited resources in a way which *ex hypothesi* it does not deem to be in the public interest".[163]

160 *Chiu Teng @ Kallang Pte Ltd v Singapore Land Authority* [2014] 1 SLR 1047 at [119].

161 *Chiu Teng @ Kallang Pte Ltd v Singapore Land Authority* [2014] 1 SLR 1047 at [119].

162 See Clive Lewis, *Judicial Remedies in Public Law* (Sweet & Maxwell, 4th Ed, 2008) at para 7-028 and Iain Steele, "Substantive Legitimate Expectations: Striking the Right Balance?" (2005) 121 LQR 300 at 319–320.

163 Iain Steele, "Substantive Legitimate Expectations: Striking the Right Balance?" (2005) 121 LQR 300 at 319.

Moreover, should such a remedy be awarded in Singapore, it would appear to sit uneasily with existing institutional conventions. As observed by Tan, it is standard practice in Singapore for public authorities to seek the advice of the Attorney-General's Chambers on the legality of their actions before implementing policies that may adversely affect individuals' rights.[164] In an extra-judicial lecture at the Singapore Management University in 2010, Chan Sek Keong CJ had also indicated that between Harlow and Rawlings'[165] "green light" and "red light" conceptualisations of administrative law, Singapore administrative law coheres more with the former.[166] Under the "green light" view of administrative law:[167]

> [The courts are not the] first line of defence against administrative abuses of power: instead, control can and should come internally from Parliament and the Executive itself in upholding high standards of public administration and policy.

78 An order for a public authority to comply with a substantive expectation created may also sit uneasily with the accepted principle of judicial deference based on the concept of relative institutional competence in Singapore.[168] As noted above,[169] Professor Thio has pointed out that in Singapore, "[c]ourts will decline review in matters where they lack expertise or special knowledge, or where their institutional capacity makes [them] ill-suited to address issues like allocative decisions".[170] This principle has been judicially echoed at the Singapore High Court.[171] It may be argued that the question of allocative policy would be adequately dealt with by Tay J's sixth exclusory rule in *Chiu Teng* (namely, that a court should not grant relief if the public authority can show an overriding national or public interest which justifies the frustration of the claimant's expectation).[172] However, a disposition on the basis of this rule must be regarded as unsatisfactory as it would simply with a broad brush stroke result in a claimant being

164 Daniel Tan, "An Analysis of Substantive Review in Singaporean Administrative Law" (2013) 25 SAcLJ 296 at 320, para 64.

165 Carol Harlow & Richard Rawlings, *Law and Administration* (Cambridge University Press, 3rd Ed, 2009) ch 1, at pp 22–48.

166 Chan Sek Keong, "Judicial Review – From Angst to Empathy" (2010) 22 SAcLJ 469 at 480, para 29. See also, Daniel Tan, "An Analysis of Substantive Review in Singaporean Administrative Law" (2013) 25 SAcLJ 296 at 320, para 65.

167 Chan Sek Keong, "Judicial Review – From Angst to Empathy" (2010) 22 SAcLJ 469 at 480, para 29.

168 See also Daniel Tan, "An Analysis of Substantive Review in Singaporean Administrative Law" (2013) 25 SAcLJ 296 at 321, para 68.

169 See para 52 above.

170 Thio Li-ann, *A Treatise on Singapore Constitutional Law* (Academy Publishing, 2012) at para 03.024.

171 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [109].

172 *Chiu Teng @ Kallang Pte Ltd v Singapore Land Authority* [2014] 1 SLR 1047 at [119].

denied relief entirely – even if the claimant has succeeded in proving all that he needs to in order to establish the existence of a substantive legitimate expectation.[173]

79 In the face of this difficulty, it has been suggested in England that "an alternative remedy may provide a *via media* between the equally unattractive extremes of full substantive protection and no protection at all".[174] It is suggested that the same should be considered in Singapore.

80 Two alternative remedies are easily conceivable. The first would be to require the public authority to take the legitimate expectation properly into account in its decision-making process,[175] and the second would be the making of an order for monetary redress.[176] Both of these remedies, however, are likewise not without their difficulties.

81 The first of these alternative remedies would operate through the court declaring that "the public authority is under a duty to consider the claimant's case on the basis that they have a legitimate expectation that they will be provided with the benefit but the weight to be attached to that expectation will be a matter for the public authority concerned".[177] Steele explains:[178]

> Where this remedy is granted, the applicant is not forced to make a new application for the benefit sought, but nor is the decision-maker forced to give the benefit to him. In effect, the applicant's legitimate expectation becomes a relevant consideration which must be taken into account by the decision-maker. This remedial route is particularly appropriate in cases where upholding the legitimate expectation of one individual might inevitably lead to frustrating the legitimate expectation of another, as in *Bibi* itself. If the decision-maker only has one house available and has caused two families legitimately to expect that they will be allowed to live in it, both expectations simply cannot be substantively protected. In such circumstances, it is submitted that the courts are right to stop short of deciding which expectation should take priority. They are ill-equipped to make decisions of this nature.

173 See Iain Steele, "Substantive Legitimate Expectations: Striking the Right Balance?" (2005) 121 LQR 300 at 319.

174 Iain Steele, "Substantive Legitimate Expectations: Striking the Right Balance?" (2005) 121 LQR 300 at 319.

175 See Clive Lewis, *Judicial Remedies in Public Law* (Sweet & Maxwell, 4th Ed, 2008) at para 7-028 and Iain Steele, "Substantive Legitimate Expectations: Striking the Right Balance?" (2005) 121 LQR 300 at 320–321.

176 See Iain Steele, "Substantive Legitimate Expectations: Striking the Right Balance?" (2005) 121 LQR 300 at 322–323.

177 Clive Lewis, *Judicial Remedies in Public Law* (Sweet & Maxwell, 4th Ed, 2008) at para 7-028.

178 Iain Steele, "Substantive Legitimate Expectations: Striking the Right Balance?" (2005) 121 LQR 300 at 321.

82 The danger to this approach, however, is that this could lead to the legitimate expectation having no effect. Pievsky warns:[179]

> If the decision-maker is found to have failed to consider the fact of the promise, he may respond by saying that he has now taken it into account, and attached little weight to it. If the decision-maker did take it into account, but nevertheless decided not to keep the promise, the decision can only be attacked on *Wednesbury* grounds. The legitimate expectation appears to have added very little.

83 Such an approach would mean that a substantive legitimate expectation would in effect be "downgraded" into something no more than a matter of relevancy.[180] With the concept of relevant/irrelevant considerations being an accepted *procedural* ground of review in administrative law,[181] this approach alone may arguably lead to the substantive legitimate expectation doctrine effecting little additional rights to applicants from what is already available.

84 The other conceivable alternative remedy would be the making of a monetary award in lieu of the substantive benefit sought.[182] This possibility was expressed by Schiemann LJ in *Bibi*.[183] However, Sedley LJ has observed in *F & I Services Ltd v Commissioners of Customs and Excise*[184] that monetary compensation in administrative law "is largely uncharted territory" in England.[185] In relation to compensation for loss caused by an administrative act outside of contract and tort, his Lordship said:[186]

> That [the existing authorities] do not include damages for abuses of power falling short of malfeasance in public office does not necessarily mean that [the] door is closed to them in principle. But the policy implications of such a step are immense, and it may well be that – despite the presence for some years in the rules of a power to award damages on an application for judicial review – a legal entitlement to them cannot now come into being without legislation.

179 D Pievsky, "Legitimate Expectation as a Relevancy" [2003] JR 144 at 147–148.
180 Iain Steele, "Substantive Legitimate Expectations: Striking the Right Balance?" (2005) 121 LQR 300 at 322.
181 See M P Jain, *Administrative Law of Malaysia and Singapore* (LexisNexis, 4th Ed, 2011) at pp 419–429.
182 Iain Steele, "Substantive Legitimate Expectations: Striking the Right Balance?" (2005) 121 LQR 300 at 322–323.
183 *R (Bibi) v Newham London Borough Council; R (Al-Nashed) v Newham London Borough Council* [2001] EWCA Civ 607 at [55]; [2002] 1 WLR 237 at [55].
184 [2001] EWCA Civ 762.
185 *F & I Services Ltd v Commissioners of Customs and Excise* [2001] EWCA Civ 762 at [72].
186 *F & I Services Ltd v Commissioners of Customs and Excise* [2001] EWCA Civ 762 at [73].

85 It was argued before the Singapore High Court in *Kay Swee Pin v Singapore Island Country Club*[187] that in Singapore law, an award of damages, which is a private law remedy, is not available in an action for judicial review.[188] Since the amendment of O 53 of the Singapore Rules of Court[189] in 2011, however, the jurisdiction of the Singapore Supreme Court[190] to make a monetary award in a judicial review action appears to be no longer controversial in Singapore. Order 53 r 7 of the Rules of Court states:

> (1) Subject to the Government Proceedings Act (Cap 121), where, upon hearing any summons filed under Rule 2, the Court has made a Mandatory Order, Prohibiting Order, Quashing Order or declaration, and the court is satisfied that the applicant has a cause of action that would have entitled the applicant to any relevant relief if the relevant relief had been claimed in a separate action, *the Court may, in addition, grant the applicant the relevant relief*.
>
> …
>
> (4) In this Rule, "relevant relief" means *any liquidated sum, damages, equitable relief or restitution*.
>
> [emphasis added]

86 It is to be observed that the power of a court to grant a monetary award in the form of a "relevant relief" as a remedy pursuant to O 53 r 7(1) is conditional upon the court first making a mandatory order, prohibiting order, quashing order or declaration and also upon the court being satisfied that the applicant "has a cause of action that would have entitled the applicant to any 'relevant relief' if the relevant relief had been claimed in a separate action". Without commenting here on how the second requirement might operate in the context of a case involving substantive legitimate expectations, it is submitted that an award of a monetary sum *in addition* to a declaration that a public authority has the duty to take an applicant's legitimate expectation into account and/or an appropriate prerogative order can easily ameliorate the concerns raised by Pievsky and Steele,[191] and give content to the operation of the doctrine over and above the established procedural grounds of review.

87 A monetary award, it is submitted, ought to be regarded as an appropriate remedy to compensate the individual concerned for the harm suffered particularly when the harm suffered is of a purely

187 [2008] SGHC 143.
188 *Kay Swee Pin v Singapore Island Country Club* [2008] SGHC 143 at [30].
189 Cap 322, R 5, 2014 Rev Ed.
190 O 53 r 9 of the Singapore Rules of Court (Cap 322, R 5, 2014 Rev Ed) states that the O 53 judicial review procedure is not applicable to the State Courts.
191 See paras 82–83 above.

economic nature.[192] Risk of abuse of such a remedial power would, arguably, be adequately mitigated by the additional "safeguards" (*eg*, estoppel principles) built into the *Chiu Teng* formulation which are not present in the English position. Policy-wise, the spectre of monetary consequences for public authorities for bad administration could also stimulate an improvement in general standards of administration amongst Singapore's public authorities.[193]

88 If and when monetary awards are regarded as a suitable remedy for the breach of a substantive legitimate expectation, the crucial question of the appropriate measure of damages must then be considered. Singapore law unfortunately appears to be as yet underdeveloped in this area. Should the measure of damages be limited to compensation for actual losses incurred and proved? Or should the breach of a substantive legitimate *expectation* allow for the recovery of expectation damages? Are all actual losses recoverable? Or should the principles of causation and remoteness operate to limit liability?[194] It is observed that if *equitable compensation* is to be awarded, it would be the equity arising from the legitimate expectation that the court would seek to satisfy, and *not* the applicant's expectation.[195] Beyond this, however, it is submitted that additional guidance would present a welcome clarification to the law. Some issues worth considering might be:

(a) whether a cause of action to vindicate a substantive legitimate expectation can *in itself* entitle an applicant to any "relevant relief" under O 53 r 7;

(b) the implications of the potential interplay between a cause of action to vindicate an applicant's substantive legitimate expectation and other concurrent causes of action that might entitle the applicant to "relevant relief" under O 53 r 7; and

(c) the implications of whether the relevant representation of the public body giving rise to a substantive legitimate expectation was made *intra vires* or *ultra vires*[196] on the potential available remedies.

192 See Michael Fordham QC, "Monetary Awards in Judicial Review" [2009] *Public Law* 1. See also generally Robby Bernstein, *Economic Loss* (Sweet & Maxwell, 3rd Ed, 2013).

193 See the argument for the same in M P Jain, *Administrative Law of Malaysia and Singapore* (LexisNexis, 4th Ed, 2011) at p 541.

194 See generally the Singapore Court of Appeal's analysis of the concepts in *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric* [2007] 3 SLR(R) 782 at [50]–[57].

195 See *Lim Chin San Contractors Pte Ltd v Shiok Kim Seng* [2013] 2 SLR 279, where the Singapore Court of Appeal examined (at [38]–[42]) the principles behind assessing equitable compensation.

196 It is not inconceivable that a representation made with ostensible authority (thus satisfying requirement (b) of the *Chiu Teng* formulation) may nevertheless be *ultra vires*: see discussion in Lee Pey Woan, "The Apparent Authority of the

(*cont'd on the next page*)

89 As a final note, it is observed that O 53 r 7 allows also for other equitable relief and restitution as possible reliefs in a judicial review action – should these other remedies be applicable to the doctrine of substantive legitimate expectations? And if they are, how ought they interface with the power of a court to grant prerogative orders, declarations and/or monetary awards?

90 The above are open and very crucial questions. Unfortunately, due to their complexity, their resolution lies beyond the present scope of this article. This section has simply the more modest aim of stimulating greater discussion on the topic. If this is achieved, the author will have achieved his goal. Administrative law, after all, is an intensely practical subject – and the question of remedies is the essence of practical consequence.

D. The public authorities' broad escape proviso

91 The last observation on the *Chiu Teng* formulation that remains to be made in this article is a brief one and pertains to the third proviso to its reasonable reliance requirement. This third proviso states:[197]

> If there is reason and opportunity to make enquiries and the applicant did not, [the applicant] will not be entitled to any relief.

92 This proviso is immediately striking because its limits are not ascertainable from its words – it appears to be too broadly all encompassing. It provides, in short, that so long as an applicant had *reason* and *opportunity* to make enquiries and failed to avail himself of such opportunity, he will be denied relief. What does this mean? It is respectfully submitted that this statement of law is problematic because it is open to abuse by public authorities. So long as a public authority has made a statement or a representation that relates to an individual and which may affect his rights and obligations *vis-à-vis* others, it can very easily *always* be said that there would be a reason for the individual to make enquiries to seek clarification. Similarly, so long as there is some time interval between a public authority's representation giving rise to an expectation and an individual's reliance on it, it can *always* be said that the individual had opportunity to make enquiries to seek clarification. This could not have been what Tay J had intended in formulating the proviso, but the proviso's plain words leave open the possibility for such arguments. It appears thus that, *as formulated*, the third proviso to the *Chiu Teng* formulation's reasonable reliance

Unauthorised Agent: *Kelly v Fraser* [2012] 3 WLR 1008" (2014) 26 SAcLJ 258, particularly at 263–267, paras 10–16.

197 *Chiu Teng @ Kallang Pte Ltd v Singapore Land Authority* [2014] 1 SLR 1047 at [119].

requirement can operate to give public authorities a virtually impregnable shield against liability. As formulated, this proviso could operate to neuter the doctrine of substantive legitimate expectations in Singapore right at its birth. It is thus respectfully submitted that, if the proviso is to remain part of Singapore law, a more nuanced formulation of it ought to be developed upon the first opportunity. This is necessary – it is respectfully submitted – for the doctrine of substantive legitimate expectations in Singapore to retain any of the meaning that it purports to carry.

V. Conclusion

93 *Chiu Teng* represents a significant development to administrative law in Singapore. In it, Tay J explicitly recognised the availability of substantive review against public authorities on the basis of their representations. This development could be said to be a response to the steady expansion of the administrative decision-making process in modern Singapore.[198] Statutory boards and government ministries today discharge a litany of functions – they make policies, administer the law, and make numerous daily decisions affecting individuals' rights.[199] It has been said:[200]

> Subject as it is to the vast empires of executive power that have been created, the public must be able to rely on the law to ensure that all this power may be used in a way conformable to its ideas of fair dealing and good administration.

The recognition of the doctrine of substantive legitimate expectations represents a welcome progress towards achieving these ideals.

94 Despite these laudable aims, however, difficult issues remain. In 2010, Chan Sek Keong CJ cautioned judges to "tread carefully" when considering the doctrine of legitimate expectations, calling upon them to "[step] gingerly on each stone in crossing the river".[201] It has been demonstrated in this article that the *Chiu Teng* formulation of the substantive legitimate expectation doctrine varies in important ways from the legal positions in England, Australia and Canada. It has also been demonstrated that important aspects of the doctrine remain to be

198 See generally Sir Anthony Mason, "Administrative Review: The Experience of the First Twelve Years" (1989) 18 *Federal Law Review* 122 at 128.

199 M P Jain, *Administrative Law of Malaysia and Singapore* (LexisNexis, 4th Ed, 2011) at p 4.

200 W Wade & C Forsyth, *Administrative Law* (Clarendon Press, 7th Ed, 1994), cited in M P Jain, *Administrative Law of Malaysia and Singapore* (LexisNexis, 4th Ed, 2011) at p 7.

201 Chan Sek Keong, "Judicial Review – From Angst to Empathy" (2010) 22 SAcLJ 469 at 478, para 23.

elucidated. Given these, the *Chiu Teng* formulation must be regarded as an ambitious but necessarily imperfect attempt at crossing Chan CJ's metaphorical river – some stones have been skipped, and the landing has not been as dry as it could possibly have been. Whilst recognising the contributions of Tay J, it is perhaps incumbent upon us, for the benefit of those who may come subsequently, to revisit the stones skipped and to mark out a clearer path across the frothy jurisprudential stream.