BURDEN OF PROOF AND STANDARD OF PROOF IN CIVIL LITIGATION

This article considers the problems of burden of proof and standard of proof in civil litigation. There is no standard text on evidence law that considers these issues from the civil practitioners' point of view. Understanding clearly on whom the burden of proof lies is a fundamental requirement for any litigator. This entails understanding the trial process, the mechanics of evidence adduction, the factors at play when presumptions are applicable and the basics of the burden on a party. This is an attempt to relate matters of practice with matters of procedure and law to give the reader a fuller understanding of the tools available to better prepare his case. Matters of practical pleading are interwoven with the issues of burden of proof. These are in turn considered against how a trial is run in Singapore, bearing in mind the Evidence Act and case law. The second part of the article looks at the critical issue of standard of proof, with the focus on cases involving civil fraud. These kinds of cases have lately been receiving increasing attention, and this article would be timely to state the law on the standard of proof applicable to such civil fraud cases. The current position in England, which may be different from the current position in Singapore, is fully considered.

Peter **GABRIEL**
LLB (Hons) (National University of Singapore),
LLM (Australian National University); FCIArb, FSIArb;
Advocate and Solicitor (Singapore); Gabriel Law Corporation.

I. Introduction

1 This article considers the issues of burden of proof and standard of proof in civil litigation from the viewpoint of practitioners. In litigation, knowledge of the law (whether substantive or procedural) has only one end, that is, to succeed in the case that the litigant is pursuing. Burden of proof and standard of proof form the bedrock of civil litigation.

2 A clear understanding of these issues is thus a fundamental prerequisite for practitioners. It was very aptly observed by the Honourable V K Rajah JA in the case of *Tat Seng Machine Movers Pte Ltd v Orix Leasing Singapore Ltd*:[1]

1 [2009] 4 SLR(R) 1101 at [86]–[87].

> [T]he issue of on precisely whom the burden of proof lies on the issue of good faith is a moot point. *Nevertheless, as this is an important point of practical* significance, we think it would be useful to the legal community for us to express our views on this point …
>
> In our view, this approach ought to be further clarified. *The judge may have overstated the evidential requirements* imposed on the defendant.[2]
>
> [emphases added]

3 In respect of confusion relating to the standard of proof, the words of Lord Hoffmann in the case of *In re B (Children)*[3] ("*In re B*") are particularly relevant. He said:[4]

> Thirdly, there are cases in which judges are simply confused about whether they are talking about the standard of proof or about the role of inherent probabilities in deciding whether the burden of proving a fact to a given standard has been discharged.

II. Interpretation of terms

4 Unless the context otherwise requires, the terms below shall have the following meanings:

(a)	the "Act"	:	the Evidence Act;[5]
(b)	"burden *simpliciter*"	:	the burden on a party (either plaintiff or defendant) to prove a particular fact to the civil standard (s 105 of the Act);
(c)	"burden to prove its case"	:	the burden on the plaintiff or the defendant to prove its pleaded case to the civil standard (see ss 103 and 104 of the Act);
(d)	"civil standard"	:	proof on a balance of probabilities;

2 See also A T Denning, "Presumptions and Burdens" (1945) 61 LQR 379 at 382 where he observed: "[T]he legal burden never shifts. Many errors have occurred because judges have not kept the distinction in mind and the position has had to be put right by appellate tribunals."

3 [2009] 1 AC 11.

4 *In re B (Children)* [2009] 1 AC 11 at [5].

5 Cap 97, 1997 Rev Ed.

(e)	"criminal standard"	:	proof beyond reasonable doubt;
(f)	"hybrid case"	:	a civil case where there is a material part or allegation involving fraud, forgery, claim for fraudulent trading (s 340 of the Companies Act)[6] or other similar criminal implications;
(g)	"legal burden of proof"	:	the burden to prove its case and/or the burden *simpliciter*; and
(h)	"standard of proof"	:	the civil standard or the criminal standard.

III. Legal burden of proof[7]

5 All cases are decided on the legal burden of proof being discharged (or not). Lord Brandon in *Rhesa Shipping Co SA v Edmunds* had remarked:[8]

> No judge likes to decide cases on the burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course to take.[9]

6 Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by Rajah JA in *Britestone Pte Ltd v Smith & Associates Far East, Ltd* ("*Britestone*"):[10]

---

6 Cap 50, 2006 Rev Ed.

7 For detailed discussion on burden of proof, please refer to the standard texts, which include: Sudipto Sarkar & V R Manohar, *Sarkar on Evidence* vol 2 (LexisNexis Butterworths Wadhwa, 17th Ed, 2011) at pp 1852–1941; Gopal S Chaturvedi, *Field's Commentary on the Law of Evidence* vol 4 (Delhi Law House, 12th Ed, 2008 Reprint) at pp 3470–3786; Colin Tapper, *Cross & Tapper on Evidence* (Oxford University Press, 12th Ed, 2010) ch 3.

8 [1985] 1 WLR 948 at 955.

9 The remark of Lord Brandon was made in the context where the evidence was unsatisfactory, where the party with the burden to prove its case had not proved its case to the required standard of proof. This passage was cited with approval by the Court of Appeal in *Cooperatieve Centrale Raiffeisen-Boerenleenbank BA, Singapore Branch v Motorola Electronics Pte Ltd* [2011] 2 SLR 63 at [35].

10 [2007] 4 SLR(R) 855 at [59].

> *The court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him.* Since the terms 'proved', 'disproved' and 'not proved' are statutory definitions contained in the Evidence Act (Cap 97, 1997 Rev Ed) ('EA'), the term 'proof', wherever it appears in the EA and unless the context otherwise suggests, means the burden to satisfy the court of the existence or non-existence of some fact, that is, the legal burden of proof: see ss 103 and 105 of the EA. [emphasis added]

7 With the above observations in mind, it is proposed to analyse the issues that may come up in practice in relation to burden of proof and standard of proof under the Act in civil litigation. Generally, the case law that will be referred to will relate to civil cases. Criminal cases will only be referred to when they touch upon issues under the Act relevant to civil litigation.

IV. Sections 103 to 105 of the Evidence Act

8 The starting point is the occurrence of the burden of proof. On this matter, ss 103 to 105 of the Act provide:

> **Burden of proof**
>
> 103— (1) *Whoever desires* any court to give *judgment* as to any legal right or liability, dependent on the existence of facts which he asserts, *must prove* that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.
>
> **On whom burden of proof lies**
>
> 104 The *burden of proof* in a suit or proceeding *lies on that person who would fail if no evidence at all were given on either side.*
>
> **Burden of proof as to particular fact**
>
> 105 The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
>
> [emphases added]

9 The Court of Appeal in *Cooperatieve Centrale Raiffeisen-Boerenleenbank BA, Singapore Branch v Motorola Electronics Pte Ltd*[11] ("*Rabobank*") had clearly held that pursuant to ss 103 and 105 of the Act, the legal burden of proof is placed on the party who asserts the

11 [2011] 2 SLR 63.

existence of any fact in issue or relevant fact.[12] Also, in the same case, the distinction between legal burden of proof and evidential burden of proof was explained:[13]

> It is now trite law that there is a distinction between the legal and evidential burden of proof. This court has explained the distinction between the two concepts in *Britestone* …
>
> Sections 103 and 105 of the Evidence Act, which place the burden of proving a fact on the party who asserts the existence of any fact in issue or relevant fact respectively, concern the legal rather than the evidential burden of proof. The evidential burden, whilst not expressly provided for in the Evidence Act, exists in the form of a tactical onus to contradict, weaken or explain away the evidence that has been led: *Britestone* at [59]. It is the latter form of burden which may shift from one party to the other.

10 It is submitted that the use of the term "legal burden of proof" in *Britestone*, refers to the term "legal burden of proof" as defined above.[14] It comprises the "burden to prove its case" and the burden *simpliciter*.[15] This legal burden of proof never shifts.[16] Bearing this in mind, it is proposed to consider the various terms and implications considered in *Britestone*,[17] including presumptions, burden of proof, evidential burden and whether there is any burden "shifts".

V. The legal burden of proof on a typical plaintiff and a typical defendant

11 In order to understand the implications of ss 103 to 105 of the Act more fully, the typical plaintiff's case and defendant's case in practice must be considered. The plaintiff always has to discharge the legal burden of proof in order to succeed in its case.[18]

---

12 *Cooperatieve Centrale Raiffeisen-Boerenleenbank BA, Singapore Branch v Motorola Electronics Pte Ltd* [2011] 2 SLR 63 at [30]; see also *Britestone Pte Ltd v Smith & Associates Far East, Ltd* [2007] 4 SLR(R) 855.

13 *Cooperatieve Centrale Raiffeisen-Boerenleenbank BA, Singapore Branch v Motorola Electronics Pte Ltd* [2011] 2 SLR 63 at [30]. The issues relating to evidential burden are considered at paras 78–89 below.

14 See para 4 above.

15 The terms are defined in para 4 above. Clearly, there is reference to ss 103 and 105 of the Evidence Act (Cap 97, 1997 Rev Ed) in *Cooperatieve Centrale Raiffeisen-Boerenleenbank BA, Singapore Branch v Motorola Electronics Pte Ltd* [2011] 2 SLR 63, which together consist of "the legal rather than the evidential burden of proof" (at [30]).

16 See *Cooperatieve Centrale Raiffeisen-Boerenleenbank BA, Singapore Branch v Motorola Electronics Pte Ltd* [2011] 2 SLR 63 at [30].

17 *Britestone Pte Ltd v Smith & Associates Far East, Ltd* [2007] 4 SLR(R) 855 at [58], which is reproduced in full at para 73 below.

18 See, *eg*, *Britestone Pte Ltd v Smith & Associates Far East, Ltd* [2007] 4 SLR(R) 855 at [59].

12 The position of the defendant needs clarification. In order to ascertain what legal burden of proof is imposed on the defendant, the kinds of defence must be considered. There are three usual forms of defence. First is the defence of a mere denial of a claim ("first form of defence"). Here, there is strictly speaking no legal burden of proof. The defence is not putting forth a legal defence to avoid or defeat the claim;[19] neither is it asserting a positive case. What the first form of defence seeks to do is to ensure that the plaintiff fails to prove its case.

13 The second form of defence is a defence where the defendant asserts a fact either to explain away any of the factual assertions of the plaintiff or to give a different version of the facts that is favourable to the defendant ("second form of defence"). In such an event, the burden to prove its case or discharge the burden *simpliciter*[20] would be on the defendant. However, it may not be fatal to the defendant if it fails to discharge this burden. If the defendant succeeds in convincing the court on a 50–50 basis its version of any material fact or events *vis-à-vis* the plaintiff's version, then the plaintiff would still fail in its case if the plaintiff has not discharged its legal burden of proof.[21] In such a case, though the defendant does not succeed in proving its case by discharging its legal burden of proof, the defendant has, however, in that process succeeded in bringing down the plaintiff's case to a 50% level, thus ensuring that the plaintiff's case is "not proved".[22]

14 It can be seen that the first form of defence has as its sole objective, and the second form of defence has as part of its objective, to ensure that the plaintiff fails to discharge its burden of proof. If the plaintiff does not discharge its legal burden of proof,[23] the plaintiff would fail. It is in this context that the definition of "not proved" in the Act[24] becomes extremely important. If the judge is left in doubt as to

19 *Cooperatieve Centrale Raiffeisen-Boerenleenbank BA, Singapore Branch v Motorola Electronics Pte Ltd* [2011] 2 SLR 63 at [30]. For a recent case involving a defence of bare denial, see *Seng Swee Leng v Wong Chong Weng* [2011] SGCA 64, particularly at [32].

20 See *Wee Yue Chew v Su Sh-Hsyu* [2008] 3 SLR(R) 212, especially at [7] where the plaintiff claimed the purchase price was RMB2.5m, but the defendant asserted it was US$508,069. Thus the burden of proof on the plaintiff was to prove RMB2.5m; the legal burden of proof on the defendant was to prove US$508,069.

21 See, for *eg*, *Tang Yoke Kheng v Lek Benedict* [2005] 3 SLR(R) 263 at [13]. In such a case, the plaintiff would not have proved its case – see s 3(5) of the Evidence Act (Cap 97, 1997 Rev Ed) on the definition of "not proved". See also *Loo Chay Sit v Estate of Loo Chay Loo* [2010] 1 SLR 286.

22 See s 3(5) of the Evidence Act (Cap 97, 1997 Rev Ed), and the authorities cited in n 21 above.

23 See definition at para 4 above. See the full discussion on standard of proof at paras 96–103 below.

24 Subsection 3(5) of the Evidence Act (Cap 97, 1997 Rev Ed). See also *Loo Chay Sit v Estate of Loo Chay Loo* [2010] 1 SLR 286 at [20].

whether the event occurred or not, then the judge would have to conclude that the party with the legal burden of proof has failed to discharge the same.[25]

15 There is then the third form of defence, which is in the form of an avoidance of the claim ("third form of defence"). The third form of defence would essentially be a defence whereby, if the defendant were to succeed, he would be able to defeat the plaintiff's claim even if the plaintiff has proved its claim on a balance of probabilities. This is a typical case where the defendant has the "burden to prove its case".[26] An example of this would be a case where a plaintiff sues on a contract and a breach thereof, which it succeeds to prove. The defendant's defence could be a misrepresentation on the part of the plaintiff. If the defendant proves this defence, then notwithstanding the plaintiff discharging the burden to prove its case, the defendant would still defeat the plaintiff's case upon proving such a defence.[27]

16 It can be seen that the Court of Appeal in *Rabobank*[28] acknowledged the first and third forms of defence, which were adopted from the judgment of Walsh JA in *Currie v Dempsey.*[29] However, the second form of defence may not have been fully considered.[30]

---

25 *Rhesa Shipping Co SA v Edmunds* [1985] 1 WLR 948 where Lord Brandon said:

> This is especially so when it is open to the judge to say simply that the evidence leaves him in doubt whether the event occurred or not, and that the party on whom the burden of proving that the event occurred lies has therefore failed to discharge such burden.

See also *Miller v Minister of Pensions* [1947] 2 All ER 372 at 374, *per* Denning J (as he then was):

> If at the end of the case the evidence turns the scale definitely one way or the other, the tribunal must decide accordingly, but if the evidence is so evenly balanced that the tribunal is unable to come to a determinate conclusion one way or the other, then the man must be given the benefit of doubt. This means that the case must be decided in favour of the man unless the evidence against him reaches the same degree of cogency as is required to discharge a burden in a civil case. That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say, 'We think it more probably than not', the burden is discharged, but, if the probabilities are equal, it is not.

26 See definition at para 4 above.

27 Also see *Wee Yue Chew v Su Sh-Hsyu* [2008] 3 SLR(R) 212 where the plaintiff claimed for payment of purchase price for the sale of shares to the defendant. The defendant admitted the sale but claimed she had paid the plaintiff. The burden of proof to prove payment was on the defendant.

28 *Cooperatieve Centrale Raiffeisen-Boerenleenbank BA, Singapore Branch v Motorola Electronics Pte Ltd* [2011] 2 SLR 63 at [30].

29 [1967] 2 NSWLR 532.

30 The second form of defence may partly be treated as a defence by "avoidance" as described by Walsh JA, where the facts asserted in the defence diametrically oppose the plaintiff's case. However, it can also act to ensure that the plaintiff is not able to discharge the burden to prove its case beyond 50%, *ie*, "not proved": see s 3(5) of

(*cont'd on the next page*)

VI. Consideration of sections 103 to 105 of the Evidence Act

17 Sections 103 and 104 of the Act can now be considered in more detail. Section 103 states that the person who is seeking *judgment* must prove the existence of facts that he asserts. There are two main parts in s 103. The first is the assertion of the *existence of facts*. The second is the requirement to *prove those facts*. This position as encapsulated in s 103 is then in the negative form in s 104, that is, the "burden of proof" is on the person who would fail if no evidence is called.[31]

18 What one must discern from ss 103 and 104 are the respective words "judgment" and "suit or proceeding". Reading the two sections together, the effect is that if the party seeking *judgment* in a *suit or proceeding* fails to adduce evidence, then such party would fail to obtain "judgment" in such suit or proceeding. The single legal reason for such failure is that the said party has failed to discharge the legal burden of proof on it to adduce evidence to the required standard to prove its case.

19 Section 103 of the Act provides that he who asserts the facts must "prove that those facts exist". Hence the obligation is on the party seeking judgment in the suit to prove his case. He has to prove it to the standard required as defined in s 3 of the Act.[32] If he fails to prove, then it is "not proved".[33] In such a case, he will not obtain judgment.[34]

---

the Evidence Act (Cap 97, 1997 Rev Ed). See also *Loo Chay Sit v Estate of Loo Chay Loo* [2010] 1 SLR 286.

31 It is humbly submitted that s 104 does not speak of the evidential burden at all as asserted by Sudipto Sarkar and V R Manohar in *Sarkar on Evidence* vol 2 (LexisNexis Butterworths Wadhwa, 17th Ed, 2011 Reprint) at p 1868. It merely reinforces the legal burden of proof. In particular, s 104 speaks of the burden lying on the person "who would fail if no evidence at all were given on either side". It does not speak of a situation of some evidence on one side. The contrary position that this section reflects the evidential burden and that it takes into consideration the shifting of such burden is asserted by the same edition of *Sarkar on Evidence* at p 1868:

> Shifting of Burden — Burden of proof in the second sense above (*ie*, the duty of adducing evidence) is contained in s 102 [*ie*, s 104 of the Evidence Act]. It lies at first on that party who would be unsuccessful if no evidence at all were given on either side. This being the test, this burden of proof cannot remain constant but must shift as soon as he produces evidence which *prima facie* gives rise to a presumption in his favour. It may again shift back on him if the rebutting evidence produced by his opponent preponderates.

32 In a civil case, it would be on a balance of probabilities. For a classic exposition of "balance of probabilities", see *Miller v Ministry of Pension* [1947] 2 All ER 372 at 374, *per* Denning J.

33 See s 3(4) of the Evidence Act (Cap 97, 1997 Rev Ed) on the definition of "not proved". See also *Loo Chay Sit v Estate of Loo Chay Loo* [2010] 1 SLR 286.

34 See *Loo Chay Sit v Estate of Loo Chay Loo* [2010] 1 SLR 286; see also discussion on standard of proof at paras 96–103 below.

20 As for s 104 of the Act, it is submitted that it should be used as the practical yardstick to determine on whom the burden of proof lies. It is surprising how little consideration has been given to s 104 of the Act in this respect. It is a clear and simple yardstick provided by the Act to determine on whom lies the burden of proof. One merely has to ask the question at the outset of trial, based on the pleadings: "Who would fail if no evidence was given on either side?" As s 104 states:

> [T]he burden of proof in a suit or proceeding *lies on that person who would fail if no evidence at all were given* on either side. [emphasis added]

As for s 105 of the Act, it in turn places the burden *simpliciter* to prove any particular fact on the party who wishes the court to believe in its existence.[35] Evidence may be given of facts in issue and relevant facts.[36]

VII. Interplay between the Evidence Act and the pleadings

21 By virtue of the said sections in the Act, the burden is imposed on the person who "asserts" a fact, to prove that fact. In civil trials, one ascertains who is asserting a particular fact by looking at the pleadings.[37]

22 A fact that needs to be proved is a fact in issue.[38] "Facts in issue" is defined in the Act.[39] Further, any fact that is relevant may also be

35 Unless the law provides otherwise: see the proviso to s 105 of the Evidence Act; see also *Britestone Pte Ltd v Smith & Associates Far East, Ltd* [2007] 4 SLR(R) 855 at [59].

36 See s 5 of the Evidence Act (Cap 97, 1997 Rev Ed); Gopal S Chaturvedi, *Field's Commentary on Law of Evidence* vol 4 (Delhi Law House, 12th Ed, 2008 Reprint) at p 413 opined:

> Evidence may be given of two sets of facts: (1) of facts in issue; (2) of facts relevant to the facts in issue … [T]he litigant must remember that his case at the trial will be restricted to evidence which bears directly on the matters in issue and to matters which lead up to and explain that evidence. What are the points in issue can be ascertained from the pleadings or whatever process takes the place of pleadings.

37 The burden of proof "is fixed at the beginning of the trial by the state of pleadings and it is settled as a question of law": Gopal S Chaturvedi, *Field's Commentary on Evidence Law* vol 4 (Delhi Law House, 12th Ed, 2008 Reprint) at p 3445, [15]; *BHP Billiton Petroleum Ltd v Dalmine* [2003] EWCA Civ 170 at [15], *per* Rix LJ who passed the judgment of the English Court of Appeal; *Cooperatieve Centrale Raiffeisen-Boerenleenbank BA, Singapore Branch v Motorola Electronics Pte Ltd* [2011] 2 SLR 63 at [30].

38 See definitions of "fact" and "facts in issue" in s 3 of the Evidence Act (Cap 97, 1997 Rev Ed).

39 "Facts in issue" in s 3 of the Evidence Act (Cap 97, 1997 Rev Ed) is defined as follows:

> [It] includes any fact from which either by itself or in connection with other facts the existence, non-existence, nature or extent of any right, liability or disability asserted or denied in any suit or proceeding necessarily follows.

adduced and proved in evidence.[40] As far as proving facts in civil proceedings is concerned, it is clear by s 5 of the Act that no evidence can be given of any fact that a person is disentitled to prove by virtue of the Rules of Court.[41]

23 Thus, by virtue of s 5 of the Act, the pleadings in civil proceedings should determine what facts can and must be proved by a party to the proceedings. This can be understood from the function of pleadings as stated in *The "Ohm Mariana" ex "Peony"*:[42]

> In *Blay v Pollard and Morris* [1930] 1 KB 628, the trial judge decided the case on issues not raised in the pleadings and on appeal the Court of Appeal held that he was not entitled to do that. Scrutton LJ said:
>
> > … Cases must be decided on the issues on the record; and if it is desired to raise other issues they must be placed on the record by amendment. In the present case the issue on which the judge decided was raised by himself without amending the pleadings, and in my opinion he was not entitled to take such a course.
>
> In *Kiaw Aik Hang Co Ltd v Tan Tien Choy* [1964] MLJ 99, this court held that the trial judge had decided on issues not raised in the pleadings and ordered a new trial. Buttrose J in his judgment (with whom Wee Chong Jin CJ and Tan Ah Tah J concurred) said, at 101:
>
> > While one can appreciate the dilemma in which the learned trial Judge found himself as the result of his findings he has, with the greatest respect, in my opinion, decided the case on issues not raised by the pleadings and against the admissions contained in them and the evidence.
> >
> > The case, in my view, must be decided on issues raised by the pleadings which bind the parties. If other issues are desired to be raised or come to light during the trial they must be pleaded by way of amendment.
> >
> > For these reasons alone, in my judgment, this decision cannot be allowed to stand and in the circumstances of this case I have come to the conclusion that in order to do justice between the parties a new trail must be ordered.
>
> More recently, Lord Edmund-Davis in *Farrell v Secretary of State for Defence* [1980] 1 WLR 172 said:
>
> > … pleadings continue to play an essential part is civil actions, and although there has been since the Civil Procedure Act 1833 a wide power to permit amendments, circumstances may arise when the grant of permission would work injustice

40 "Relevant" fact is also defined and elaborated upon in ss 3 and 5 of the Evidence Act (Cap 97, 1997 Rev Ed).

41 Cap 322, R 5, 2004 Rev Ed.

42 [1993] 2 SLR(R) 113 (CA) at [49]–[51].

> or, at least, necessitate an adjournment which may prove particularly unfortunate in trials with a jury. To shrug off a criticism as 'a mere pleading point' is therefore bad law and practice. For the primary purpose of pleadings remains, and it can still prove of vital importance. That purpose is to define the issues and thereby to inform the parties in advance of the case they have to meet and so enable them to take steps to deal with it.

24 Thus for the plaintiff or defendant to prove and win its case, it simply has to establish its pleaded case. The plaintiff must prove its pleaded case by discharging its legal burden of proof. For a plaintiff to lose its case, the defendant need not disprove the plaintiff's case. All that the defendant needs to do is to show to the court that the plaintiff's case is "not proved" to ensure that the plaintiff does not get judgment. The first form of defence does just that. The second form of defence can do the same: ensure that the plaintiff does not discharge the legal burden of proof. The second form of defence can also take the form of a diametrically opposite set of facts, which, if believed, would make the plaintiff's case untenable.[43] In such a case, the defendant would have to discharge its legal burden of proof to prove such diametrically opposite facts.

25 In the second form of defence, there is nothing to stop the defendant from completely disproving the plaintiff's case to ensure that the plaintiff fails to prove its case. It is up the defendant as a matter of strategy to defend the case right to the level of disproving the plaintiff's case though the defendant need not do so in order to defeat the plaintiff's claim.[44]

26 There is then the third form of defence. To succeed here, the defendant has to discharge the legal burden of proof.[45]

27 To further understand the issues on burden of proof, one must also have a full knowledge of the trial process in Singapore. Events in the trial process would have direct implications on the burden of proof.

---

43 See discussion at paras 96–103 below on the terms "proved", "unproved" and "disproved". See further *Loo Chay Sit v Estate of Loo Chay Loo* [2010] 1 SLR 286.

44 See *Loo Chay Sit v Estate of Loo Chay Loo* [2010] 1 SLR 286. However, where the second form of defence seeks to assert facts, in particular, diametrically opposite facts, the defendant must discharge the legal burden of proof. See paras 39–46 below on legal burden of proof.

45 See discussion at paras 39–46 below.

VIII. The trial process

28 Under our present Rules of Court, the evidence of all parties and witnesses are prepared in written form, called the affidavits of evidence-in-chief ("AEICs").[46] The AEICs function as the evidence to support the pleadings of the respective parties. The AEICs of all parties are normally served on the court and exchanged between the parties. There is no right of response without the leave of court.[47] Further, no new witness[48] or evidence[49] can be allowed or adduced without leave of court.[50]

29 Also, it must be noted that, in a trial, the cross-examination of all witnesses of one party – for example, the plaintiff to the dispute – is completed at one go. After that, the cross-examination of the witnesses of the other party, that is, the defendant to the dispute, takes place. Again, this is done at one go. The party that has completed cross-examination (except in very rare and unusual circumstances, which are not relevant here) is not allowed to cross-examine after it has closed its case.

30 In practice, while a trial is proceeding, no one can notice any shifting of any burden.[51] What happens is this: in the case of a plaintiff, it has to adduce evidence to prove its case on a balance of probabilities. Its witnesses are put on the stand and cross-examination usually takes place whereby the credibility of the evidence is tested. In such cross-examination, many styles are involved and many purposes are achieved. One main purpose of cross-examination is to discredit the evidence of that particular witness. This necessarily involves convincing the court to disbelieve the evidence of the witness.

31 The judge in a trial does not notify parties of his views on the evidence during the trial. What the judge does is that, amongst other factors, he gives due consideration to the cross-examination process, to the relevance of the questions, to the relevance of the issues and to the weight or importance of the particular fact being credited or discredited. When cross-examination is taking place, the cross-examiner will be weighing the evidence against him and the weight of evidence for him. He does not measure mechanically whether he has cross-examined and

46 Rules of Court (Cap 322, R 5, 2004 Rev Ed) O 38 r 2(1).
47 *Auto Clean 'N' Shine Services v Eastern Publishing Associates Pte Ltd* [1997] 2 SLR(R) 427.
48 Rules of Court (Cap 322, R 5, 2004 Rev Ed) O 25 r 1 and Form 44; *Auto Clean 'N' Shine Services v Eastern Publishing Associates Pte Ltd* [1997] 2 SLR(R) 427.
49 Rules of Court (Cap 322, R 5, 2004 Rev Ed) O 38 r 2(3).
50 *Auto Clean 'N' Shine Services v Eastern Publishing Associates Pte Ltd* [1997] 2 SLR(R) 427.
51 See discussion on shifting of burden at paras 72–89 below.

proved his client's case to a certain point to be confident that his client is assured of success.

32 The defendant may have at least three options available to it.

33 The first is a case where even before the trial commences, based on the AEICs, the plaintiff fails to produce the degree of evidence to discharge its legal burden of proof or has failed to plead its legal cause of action in full as required by law. In such a case, the defendant may wish to strike out the case without further steps being taken in a trial.[52]

34 The second situation is where the defendant would have cross-examined the witnesses of the plaintiff. There is then the question of whether the plaintiff has established a *prima facie* case at this point.[53] At this juncture, the plaintiff would have brought in all the evidence required to prove its pleaded case. The plaintiff would then close its case.

35 The defendant, however, would not be aware of whether there is in fact a *prima facie* case established by the plaintiff after the close of the plaintiff's case following such cross-examination by the defence counsel. The judge will not intimate to the parties as to whether there is or is not a case to answer. Counsel for the defendant would have to assess the evidence adduced by the plaintiff and the strength of his cross-examination and documentary evidence and determine whether the judge would make a finding that the plaintiff had not established a *prima facie* case.

36 Counsel for the defendant would have to make a serious decision at this point in time. If he is confident that the plaintiff had not established a *prima facie* case, then he would end the proceedings without adducing further evidence. He would state to the judge that there is no case to answer.[54] Once he has made such an election, it is irrevocable.[55]

---

52 Though this would rarely be allowed by the judge. If the striking-out involved bad pleading, it could have been taken earlier before the trial started.

53 See, for example, *Lim Eng Hock Peter v Lin Jian Wei* [2009] 2 SLR(R) 1004.

54 See, for example, *Bansal Hemant Govindprasad v Central Bank of India* ("*Bansal Hemant*") [2003] 2 SLR(R) 33; *Lim Eng Hock Peter v Lin Jian Wei* [2009] 2 SLR(R) 1004. It is still an open question as to whether the defendant can adduce evidence if the judge determines that there is a *prima facie* case, where the submission of "no case to answer" is made on the basis that the evidence led by the plaintiff "was unsatisfactory or unreliable": see *Bansal Hemant* at [16]. It is submitted that there should only be one position in civil proceedings when the defendant takes a stand of "no case to answer": the trial ends and the judge must deliver the judgment. In practice, he must make the defendant agree that he is electing not to give any further evidence. This would ensure that there is no retrial if the judge finds there is "no case to answer" on the basis that the evidence of the

(*cont'd on the next page*)

37 If defence counsel is not sure as to whether in his assessment the plaintiff had established a *prima facie* case, then he would take the third option. He would then proceed to introduce his evidence through his witnesses to make out the defence and to seek to ensure that the plaintiff fails in its case. Defence counsel at this point must always bear in mind that if the plaintiff had not in fact established a *prima facie* case on the plaintiff's evidence, the act of the defence putting in their witnesses can result in the evidence from such defence witnesses helping the plaintiff to in fact be able to discharge the plaintiff's legal burden of proof. It is settled law that the plaintiff can establish its case either through evidence of its witnesses or the defendant's witnesses.[56] The court does not make a distinction as to who had brought in the particular evidence; the court merely looks at the credibility of the evidence to see whose case it supports.

38 When the third option applies, the judge would then look at the whole sum of evidence to decide whether the plaintiff succeeds in its claim.

IX. Legal burden of proof – Burden to prove its case and burden *simpliciter*

39 From a consideration of the authorities, various terms relating to the burden of proof have been used, and one of which is the legal burden of proof;[57] another is the evidential burden;[58] yet another is the tactical burden.[59]

plaintiff "was unsatisfactory or unreliable". There should not be any delay or waste of precious court resources. Further, the present case management and court efficiency indicate that there should not be a retrial. See further *Tan Juay Pah v Kimly Construction Pte Ltd* [2012] 2 SLR 549 (CA) at [23] and [36]–[37]. In this article's discussion, a "no case to answer" situation is where the defendant cannot adduce any further evidence.

55 *Storey v Storey* [1960] 3 All ER 279.

56 *Abrath v North Eastern Railway Co* [1883] 11 QBD 440 at 453, affirmed by the House of Lords at *Abrath v North Eastern Railway Co* [1886] 11 App Cas 247.

57 See, for example, *Cooperatieve Centrale Raiffeisen-Boerenleenbank BA, Singapore Branch v Motorola Electronics Pte Ltd* [2011] 2 SLR 63 at [30] and *Britestone Pte Ltd v Smith & Associates Far East, Ltd* [2007] 4 SLR(R) 855 at [58].

58 See, for example, *Cooperatieve Centrale Raiffeisen-Boerenleenbank BA, Singapore Branch v Motorola Electronics Pte Ltd* [2011] 2 SLR 63 at [30] and *Britestone Pte Ltd v Smith & Associates Far East, Ltd* [2007] 4 SLR(R) 855 at [58].

59 *Anti-Corrosion Pte Ltd v Berger Paints Singapore Pte Ltd* [2012] 1 SLR 427 at [37].

40 When one speaks of the "legal burden of proof" *vis-à-vis* the plaintiff or the defendant, it is suggested, one should only be referring to the legal burden of proof as defined above.[60]

41 The legal burden of proof on the plaintiff or defendant to prove its *case* is "the burden to prove its case".[61] Any other burden by virtue of the Act or by any other law to prove a fact in issue is simply a "burden *simpliciter*".[62] It stops there.

42 The parties will know, based on their pleadings, the legal burden of proof on them to succeed in the claim or the defence. They would have adduced the AEICs and other documents to support their cases.[63]

X. Interaction of burden to prove its case and burden *simpliciter*

43 The plaintiff would obviously have the burden to prove its case. The burden of proof would be on it to prove each of the particular facts, unless the law has provided otherwise in respect of any particular fact.[64] The plaintiff would then have to prove each of the material facts on a balance of probabilities in order to succeed in its claim. In the plaintiff's case then, each material fact is, figuratively speaking, a link in a chain, the chain being the sum of evidence to prove the plaintiff's case in order to discharge its legal burden of proof. The plaintiff has the burden *simpliciter* to prove each of the links (that is, each material fact) in order to succeed to form a chain. If it fails to prove any of the facts, it would amount to one or more links missing in the chain and thus it would fail to discharge its burden to prove its case.

44 As for the defendant, we revert to the three forms of defence.[65] In the first form of defence, there is really no burden of proof on the defendant. In the second and third forms of defence, the legal burden of proof is on the defendant. The only qualification is that if the defendant fails to prove its case but proves any material fact to the 50% level, this may have the effect of the plaintiff not succeeding in proving that same material fact beyond the 50% level.[66] Thus, the plaintiff would fail to discharge its legal burden of proof.[67]

60 See definitions at para 4 above. See also *Britestone Pte Ltd v Smith & Associates Far East, Ltd* [2007] 4 SLR(R) 855 at [58]: the reference to the legal burden of proof is in relation to ss 103 and 105 of the Evidence Act (Cap 97, 1997 Rev Ed).

61 See para 4 above.

62 See para 4 above.

63 See discussion on trial process at paras 28–38 above.

64 See Evidence Act (Cap 97, 1997) s 105.

65 See discussion at paras 11–16 above.

66 See discussion at paras 13–14 above.

67 The submissions on the link in a chain equally apply to the defendant when it has the burden to discharge its legal burden of proof.

45 From this perspective, any party who wishes to prove the existence of a fact must necessarily have the burden to prove that fact – this is the burden *simpliciter*.[68] On top of that, there is always a burden on the plaintiff or the defendant to prove its case.[69]

46 Finally, it must be remembered that the legal burden of proof must be discharged on a balance of probabilities, that is, the civil standard.[70]

XI. Application of "burden to prove its case" and "burden *simpliciter*" to a hypothetical contractual claim

47 We can now test the interaction of "burden to prove its case" and the "burden *simpliciter*" by way of a simple contract claim.

48 A plaintiff may claim the existence of a contract and a breach by non-performance by the defendant. The legal burden of proof is thus on the plaintiff to show that there is a contract and there is non-performance by the defendant. In the first form of defence, the only legal burden of proof would be on the plaintiff to prove its case. All that the defendant has to do is cast doubts on the plaintiff's case that there is no contract or no breach, so that the plaintiff does not succeed on a balance of probabilities – that is, the plaintiff's case then is "not proved".

49 In the second form of defence, the defendant may seek to show its version of the facts that there was no contract in existence or no breach. In such a situation, the defendant would have the legal burden to prove its version of events. If it succeeds, then the plaintiff's case would not be proved on a balance of probabilities if this was a material fact to make out the plaintiff's case. However, even if the defendant fails to succeed but if it has brought any material fact to a level of 50% of proof, though the defendant fails to prove that fact, the plaintiff would also have failed to prove its case on a balance of probabilities.[71]

50 In the third form of defence, the defendant may take the further step of asserting a case where it seeks to avoid the contract, for example, on the basis of misrepresentation or mistake. In such a case, the legal burden of proof[72] to prove the misrepresentation or mistake will be on the defendant.

68 See Evidence Act (Cap 97, 1997 Rev Ed) s 105; see also para 4 above.
69 See definition at para 4 above.
70 See definition at para 4 above.
71 See discussion at paras 13–14 above.
72 As defined in para 4 above.

51 In the above example, if the plaintiff succeeds in proving the existence of a contract and the breach thereof, and if there is no other evidence or defence, the plaintiff must succeed. However, if the defendant has put up a particular defence of misrepresentation or mistake and it succeeds in proving this defence, then notwithstanding the existence of the contract and breach thereof, the contract is liable to be set aside. The defendant would still succeed in the case.

XII. Presumptions[73] and legal burden of proof

52 The article shall now consider presumptions and their effect on the legal burden of proof. When considering presumptions, it is important to note whether the court "may" presume or "shall" presume, or whether it is "conclusive proof".[74]

53 Section 116[75] of the Act, for example, prescribes the situations where the court "may presume" the existence of certain facts. In truth, this section does not put any form of burden of proof on any party, though it appears under the heading "Burden of Proof" in the Act. All s 116 provides for is to give the court the *discretion* to presume or infer

---

73 In this article, presumptions are referred to only to show the incidence of the legal burden of proof and whether there is any "shifting" in the loose sense. Therefore there will not be an in-depth analysis of presumptions, as that is not within the purview of this article. The term "presumption" is defined in s 4 of the Evidence Act (Cap 97, 1997 Rev Ed) as follows:

> 4— (1) Whenever it is provided by this Act that the Court may presume a fact, it may either regard such a fact as proved unless and until it is disproved, or may call for proof of it.
>
> (2) Whenever it is directed by this Act that the court shall presume a fact, it shall regard such fact as proved unless and until it is disproved.
>
> (3) When one fact is declared by this Act to be conclusive proof of another, the court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it.

For an in-depth analysis of presumptions, see further Gopal S Chaturvedi, *Field's Commentary on Law of Evidence* vol 1 (Delhi Law House, 12th Ed, 2008 Reprint) at pp 380–409. See also an illuminating discussion on presumptions: A T Denning, "Presumptions and Burden" (1945) 61 LQR 379.

74 See Evidence Act (Cap 97, 1997 Rev Ed) s 4. This position is equally applicable to presumptions under common law: see further Colin Tapper, *Cross & Tapper on Evidence* (Oxford University Press, 12th Ed, 2010) at pp 133–136. In respect of certain documents, the Evidence Act has provided that the court "shall presume" when the stipulated conditions are met: see Evidence Act (Cap 97, 1997 Rev Ed) ss 81–92.

75 Section 116 of the Evidence Act (Cap 97, 1997 Rev Ed) states:

> The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.

For a full discussion see Gopal S Chaturvedi, *Field's Commentary on Law of Evidence* vol 4 (Delhi Law House, 12th Ed, 2008 Reprint) at pp 3982–4209.

the existence of certain facts if certain other facts were proved. The party, who has the burden to prove the prerequisite facts for such an inference to be made, still has to prove that particular fact, which is the prerequisite.[76]

54 Presumptions, as a matter of law or as a matter of fact, presume the existence of certain facts in the context of certain facts that are proved. Thus for the presumption to become applicable, the party would have the burden *simpliciter* to prove each of the relevant facts that would result in the application of the presumption.[77] If the presumption is conclusive and there is no provision for rebuttal, then the presumption cannot be rebutted.[78] If the presumption is rebuttable, then the burden *simpliciter* would be on the party against whom the presumption is being made, to rebut the said presumption.

55 The article now briefly considers two presumptions that are in the category of "'shall presume unless rebutted", provided for in the Act[79] – that is, ss 108 and 113 – and a similar presumption at a common law in relation to the presumption of resulting trust.

56 Section 108 of the Act states:

> **Burden of proving fact especially within knowledge**
>
> When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

76 For a similar view in relation to the position under English law where the Evidence Act is not applicable, see Colin Tapper, *Cross & Tapper on Evidence* (Oxford University Press, 12th Ed, 2010) at pp 133–135.

77 In the context of a common law presumption, Lord Nicholls in *Royal Bank of Scotland plc v Etridge (No 2)* [2001] UKHL 44 at [14] said:

> Proof that the complainant placed trust and confidence in the other party in relation to the management of the complainant's financial affairs, coupled with a transaction which calls for explanation, will normally be sufficient, failing satisfactory evidence to the contrary, to discharge the burden of proof. *On proof of these two matters* the stage is set for the court to infer that, in the absence of a satisfactory explanation, the transaction can only have been procured by undue influence. [emphasis added]

These words similarly apply to the presumptions under the Evidence Act, *ie*, *the pre-conditions to the presumption must be proved* for the presumption to become applicable.

78 See, for *eg*, ss 81 – 92 of the Evidence Act (Cap 97, 1997 Rev Ed).

79 We will consider the presumptions in ss 108 and 113 of the Evidence Act (Cap 97, 1997 Rev Ed). There are other rebuttable presumptions that exist at common law, in particular, in equity to which the same submissions herein equally apply – for *eg*, presumption of advancement – *Low Gim Siah v Low Geok Khim* [2007] 1 SLR(R) 795; presumption of resulting trust – *Lau Siew Kim v Yeo Guan Chye* [2008] 2 SLR(R) 108.

Illustration

(*a*) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.

(*b*) *A* is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him.

57 This section puts the burden *simpliciter* on the party, especially within whom the particular knowledge would lie. For s 108 to come into play, the party – that is, the plaintiff who has the legal burden of proof – would have to prove everything within its case, including the inference from its evidence that unless there is rebuttal evidence from the other side, the inference of knowledge as asserted by the plaintiff would prevail.

58 Section 108 removes the necessity for a plaintiff to prove what would be impossible for it to do.[80] Thus, it places the burden *simpliciter* on the opposite party – that is, the defendant – to prove a fact "especially within the knowledge" of the defendant.

59 If the defendant fails to positively prove a different knowledge, and thus fails to discharge the burden *simpliciter*, then the plaintiff would succeed in its assertion of the fact as being within the defendant's knowledge. The role of s 108, then, is to merely assist in providing the link in the evidence to enable the plaintiff to discharge its legal burden of proof.[81]

60 Section 113 of the Act shall now be considered.[82] Take the case of a plaintiff pleading a breach of fiduciary duty by the defendant. Additionally, assume that the plaintiff asserts that the defendant as such fiduciary was in a position of active confidence and had failed to act in

80 As to when this presumption becomes applicable see *Surender Singh s/o Jagdish Singh v Li Man Kay* [2010] 1 SLR 428 at [217]–[222], in particular, see [217] where it is said that s 108 "cannot apply when the fact or facts are such that they are capable of being known also by a person other than the defendant".

81 This analysis is in line with the illustrations to s 108 of the Evidence Act (Cap 97, 1997 Rev Ed). In particular, illustration (*a*) shows that if a plaintiff has adduced the evidence to prove that a person has done an act with a particular intention and that the evidence shows from its character and circumstances that such an intention can be suggested, then the burden of proof is on the defendant to suggest a contrary intention when the fact is especially within the knowledge of the defendant.

82 Section 113 of the Evidence Act (Cap 97, 1997 Rev Ed) (excluding the illustrations) states:

> Where there is a question as to the good faith of a transaction between parties, one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence.

good faith. The defendant then seeks to take the position that the defendant had acted in good faith.

61 In such a case, the plaintiff would have to prove the existence of the fiduciary relationship whereby the defendant stood in a position of active confidence.[83] When this is proved, the plaintiff would have satisfied its case. The plaintiff would not have to prove the absence of good faith. The reason for this is that s 113 of the Act only requires the plaintiff to prove the existence of the relationship of "active confidence" and the plaintiff would have succeeded in proving the absence of good faith if no evidence was forthcoming from the defendant.[84]

62 The law has thus intervened to assist the plaintiff in the plaintiff's case. The burden *simpliciter* is now placed on the defendant to show that there was good faith. If the defendant fails to adduce evidence to prove positively that there was good faith, then the law, by virtue of s 113 of the Act, would deem that the defendant acted in bad faith. The Act has specifically made it clear that the plaintiff would be deemed to have succeeded in showing absence of good faith by the defendant's failure to prove otherwise.

63 The analysis above applies to all presumptions under the Act, as well as to other presumptions at common law or in equity.[85]

64 The common law presumption relating to resulting trust shall now be considered, as lately it has received increasing attention. It is settled law that the presumption of resulting trust is a rebuttable presumption of law.[86]

---

83 If the plaintiff fails to prove "active confidence", then the presumption in s 113 of the Evidence Act (Cap 97, 1997 Rev Ed) will not apply: see *Lai Kwee Lan v Ng Yew Lay* [1989] 2 SLR(R) 252.

84 Section 113 of the Evidence Act (Cap 97, 1997 Rev Ed) is a presumption that arises where there is a relationship of "active confidence" between the parties to the dispute: see Gopal S Chaturvedi, *Field's Commentary on Law of Evidence* vol 4 (Delhi Law House, 12th Ed, 2008 Reprint) at p 3931. Where s 113 is not applicable, the burden would lie on the person asserting bad faith: see *Tat Seng Machine Movers Pte Ltd v Orix Leasing Singapore Ltd* [2009] 4 SLR(R) 1101, in particular, at [76]; see also *Red Bull GmbH v Sun Mark Ltd* [2012] EWHC 1929 (Ch). However, when there is special relationship, the common law (*ie*, equity) also follows a presumption similar to s 113: see, for *eg*, *National Westminster Bank plc v Morgan* [1985] 1 AC 686, especially the judgment of Lord Scarman; *Royal Bank of Scotland plc v Etridge (No 2)* [2001] UKHL 44, especially *per* Lord Nicholls at [13] and [19].

85 For a full discussion, see A T Denning, "Presumptions and Burdens" (1945) 61 LQR 379; Colin Tapper, *Cross & Tapper on Evidence* (Oxford University Press, 12th Ed, 2010) ch 3.

86 *Lau Siew Kim v Yeo Guan Chye* [2008] 2 SLR(R) 108 at [46]. "Presumptions of law are, in reality, rules of law, and part of the law itself, the Court may draw the inference whenever the requisite facts are before it": see Gopal S Chaturvedi, *Field's*

(*cont'd on the next page*)

65 The position in law on the legal burden of proof, in respect of the presumption of resulting trust, was settled by the Court of Appeal in *Lau Siew Kim v Yeo Guan Chye*:[87]

> In addition, it should also be noted that the actual *effect* of the presumptions of resulting trust and advancement relates to the *burden of proof* in the particular case. As Abella J in *Pecore* astutely noted:
>
> > If the presumption of advancement applies, an individual who transfers property into another person's name is presumed to have intended to make a gift to that person. The burden of proving that the transfer was not intended to be a gift is on the challenger to the transfer. If the presumption of resulting trust applies, the transferor is presumed to have intended to retain the beneficial ownership. The burden of proving that a gift was intended is on the recipient of the transfer.
>
> [emphases in original]

66 Thus, in a typical situation, proof of payment of the purchase price by A for the purchase of the property in the name of B, is a prerequisite for a resulting trust in favour of A.[88] The legal burden of proof is on party A, who is asserting the existence of a resulting trust to establish that he provided the purchase price.[89]

67 Once the presumption of resulting trust is applied, the party – that is, B in the example – in seeking to challenge the presumption, in fact, bears the legal burden and not an evidential burden.[90]

68 The reason is simple: once the presumption of resulting trust has come into place, unless the party seeking to rebut the presumption adduces evidence on a balance of probabilities, that is, the civil standard, it cannot displace the presumption. That is because the party seeking to rebut the resumption has the *legal burden of proof*.[91] There is no question of party B in the aforesaid example seeking to adduce evidence based on an "evidential burden", to seek to show that the presumption is proved to less than a balance of probabilities. There is no such possibility.

Commentary on Law of Evidence vol 1 (Delhi Law House, 12th Ed, 2008 Reprint) at p 388, para 4.

87 [2008] 2 SLR(R) 108 at [57].

88 *Lau Siew Kim v Yeo Guan Chye* [2008] 2 SLR(R) 108.

89 *Lau Siew Kim v Yeo Guan Chye* [2008] 2 SLR(R) 108.

90 However, see the Hong Kong case of *Lee Tso Fong v Kwok Yai Sun* [2008] 4 HKC 36 at [23] where the contrary position was taken, that the evidential, and not legal burden, is placed on such party. This Hong Kong case was cited with approval in *United Overseas Bank v Giok Bie Jao* [2012] SGHC 56. For a full discussion on the legal burden of proof and evidential burden, see paras 78–89 below.

91 *Lau Siew Kim v Yeo Guan Chye* [2008] 2 SLR(R) 108 at [57].

69 Party B must now prove with facts on the civil standard that there is no resulting trust. For example, party B can assert that there was consideration given by party B for the transfer, or that it was a gift to party B. There is no burden on party A to say it was not a gift. The legal burden of proof is on party B.

70 Thus the position under the law is that when the presumption of resulting trust applied, the legal burden of proof, and not just the "evidential burden", falls on the party disputing the resulting trust to displace the presumption. This is then exactly a position similar to that provided in s 113 of the Act.[92]

71 Having considered the mechanics of presumptions, whatever the nature of presumptions, it can be noted that they do not shift any burden (whether the legal burden or evidential burden). The application of a presumption, in fact, presumes the party as having proved what is presumed. If it is a rebuttable presumption, the other party must now adduce evidence to rebut, failing which the first party succeeds. There is no shifting of the legal burden of proof. The legal burden of proof has been placed on the parties based on their pleaded cases at the outset of the trial. It did not and cannot shift while the trial is progressing.

XIII. Shifting of burden of proof and evidential burden[93]

72 We now consider the issue relating to the so-called "shifting" of the burden of proof. The trial process[94] as described above must be borne in mind to appreciate whether there is any "shifting".

92 The contrary position that it is merely an evidential burden, and not a legal burden that is imposed on the party challenging the presumption of resulting trust, was approved in *United Overseas Bank v Giok Bie Jao* ("*United Overseas Bank*") [2012] SGHC 56 at [18], where the judge cited the Hong Kong case of *Lee Tso Fong v Kwok Wai Sun* ("*Lee Tso Fong*") [2008] 4 HKC 36 at [22]–[23]. It is humbly submitted that the position taken in *United Overseas Bank* is incorrect and is inconsistent with *Lau Siew Kim v Yeo Guan Chye* ("*Lau Siew Kim*") [2008] 2 SLR(R) 108 at [57]. It is unfortunate that the learned judge, having referred to *Lau Siew Kim* at [52]–[55], failed to refer to [57], which is in total contradiction to the position taken in the Hong Kong case of *Lee Tso Fong* on the issue of legal burden or evidential burden to discharge the presumption of resulting trust.

93 For a discussion on "evidential burden", see Colin Tapper, *Cross & Tapper on Evidence* (Oxford University Press, 12th Ed, 2010) at pp 122–126.

94 See discussion at paras 28–38 above.

73 The legal burden of proof never shifts.[95] The position on the so-called "shifting" was elaborated by the Court of Appeal in *Britestone*:[96]

> The term 'burden of proof' is more properly used with reference to the obligation to prove. There are in fact two kinds of burden in relation to the adduction of evidence. The first, designated the legal burden of proof, is, properly speaking, a burden of proof, for it describes the obligation to persuade the trier of fact that, in view of the evidence, the fact in dispute exists. *This obligation never shifts in respect of any fact, and only 'shifts'* in a manner of loose terminology when a legal presumption operates. The second is a burden of proof only loosely speaking, for it falls short of an obligation to prove that a particular fact exists. It is more accurately designated the evidential burden to produce evidence since, whenever it operates, the failure to adduce some evidence, whether in propounding or rebutting, will mean a failure to engage the question of the existence of a particular fact or to keep this question alive. As such, this burden can and will shift.[97] [emphasis added]

95 See also *Cooperatieve Centrale Raiffeisen-Boerenleenbank BA, Singapore Branch v Motorola Electronics Pte Ltd* [2011] 2 SLR 63 at [31]; and *Currie v Dempsey* [1967] 2 NSWLR 532 at 532 and 539, *per* Walsh JA.

96 *Britestone Pte Ltd v Smith & Associates Far East, Ltd* [2007] 4 SLR(R) 855 at [58]. See also *Cooperatieve Centrale Raiffeisen-Boerenleenbank BA, Singapore Branch v Motorola Electronics Pte Ltd* [2011] 2 SLR 63 at [31]; *Currie v Dempsey* [1967] 2 NSWLR 532 at 532 and 539, *per* Walsh JA. However, it is to be observed that the language of "shift" has been used in the Act on one occasion, when it talked about the legal burden of proof. This can be found in s 110 of the Evidence Act (Cap 97, 1997 Rev Ed). Section 110 reads:

> When the question is whether a man is alive or dead, and it is proved that he has not been heard of for 7 years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it.

The Act provides that "the burden of proving … is *shifted to* the person who affirms it". It could have instead used "on" or "upon" in place of "shifted to". It is humbly submitted that the meaning of "shifted to" is either "on" or "upon". Gopal S Chaturvedi, *Field's Commentary on Law of Evidence* vol 1 (Delhi Law House, 12th Ed, 2008 Reprint) at p 3784 states: "[T]he burden of proving that he is alive is under [s 110 of the Act], *upon* him who asserts that he is alive" [emphasis added]. In fact, s 108 of the Indian Evidence Act 1872 (Act No 1 of 1872) [similar to s 110 of the Singapore Evidence Act] actually starts with "Provided that when the question". However, s 110 of the Evidence Act starts with "when" and the proviso words "Provided that" do not appear. In the Indian Evidence Act, the position of their s 108 (*ie*, s 110 of the Singapore Act) is in the form of a proviso to s 107 of the Indian Evidence Act (*ie*, s 109 of the Singapore Act), and therefore reading ss 107 and 108 of the Indian Evidence Act, it would seem that s 108 uses the words "shifted to": see Gopal S Chaturvedi, *Field's Commentary on Law of Evidence* vol 4 (Delhi Law House, 12th Ed, 2008 Reprint) at pp 3872–3874.

97 See discussion at paras 8–10 above.

The Court of Appeal[98] then referred to what is designated a "legal presumption".[99] It was of the view that by virtue of the application of a legal presumption in "loose terminology",[100] the burden "shifts".[101] Further, it also said that the "evidential burden"[102] is only, "loosely speaking", a burden of proof but not in the legal sense of the legal burden of proof. It was also said that the evidential burden "can and will shift".[103]

XIV. Presumptions and shifting of burden

74 Bearing in mind the trial process,[104] one would immediately note that parties to the trial will not, at any point, be aware of any shifting of any burden. It would be better for practitioners to understand that all that they need to consider in any suit or proceeding is the incidence of the legal burden of proof, that is, the burden on a party to prove its case and/or and the burden *simpliciter*. This would be crystallised at the commencement of the trial, bearing in mind the pleadings, the law, the AEICs and the evidence placed before the court.

75 There is no shifting of the legal burden of proof when a presumption applies. The legal burden of proof on a plaintiff remains on it at all times.[105] By the application of the presumption, there is a burden *simpliciter* placed on the defendant. A shifting in such a case would mean that there was originally the burden placed on the plaintiff, which now, at a certain point of time during the proceedings, had shifted to the defendant. That is not the case.

76 From the outset, the plaintiff in its pleaded case would have the application of all presumptions based on the facts of the case applying to it, whether by virtue of the Act or other rules of law. The plaintiff, bearing in mind the applicable presumptions, would prove its case up to the point of the presumption becoming applicable. Then, the presumption would come into play to complete the plaintiff's pleaded case.

77 The burden of proof would then be on the defendant to rebut the presumption. This burden *simpliciter* on the defendant never shifted

98 *Britestone Pte Ltd v Smith & Associates Far East, Ltd* [2007] 4 SLR(R) 855 at [58].
99 *Britestone Pte Ltd v Smith & Associates Far East, Ltd* [2007] 4 SLR(R) 855 at [58].
100 *Britestone Pte Ltd v Smith & Associates Far East, Ltd* [2007] 4 SLR(R) 855 at [58].
101 *Britestone Pte Ltd v Smith & Associates Far East, Ltd* [2007] 4 SLR(R) 855 at [58].
102 *Britestone Pte Ltd v Smith & Associates Far East, Ltd* [2007] 4 SLR(R) 855 at [58].
103 *Britestone Pte Ltd v Smith & Associates Far East, Ltd* [2007] 4 SLR(R) 855 at [58].
104 See discussion at paras 28–38 above.
105 See *Cooperatieve Centrale Raiffeisen-Boerenleenbank BA, Singapore Branch v Motorola Electronics Pte Ltd* [2011] 2 SLR 63 at [31]; see discussion at paras 72–73 above.

from the plaintiff. The presumption was never a burden on the plaintiff in the first place. It was there for the plaintiff to use to its advantage to discharge its legal burden of proof, so long as the plaintiff proved the existence of the facts, which is a prerequisite to the presumption becoming applicable.

XV. Legal burden of proof and evidential burden of proof

78 The party on whom the legal burden of proof rests has the legal obligation to adduce evidence to the civil standard to discharge its burden to prove its case and/or the burden *simpliciter*. Thus it is of paramount importance in litigation to determine who bears the legal burden of proof on any matter.

79 In the normal course of events, both parties to the suit would be adducing evidence to support their respective positions.[106] In that process, one party would seek to make its evidence more credible than that of the other party's. In litigation, there will be this continuing tension from the start to the end of the trial. The judge would have to make his decision at the end of the trial as to his finding on the evidence and whom he believes.

80 It is in analysing this process of adduction of evidence to satisfy the legal burden of proof that sometimes one speaks of an "evidential burden".[107] Used in this sense, all it means is that the party with the legal burden of proof has, simultaneously, the obligation or burden *to adduce evidence*.[108] It is not of any additional use to term the obligation an "evidential burden". The legal burden of proof already encompasses such an obligation.

81 The term "evidential burden" is also used in contradistinction to the term "legal burden of proof". Commonly, judges say that the party with the legal burden of proof on the particular facts has proved its case to a *prima facie* level. At this point the judge would also indicate that the evidential burden, and not the legal burden, shifts to the opposite party to rebut the *prima facie* case.[109]

---

106 See discussion on the trial process at paras 28–38 above.

107 See, for *eg*, *Asia Hotel Investments Ltd v Starwood Asia Pacific Management Pte Ltd* [2005] 1 SLR(R) 661, in particular, [124]–[127] and [139].

108 See discussion at paras 17–27 above.

109 See, for *eg*, *John While Springs (S) Pte Ltd v Goh Sai Chuah Justin* [2004] 3 SLR(R) 596, in particular, [5]–[6]. Bearing in mind the trial process – see paras 28–38 above – it will be clear that no party to the trial would be aware as to when such an evidential burden shifted to it. The observation of the judge would not be known to the parties. See also *Wee Yue Chew v Su Sh-Hsyu* [2008] 3 SLR(R) 217 at [7].

82 What is meant in such a case is that the first party's case would be believed if the opposite party did not produce evidence to rebut the first party's evidence. If the opposite party produces evidence to make the first party's evidence less believable, then it may succeed in reducing the first party's case to less than *prima facie*, that is, 50–50 or less.[110]

83 In such a situation, the opposite party in fact has no evidential *burden*. There is no such burden imposed by law. It is a party's tactical decision whether to produce evidence to the contrary.[111]

84 More importantly, the opposite party would not, at any point of time, know that the evidence of the first party has reached the *prima facie* level.[112] At best, the judge, in watching the trial progress, may note – as Belinda Ang J noted astutely in *Wee Yue Chew v Su Sh-Hsyu*[113] – that "the evidential burden shifts or alternates from one party to the next in the progress of a trial according to the nature and strength of the evidence offered in support or in opposition of the main fact to be established".

85 *In his mind*, the judge can take the view that a plaintiff may have made out a *prima facie* case at some stage. In such a case, in the judge's mind there would be an obligation on the defendant to rebut the plaintiff's case, failing which a decision may be entered in favour of the plaintiff. Such a situation can only arise when the defendant had submitted a "no case to answer".[114]

86 Nobody in the trial would know what is on the judge's mind. None of the parties to the trial would be privy to the judge's assessment and weighing of the evidence during the trial. Further, it can be seen from the actual trial process[115] that no one who is a party to the proceedings would be aware of any evidential burden shifting to it. Neither would such a party be able to tailor its evidence accordingly.[116]

87 When the judge is making a finding at the end of the trial,[117] there is no question of asserting that the evidential burden shifted to the other party. It is merely a matter of saying that, having heard both sides,

110 That is, "not proved": see discussion at paras 96–103 below.
111 See discussion on the trial process at paras 28–38 above.
112 See discussion on the trial process at paras 28–38 above.
113 [2008] 3 SLR(R) 212 at [7].
114 See the full discussion on trial process and "no case to answer" at paras 28–38 above.
115 See discussion on trial process at paras 28–38 above.
116 From the discussion on trial process at paras 28–38 above, it can be noted that the evidence (by way of affidavits of evidence-in-chief) is crystallised at the time the trial commences.
117 The trial ends either at the "no case to answer" stage or after both sides close their cases.

one party's evidence has reached the level to discharge its legal burden of proof. The other party did not succeed in making the first party's case "not proved" or in discharging its own legal burden of proof.[118] There is no shifting of any "evidential burden". This, at best, would be the observation of the judge on an *ex-post-facto* basis.

88 Serious confusion can arise when judges in cases speak of the "evidential burden".[119] Is the judge saying that the evidential burden is on the other party, in the sense that it now has the legal burden of proof and thus the evidential burden? Or is the judge merely saying that regardless of the legal burden of proof, the party with the evidential burden now has to produce evidence or fail? Either of these notions serves no purpose but to confuse.

89 When one speaks of the "evidential burden to produce evidence",[120] there is in fact no such burden on any party except on the party with the legal burden of proof.[121] There is no other burden imposed by law on any party in law to produce evidence.[122] It is the inherent right of the defendant at all times to discredit the case of the plaintiff and *vice versa*. It is a misnomer to call this inherent right an "evidential burden". The defendant does not have any burden in such a case to prove anything. The plaintiff has the "legal burden of proof". All the defendant needs to do is to discredit the plaintiff's case. It can do this by simply cross-examining and discrediting the plaintiff's witnesses. It is the defendant's decision whether to adduce any evidence or not. There is no *burden* imposed on it.[123]

---

118 See further discussion at paras 11–16 above.

119 In the first place, the term "evidential burden" is not even used in the Evidence Act. The term has been observed to lead to error. Sir Nicholas Browne-Wilkinson VC in *Brady (Inspector of Taxes) v Group Lotus Car Cos plc* [1987] 2 All ER 674 at 687 observed that, in his "experience, every time the phrase 'evidential burden' is used it leads to error". It is submitted that this term is better discarded, so that when one speaks of a burden of proof, all there is in mind is the legal burden of proof and nothing more.

120 *Britestone Pte Ltd v Smith & Associates Far East, Ltd* [2007] 4 SLR(R) 855 at [58].

121 See discussion at paras 17–27 above.

122 In practice, the defendant would not have any burden on it in the first form of defence. However, almost invariably, the defence taken by the defendant in such a situation would be the second form of defence, *ie*, either prove facts contrary to the plaintiff's or, in that process, ensure that the plaintiff does not succeed in discharging its legal burden of proof. For the importance in practice to plead by way of the second form of defence and not just the first form, see *Seng Swee Leng v Wong Chong Weng* [2011] SGCA 64 at [33], [37]–[38]. If the defendant pleads in the second or third form of defence, then it would have imposed on it the legal burden of proof: see further paras 11–16 above.

123 The author believes this is what has been referred to as the evidential burden or "tactical burden": see *Anti-Corrosion Pte Ltd v Berger Paints Singapore Pte Ltd* [2012] 1 SLR 427 at [37]. See also Colin Tapper, *Cross and Tapper on Evidence* (Oxford University Press, 12th Ed, 2010) at p 126.

XVI. Conclusion on burden of proof

90 The question of whether a party has a burden imposed on it arises at the time of the pleadings of the case.[124] The plaintiff would have the burden to prove its case and the burden *simpliciter*. To discharge the burden to prove its case, there is a burden *simpliciter* on it to prove each material fact on a balance of probabilities.[125] This position does not and cannot change during or after the trial. It is clearly fixed at the outset of the trial.

91 If during the trial one party – for example, the plaintiff – adduces credible evidence to support its case, then subsequently it is for the defence to adduce contrary evidence to rebut the evidence of the plaintiff. However, the position of the defendant to adduce contrary evidence is already fixed at the time of the commencement of the trial. The defendant cannot respond with new evidence or witnesses if these were not already in place (except with leave of court) in the form of documents and AEICs that have been exchanged between the parties just before the trial commenced.

92 When one speaks of "shifting of the evidential burden", it seems to postulate a situation where the defendant, after having heard the plaintiff's evidence in trial, would at a certain point in time know that there is shifted upon it the burden to rebut the credible evidence of the plaintiff. This does not happen during the trial process.[126]

93 Any purported "shifting" is, at best, a fiction. It is a fiction that appears in the reasoning process of the court on an *ex-post-facto* basis, with the benefit of hindsight. It would seem that when a judge makes such a comment about the purported "shifting", what he really has in mind is his observation at the end of the trial that, earlier during the trial, the party to whom the burden "shifted" had failed to rebut the same. It is then purely a reasoning justification of the judge for his conclusion on the evidence. There is, at most, only a "shifting" theoretically. Practically, the parties to the proceedings will not be aware of the same at the material time.

94 As for the term "evidential burden", it has no added value. It states the obvious, which exists as an obligation to adduce evidence to discharge the legal burden of proof, or to the inherent right of a party to

124 See discussion at paras 39–42 above.

125 Save that in the second form of defence, failing to prove the particular fact would mean the defence has not been made out as pleaded, but such defence may be proved to the level of 50% to ensure that the plaintiff is not able to discharge its burden of proof to more than 50%: see further paras 96–103 below.

126 See discussion on trial process at paras 28–38 above.

discredit the evidence of the opposite party. In either case, the term "evidential burden" adds nothing of value.

95 It is time that the notions of "evidential burden", "shifting of evidential burden" or even a consideration on whom lies the "evidential burden", are discarded. Even presumptions do not shift any burden. All one needs to be clear about is the occurrence of the legal burden of proof. This burden never shifts. It is imposed by the Act on the parties, depending on the terms of the pleaded case and the applicable rules of law.

XVII. Standard of proof

96 In a trial, a fact that is asserted must be proved.[127] A fact is only proved if it meets the standard of proof, that is, "the degree of persuasion which the tribunal must feel before it decides that the fact in issue did happen".[128]

97 The process as to whether or not a fact to be proved has happened was neatly described by Lord Hoffmann in the case of *In re B*:[129]

> If a legal rule requires a fact to be proved (a 'fact in issue'), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are zero and one. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of zero is returned and the fact is treated as not having happened. If he does discharge it, a value of one is returned and the fact is treated as having happened.

98 The judge has to so decide whether a fact has been proved in accordance with the provisions in ss 3(3), 3(4) and 3(5) of the Act. Subsections 3(3), 3(4) and 3(5) state:

> **'Proved'**
>
> 3(3) A fact is said to be 'proved' when, after considering the matters before it, the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

127 See Evidence Act (Cap 97, 1997 Rev Ed) ss 103–105.
128 *In re B (Children)* [2009] 1 AC 11 at [4], *per* Lord Hoffmann.
129 *In re B (Children)* [2009] 1 AC 11 at [2], *per* Lord Hoffmann.

> **'Disproved'**
>
> 3(4) A fact is said to be 'disproved' when, after considering the matters before it, the court either believes that it does not exist or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.
>
> **'Not proved'**
>
> 3(5) A fact is said to be 'not proved' when it is neither proved nor disproved.

99 The Court of Appeal in *Loo Chay Sit* construed these provisions and lucidly interpreted the said provisions of the Act:[130]

> In so far as the statutory definitions in s 3 of the Evidence Act are concerned, we would also add the following observations. First, where the party asserting a particular fact has discharged his burden of proof on a balance of probabilities (in civil suits) to allow the court to make the finding that a particular fact *exists*, that fact is 'proved'. Secondly, where the party seeking to challenge a particular fact sought to be proved by the opposing party adduces sufficient evidence to allow the court to make the finding that the fact does not exist, the said fact is 'disproved'. Now, it is equally possible that the party seeking to challenge the particular fact sought to be proved by the opposing party has proven a fact *mutually exclusive* from the fact sought to be proved by the opposing party. In this case, the fact sought to be proved by the opposing party has also been disproved. In other words, the party adduces sufficient evidence for the court to make a finding that Fact X exists and since Fact X and the fact sought to be proved by the opposing party, Fact Y, are mutually exclusive, Fact Y has been disproved.
>
> Thirdly, a finding that a particular fact is 'not proved' is not the same as a finding that the fact is 'disproved' … The finding that a particular fact has been 'disproved' is an affirmative finding as to the non-existence of that fact. Likewise, the finding that the fact has been 'proved' is an affirmative finding as to the existence of the fact. It follows that the finding that the fact is 'not proved' means that no affirmative pronouncement as such is made by the court as to either its existence or non-existence …
>
> In a case where a fact is said to be 'not proved', the court is unable to say precisely how the matter stands because of a lingering doubt as to the existence *and* non-existence of the fact; put simply, the court is unable to decide one way or the other. The court thus refrains from making an affirmative pronouncement as to the existence or non-existence of the fact.
>
> [emphases in original]

130 *Loo Chay Sit v Estate of Loo Chay Loo* [2010] 1 SLR 286 at [18]–[20].

100 Apart from what is "proved" or "disproved", what is to be noted is what is meant to be "not proved". In this article, "not proved" is referred to as proving at a level of 50–50 or less. A party seeking to discharge its legal burden of proof at the level of 50–50 or less would in fact "not prove" its case.

101 There is no other provision in the Act that touches upon the standard of proof; this is the only section that talks about the relevant standard. The Act does not refer to the standard of proof of beyond reasonable doubt for criminal cases, or to the balance of probabilities for civil cases. All that the Act refers to is what a "prudent man"[131] would consider, having regard to the circumstances of the particular case.

102 The Privy Council in the case of *Public Prosecutor v Yuvaraj*[132] stated that the applicable standard of proof was dependent on the nature of the proceedings.[133] In a criminal proceeding, the prudent man following the provisions of the Act would apply the standard of proof of beyond reasonable doubt. When the prudent man is sitting in a civil proceeding, he would apply the standard of proof that is on a balance of probabilities.

131 See Evidence Act (Cap 97, 1997 Rev Ed) ss 3(3)–3(4).

132 [1970] 2 WLR 226.

133 Lord Diplock in *Public Prosecutor v Yuvaraj* [1970] 2 WLR 226 at 231 said:

> The definitions in the *Evidence Ordinance* do not attempt to spell out explicitly the degree of probability for which a prudent man ought to look before he acts on the supposition that a fact does not exist. As a matter of common sense this must depend upon the nature of the action contemplated. A degree of probability sufficient to induce a prudent man to spend a dollar on the supposition that a fact did not exist might be insufficient to induce him to risk a million dollars. The definitions, however, contain no express identification of the action which the prudent man is to be assumed to have in contemplation.
>
> In their Lordships' view the relevant action to be taken by the prudent man upon the supposition that a particular fact does or does not exist to which the definitions refer is the determination of the judicial proceedings which will follow from a finding that the fact is proved or disproved as the case may be. The *Evidence Ordinance* applies to civil and to criminal proceedings alike and the definitions of 'proved' and 'disproved' draw no explicit distinction between facts required to be proved by the prosecution in criminal proceedings and facts required to be proved by a successful party to civil proceedings. Yet it cannot be supposed that the *Evidence Ordinance* intended by a provision contained in what purports to be a mere definition section to abolish the historic distinction, fundamental to the administration of justice under the common law, between the burden which lies upon the prosecution in criminal proceedings to prove the facts which constitute an offence beyond all reasonable doubt and the burden which lies upon a party in a civil suit to prove the facts which constitute his cause of action or defence upon a balance of probabilities.

103 Thus, it is established that the Act recognises two standards of proof: first, the criminal standard; and second, the civil standard.[134]

XVIII. Hybrid case

104 Whatever the justification may be to incorporate the two standards of proof into one "*prudent man*", a new tension has now arisen in respect of a hybrid case.[135] Case law seems to indicate that a "higher degree" of proof,[136] or even a "higher standard",[137] is required.

105 An attempt will be made below to analyse precisely the standard of proof required in hybrid cases. There can be gleaned from case law three possibilities: first, the civil standard; second, the criminal standard; and third, the possibility of a standard between the civil standard and the criminal standard.

XIX. Civil standard for hybrid cases

106 Recent case law in Singapore on the subject matter of hybrid cases seems to show the civil standard as the applicable standard, but opens the possibility of a third standard that may exist between the civil standard and criminal standard.

107 A good starting point is the case of *Yogambikai Nagarajah v Indian Overseas Bank*[138] ("*Yogambikai*"). In this case, the Court of Appeal asserted that the standard of proof for forgery in civil cases is "the civil one". However, the Court of Appeal went on to state that there may be a higher degree of probability required or even a higher standard of proof:[139]

> The first observation we make in this context is that the burden of proof is on the party alleging the forgery. This raises the question of the standard of proof which the party has to satisfy. At one time, the authorities were unclear and espoused conflicting views as to whether the proper standard was the criminal standard or the ordinary civil standard (*per* Sir John Patterson in *Doe v Wilson* (1855) 14 ER 581 at 592 (PC)). In *Hornal v Neuberger Products Ltd* [1957] 1 QB 247, the *Court of Appeal of England adopted the latter approach but with a significant qualification*. The Court of Appeal interpreted the civil standard as one which varied depending on the gravity and

134 This position is now recognised by the Court of Appeal in *Loo Chay Sit v Estate of Loo Chay Loo* [2010] 1 SLR 286 at [17].

135 See definition at para 4 above.

136 *Yogambikai Nagarajah v Indian Overseas Bank* [1996] 2 SLR(R) 774 at [39].

137 *Yogambikai Nagarajah v Indian Overseas Bank* [1996] 2 SLR(R) 774 at [43].

138 [1996] 2 SLR(R) 774.

139 *Yogambikai Nagarajah v Indian Overseas Bank* [1996] 2 SLR(R) 774 at [39]–[43].

seriousness of the allegation. ***The more serious the allegation, the higher the required standard of proof.*** In that case, there was a claim based on fraud. The trial judge held that on a balance of probability, a fraudulent misrepresentation had been made. However, he would not have been satisfied if the standard was the criminal standard of beyond reasonable doubt. Nevertheless, he was of the opinion that the correct standard to apply was the civil one. In the course of affirming the trial judge, Hodson LJ at 263 approved a passage from an earlier case of *Bater v Bater* [1951] P 35 where Denning LJ said (at 37):

> … So also in civil cases, the case may be proved by a preponderance of probability but there may be degrees of probability within that standard. The degree depends on the subject-matter. A civil court, when considering a charge of fraud, will naturally require for itself a ***higher degree of probability*** than that which it would require when asking if negligence is established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature; but still it does require a degree of probability which is commensurate with the occasion.

…

> Whatever the precise formula adopted and whatever the theoretical position may be, it has long been the practice in countries where the English system of law operates for the courts, in civil cases, to require *a high standard of proof* in cases where fraud is alleged.[140]

…

Nonetheless, as regards allegations of fraud, forgery or criminal conduct, the standard of proof is to be determined according to the approach in *Hornal*'s case. This much is clear from [88] of that judgment where it was said:

> This is not to say that inferences of this serious nature should be lightly made. The circumstantial evidence must be so compelling and convincing that *bearing in mind the high standard of proof* one is nevertheless satisfied that an inference of fraud is justified.

[emphases added in bold italics; emphases added by the Court of Appeal in italics]

108 The position was also adopted by the Court of Appeal in *Tang Yoke Kheng v Lek Benedict*[141] ("*Tang Yoke Kheng*"). The reasoning process in *Tang Yoke Kheng* also seems to say that hybrid cases are to be judged on the civil standard, but that the more serious the allegation the more

140 Passage from *Nederlandsche Handel-Maatschappij Nv (Netherlands Trading Society) v Koh Kim Guan* [1959] MLJ 173 at 175.

141 [2005] 3 SLR(R) 263.

the party bearing the burden of proof has to do to establish its case. In particular, the Court of Appeal in *Tang Yoke Kheng* said:[142]

> But since fraud can also be the subject of a civil claim, the civil standard of proving on a balance of probabilities must apply because there is no known 'third standard' although such cases are usually known as 'fraud in a civil case' as if alluding to a third standard of proof. However, because of the severity and potentially serious implications attaching to a fraud, even in a civil trial, judges are not normally satisfied by that little bit more evidence such as to tilt the 'balance'. They normally require more … Therefore, we would reiterate that the standard of proof in a civil case, including cases where fraud is alleged, is that based on a balance of probabilities; *but the more serious the allegation, the more the party, on whose shoulders the burden of proof falls, may have to do if he hopes to establish his case.*[143] [emphasis added]

109 This position adopted in *Tang Yoke Kheng*[144] was subsequently accepted in *Chua Kwee Chen v Koh Choon Chin*[145] ("*Chua Kwee Chen*") where, in particular, having cited *Tang Yoke Kheng*, the court said:[146]

> This decision was, in fact, also cited in *Tang Yoke Kheng* … Indeed, I should add that reference may also be made to the following observation by Millett LJ (as he then was) at the Court of Appeal stage in *Re H and R (Child Sexual Abuse: Standard of Proof)* [1995] 1 FLR 643, as follows:
>
> > In civil cases, contempt proceedings apart, there is *only one standard of proof: proof on the balance of probabilities*. It is never necessary to prove facts to a standard beyond the balance of probabilities …
> >
> > *The difference lies in the cogency of the evidence needed to tip the balance, not in the degree to which the balance must be tipped.*
>
> [emphases added by the Court of Appeal]

110 Having stated the above and after having analysed the existing law, *Chua Kwee Chen* was concluded as follows:[147]

142 *Tang Yoke Kheng v Lek Benedict* [2005] 3 SLR(R) 263 at [14].

143 The court had earlier indicated that to judge a hybrid case by reference to a civil standard without more was not entirely satisfactory. It was said in *Tang Yoke Kheng v Lek Benedict* [2005] 3 SLR(R) 263 at [13] that "this reasoning is logically correct, but the rejection of a third test and the reference to the application of the civil standard (on a balance of probabilities) to cases of fraud, without more, is not entirely satisfactory".

144 *Tang Yoke Kheng v Lek Benedict* [2005] 3 SLR(R) 263 at [39].

145 [2006] 3 SLR(R) 469.

146 *Chua Kwee Chen v Koh Choon Chin* [2006] 3 SLR(R) 469 at [28].

147 *Chua Kwee Chen v Koh Choon Chin* [2006] 3 SLR(R) 469 at [39].

> In summary, the standard of proof in civil proceedings where fraud and/or dishonesty is alleged is the civil standard of proof on a balance of probabilities. However, where such an allegation is made (as in the present proceedings), *more* evidence is required than would be the situation in an ordinary civil case. Such an inquiry lies, therefore and in the final analysis, in the sphere of practical application (rather than theoretical speculation). In this regard, a distinction ought not, in my view, to be drawn between civil fraud and criminal fraud. [emphasis in original]

111 More recently, the case of *Kon Yin Tong v Leow Boon Cher*[148] ("*Kon Yin Tong*"), after citing *Tang Yoke Kheng* with approval, said:[149]

> It is generally recognised, as enunciated above, that in order to make a finding of fraud, the court requires a *greater degree of proof* than it would when coming to a finding on issues of fact that do not involve fraud. [emphasis added]

112 Therefore for hybrid cases, the applicable standard is the civil standard. However, certain additional considerations seem to apply. Some examples are: (a) "more" evidence is required than would be the situation in an ordinary civil case;[150] (b) the "seriousness of the allegations" would require more evidence;[151] (c) proving fraud would require a "greater degree of proof";[152] and (d) a "high standard of proof".[153]

113 The above position seems to be similar to the state of affairs in England as at 2008. Lord Nicholls of Birkenhead stated this position very succinctly in *In re H (Minors)* ("*In re H*"):[154]

> The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury. A stepfather is usually less likely to have repeatedly raped and had non-consensual oral sex with his

148 [2011] SGHC 228.

149 *Kon Yin Tong v Leow Boon Cher* [2011] SGHC 228 at [43].

150 See *Chua Kwee Chen v Koh Choon Chin* [2006] 3 SLR(R) 469 at [39]; see also the various epithets used in *Yogambikai Nagarajah v Indian Overseas Bank* [1996] 2 SLR(R) 774 and *Tang Yoke Kheng v Lek Benedict* [2005] 3 SLR(R) 263.

151 *Tang Yoke Kheng v Lek Benedict* [2005] 3 SLR(R) 263 at [39].

152 *Kon Yin Tong v Leow Boon Cher* [2011] SGHC 228 at [43].

153 *Yogambikai Nagarajah v Indian Overseas Bank* [1996] 2 SLR(R) 774 at [43].

154 [1996] AC 563 at 586–587.

> underaged stepdaughter than on some occasion to have lost his temper and slapped her. Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation.
>
> Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established. Ungoed-Thomas J expressed this neatly in *In re Dellow's Will Trusts* [1964] 1 WLR 451 [at] 455:
>
> > The more serious the allegation the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it.
>
> This substantially accords with the approach adopted in authorities such as the well-known judgment of Morris LJ in *Hornal v Neuberger Products Ltd* [1957] 1 QB 247 [at] 266. This approach also provides a means by which the balance of probability standard can accommodate one's instinctive feeling that even in civil proceedings a court should be more sure before finding serious allegations proved than when deciding less serious or trivial matters.[155]

XX. Criminal standard

114 There is a line of cases that sought to apply the criminal standard to such hybrid cases. This line of cases mainly developed in Malaysia.[156] For the present purposes, this standard by settled case law cannot be applied to hybrid cases in Singapore. The Court of Appeal has applied the civil standard and not the criminal standard.[157]

155 The above position in respect of hybrid cases has also been adopted in other Commonwealth jurisdictions. See *Chua Kwee Chen v Koh Choon Chin* [2006] 3 SLR(R) 469 at [29]. It would seem, however, that in Malaysia, such hybrid cases require proof beyond reasonable doubt, thus applying the criminal standard.

156 See the Malaysian cases cited in *Chua Kwee Chen v Koh Choon Chin* [2006] 3 SLR(R) 469 at [30].

157 See *Yogambikai Nagarajah v Indian Overseas Bank* [1996] 2 SLR(R) 774 and *Tang Yoke Kheng v Lek Benedict* [2005] 3 SLR(R) 263. The criminal standard was rejected in the more recent case of *Chua Kwee Chen v Koh Choon Chin* [2006] 3 SLR(R) 469. The clear conclusion, then, is that in Singapore the criminal standard cannot apply to hybrid cases.

XXI. No third standard for hybrid cases

115 It is the author's view that there is no third standard for hybrid cases. There is merely a civil standard applicable to hybrid cases. Additionally, *nothing more is required*.

116 The courts have been grappling with the question of fraud and forgery – which are serious allegations touching upon criminality – being justified and proven by a mere civil standard in civil proceedings.[158] In this process, the courts, in coming to grips with hybrid cases, sought to place certain additional requirements on the party with the legal burden of proof in a civil claim.[159] The courts' requirement in this context has been described on various occasions as follows:

(a) "the more serious the allegations, the more the party … may have to do";[160]

(b) there must be a "cogency of evidence";[161]

(c) there must be "more evidence";[162] or

(d) there must be "a greater degree of proof".[163]

117 English case law on this subject matter is generally traced back to Denning LJ's judgment in *Bater v Bater*[164] and the judgment of the English Court of Appeal in *Hornal v Neuberger Products Ltd*[165] ("*Hornal*"), culminating in the case of *In re H*.

118 The position in England as stated in *In re H*[166] has now been effectively re-explained in the case of *In re B*.[167] Baroness Hale, who passed the leading judgment of the House of Lords, made it clear that in civil matters, regardless of the subject matter, there was only one standard, that is, the civil standard. Further, Baroness Hale went out of her way to explain that there were no additional requirements beyond proving to the civil standard.

158 See, for example, *Tang Yoke Kheng v Lek Benedict* [2005] 3 SLR(R) 263 at [10] and [12].
159 See examples of such additional requirements at para 112 above.
160 See, for example, *Tang Yoke Kheng v Lek Benedict* [2005] 3 SLR(R) 263 at [14]; see also *Yogambikai Nagarajah v Indian Overseas Bank* [1996] 2 SLR(R) 774 at [39].
161 *Chua Kwee Chen v Koh Choon Chin* [2006] 3 SLR(R) 469 at [28].
162 *Chua Kwee Chen v Koh Choon Chin* [2006] 3 SLR(R) 469 at [25] and [39].
163 See *Kon Yin Hong v Leow Boon Chew* [2011] SGHC 228 at [43].
164 [1951] P 35.
165 [1957] 1 QB 247 at 266, *per* Morris LJ.
166 *In re H (Minors)* [1996] AC 563 at 586–587 (which is quoted at para 113 above).
167 *In re B (Children)* [2009] 1 AC 11.

119 The whole of the relevant English case law – which includes *Bater v Bater*, *Hornal*, *In re H*, the judgment of Lord Bingham of Cornhill CJ in *B v Chief Constable of the Avon and Somerset Constalburg*[168] and the judgment of Lord Steyn in *R (McCann) v Crown Court at Manchester*[169] – was examined by Baroness Hale, who then concluded:[170]

> *The standard of proof*
>
> All of their Lordships in *In re H* were clear that there was one standard of proof, the balance of probabilities. But Lord Nicholls went on to say:
>
> > The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, *to whatever extent is appropriate in the particular case*, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability … The more improbable the event, the stronger must be the evidence that it did occur …
> >
> > … Ungoed-Thomas J expressed this neatly in *In re Dellow's Will Trusts* [1964] 1 WLR 451 [at] 455: "The more serious the allegation the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it."
>
> If he had stopped there, perhaps there would have been no difficulty, provided that lawyers and courts paid attention to the whole passage, including the words which I have italicised, rather than extracting a single phrase. But he went on:
>
> > This substantially accords with the approach adopted in authorities such as the well-known judgment of Morris LJ in *Hornal v Neuberger Products Ltd* [1957] 1 QB 247 [at] 266. This approach also provides a means by which the balance of probability standard can accommodate one's instinctive feeling that even in civil proceedings a court should be more sure before finding serious allegations proved than when deciding less serious or trivial matters.
>
> 'More sure' may be read as suggesting a higher standard than the simple preponderance of probabilities.
>
> …

168 [2001] 1 WLR 340 at [30]–[31].
169 [2003] 1 AC 787 at [37].
170 *In re B (Children)* [2009] 1 AC 11 at [62]–[70].

Indeed, later events made matters worse. In *B v Chief Constable of the Avon and Somerset Constabulary* [2001] 1 WLR 340, the issue was the standard of proof to be applied when finding the facts needed to make a sex offender order under section 2 of the Crime and Disorder Act 1998. The Court of Appeal held that these were civil proceedings, but Lord Bingham of Cornhill CJ said this about the standard of proof:

> It should, however, be clearly recognised, as the justices did expressly recognise, that the civil standard of proof does not invariably mean a bare balance of probability, and does not so mean in the present case. The civil standard is a flexible standard to be applied with greater or lesser strictness according to the seriousness of what has to be proved and the implications of proving those matters.
>
> In a serious case such as the present the difference between the two standards is, in truth, largely illusory …

In re H was neither referred to nor cited in that case, but of course the link could be made through the references to *Hornal v Neuberger Products Ltd*. However, *In re H* was cited in *R (McCann) v Crown Court at Manchester* [2003] 1 AC 787. One issue was the standard of proof in finding the facts needed to make an anti-social behaviour order under section 1 of the Crime and Disorder Act 1998. Lord Steyn said this:

> Having concluded that the relevant proceedings are civil, in principle it follows that the standard of proof ordinarily applicable in civil proceedings, namely the balance of probabilities, should apply. However, I agree that, given the seriousness of matters involved, at least some reference to the heightened civil standard would usually be necessary (see *In re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563 [at] 586D–H, *per* Lord Nicholls of Birkenhead) … Lord Bingham of Cornhill has observed that the heightened civil standard and the criminal standard are virtually indistinguishable. I do not disagree with any of those views.

…

My Lords, for that reason I would go further and announce loud and clear that the standard of proof in finding the facts necessary to establish the threshold under section 31(2) or the welfare considerations in section 1 of the 1989 Act is ***the simple balance of probabilities, neither more nor less. Neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. The inherent probabilities are simply something to be taken into account, where relevant, in deciding where the truth lies.***[171]

[emphases added in bold italics; emphasis in original in italics]

171 The judgment in *In re B (Children)* [2009] 1 AC 11 was subsequently endorsed by the UK Supreme Court in *In re S-B Children* [2009] UKSC 17 at [10]–[11].

120 The above position of Baroness Hale, it is submitted, applies to all civil proceedings, including hybrid cases. In *In re B*, there was clearly the reference to the landmark cases of *Hornal* and *In re H*. These are cases that were applied by our Court of Appeal in hybrid cases.[172]

121 It is humbly submitted that, based on *In re B*, the courts may now have to reconsider the position at law. Only a simple civil standard should apply to hybrid cases. There should be no further additional requirements.

XXII. No additional requirement placed beyond the civil standard in respect of hybrid cases

122 In *In re B*,[173] Baroness Hale reviewed all the epithets used by case law when trying to determine the standard of proof required in civil cases that were akin to hybrid cases. Having considered all of them, she finally discarded their use and reverted to the application of only the civil standard to a civil case, be it a hybrid case or not.

123 Baroness Hale debunked the purported requirement that the more serious the allegation the more cogent the evidence needed to prove it. Similarly, the seriousness of the consequences of the allegation was discarded. All that is required, in any civil trial, is whether there are inherent probabilities or inherent improbabilities to be taken into account "when relevant".[174] As very clearly explained by Baroness Hale, the seriousness of the allegation or consequences may not be difficult to prove with simple evidence if such simple evidence clearly existed. In a similar way, the seriousness of the allegation does not make that allegation improbable. The position was best said by Baroness Hale:[175]

> As to the seriousness of the consequences, they are serious either way. A child may find her relationship with her family seriously disrupted; or she may find herself still at risk of suffering serious harm. A parent may find his relationship with his child seriously disrupted; or he may find himself still at liberty to maltreat this or other children in the future.
>
> As to the seriousness of the allegation, there is no logical or necessary connection between seriousness and probability. Some seriously harmful behaviour, such as murder, is sufficiently rare to be inherently improbable in most circumstances. Even then there are circumstances, such as a body with its throat cut and no weapon to hand, where it is not at all improbable. Other seriously harmful behaviour, such as

172 *Tang Yoke Kheng v Lek Benedict* [2005] 3 SLR(R) 263 at [11]–[12].
173 *In re B (Children)* [2009] 1 AC 11 at [62]–[72].
174 *In re B (Children)* [2009] 1 AC 11 at [70].
175 *In re B (Children)* [2009] 1 AC 11 [71]–[72].

> alcohol or drug abuse, is regrettably all too common and not at all improbable. Nor are serious allegations made in a vacuum. Consider the famous example of the animal seen in Regent's Park. If it is seen outside the zoo on a stretch of greensward regularly used for walking dogs, then of course it is more likely to be a dog than a lion. If it is seen in the zoo next to the lions' enclosure when the door is open, then it may well be more likely to be a lion than a dog.

124 Baroness Hale has now re-explained the judgment of Lord Nicholls in *In re H* as applying only the civil standard and requiring nothing more. *On the particular facts of the case*, *inherent probabilities* may need to be taken into consideration. Even on the issue of "inherent probabilities" she made it very clear that it had to be considered only "*when relevant*".[176]

125 Thus, there is only one standard of proof in civil proceedings, even if it involves hybrid cases, that is, the civil standard. The House of Lords in England has announced "loud and clear" that the standard of proof in civil proceedings "is the simple balance of probabilities, neither more nor less".[177]

126 When applying the standard of proof, one must not confuse the situation with the inherent probabilities on the facts of the case. The standard of proof that is applicable is a matter of law. It is an *objective standard* to be applied, regardless of the facts of any particular case.

127 "Inherent probability" is a *subjective* consideration depending on the facts of each particular case. One cannot say in advance that fraud or forgery is inherently improbable. That is totally dependent on the facts of the particular case.

128 Thus any purported inherent improbability cannot arise in advance. It only arises at the time of the facts of the case. It is merely to be taken into consideration *when relevant*.[178] It does not place an additional objective requirement to the civil standard.

129 We can take a simple example of a company and a managing director. A managing director, in his role as a managing director, must act in the interests of the company. However, if a sum of a $100m of the company was taken by him to be gambled away in a casino, then he would, in taking the money, not have acted in the interests of the company and thus be in breach of his fiduciary duty to the company. He has taken the money for his own use.

176 *In re B (Children)* [2009] 1 AC 11 at [70].
177 *In re B (Children)* [2009] 1 AC 11 at [70]; this is adopted by the Supreme Court in *In re S-B (Children)* [2009] UKSC 17 at [10]–[11].
178 *In re B (Children)* [2009] 1 AC 11 at [70].

130 Based on the above example, if a civil suit is taken by the company against the managing director for the return of the $100m (assuming there is no other evidence), the managing director would have to return the said money. The simple facts of such a case would show that fraud has been committed by the managing director on the company. On the civil standard, it is clear that the money belongs to the company. Just because it is a fraud case it does not mean that there is a higher standard of proof to be satisfied. The evidence as it exists clearly shows that, on the particular facts, there is no inherent improbability of the managing director not having taken the company's money wrongfully.

131 "Inherent probability" is therefore dependent on the particular facts of the case – and so do all the other epithets[179] used. Thus at the end of the day, notwithstanding the hybrid nature of the case, the civil standard is the only applicable standard. Any additional requirement of "more" evidence or "cogent" evidence is only relevant in respect of the judge's consideration of the subjective facts and the inherent improbabilities on the facts of the particular case. If a serious act or wrong is proved by a simple piece of evidence, there need not be any "more" evidence requirement. If such a simple piece of evidence shows that a civil fraud was more probably committed than not, then on the application of the civil standard the plaintiff must win the case.

XXIII. Consideration of the basis of Singapore's position

132 It is proposed to consider the basis of the position in Singapore as explained in *Tang Yoke Kheng*. In particular, the case *seems to justify requirements additional* to the civil standard that needs to be satisfied in a hybrid case. It was said:[180]

> Lord Hoffmann expressed a similar view in *Aktieselskabet*, where he used a scale of 0 (impossibility) to 1 (certainty) for illustration. He reasoned that:
>
> > [I]f proof is required on a preponderance of probabilities … it is inconsistent to require a "degree of probability commensurate with the occasion". This suggests some other degree of probability, higher than >0.5 [*sic*], somewhere between the civil standard and the criminal standard, which the courts have wisely never attempted to define as a point on the probability scale. The correct analysis is that the court is not looking for a higher degree of probability. It is only that the more inherently improbable the act in question, the more

179 For some of the epithets used, see para 116 above; see also *In re B (Children)* [2009] 1 AC 11 at [71]–[72].

180 *Tang Yoke Kheng v Lek Benedict* [2005] 3 SLR(R) 263 at [13].

> compelling will be the evidence needed to satisfy the court on a preponderance of probability.
>
> This reasoning is logically correct, but the rejection of a third test and the reference to the application of the civil standard (on a balance of probabilities) to cases of fraud, without more, is not entirely satisfactory. First, in using a scale (say, from 0 to 1) to determine the balance of probabilities, one would be assuming that there is an objective standard by which evidence (quantitatively and qualitatively) may be assessed inerrably. But that is rarely possible, if at all. Although the premise itself is perfectly logical in that a balance of probabilities merely requires the court to decide which of the two cases is more probable (that is, on proof greater than 50%, or in Lord Hoffmann's terminology, >0.5 on a scale of 0 to 1), it is not realistic to apportion grades to evidence – on any scale, be it a scale of 0 to 1, 10, or 100 because of the subjectivity of such an exercise. Secondly, the application of a scale of points to evidence (and the assumption that all evidence is quantitatively and qualitatively homogeneous) naturally assumes also that all evidence may be presented at a single level only. The problem with this assumption is easily demonstrable. Let us take two hypothetical cases. In each case, the plaintiff adduces evidence, the sum of which is *x*, and where *x*, say, consists of one witness and one document. The defendant adduces his evidence, the sum of which is *y*, and where *y*, say, consists of only one witness. The court may find that in each case, *x* is >0.5 (on a scale of 0 to 1) – more than *y*. However, let us assume that in one of the cases, the evidence of *x* is quantitatively and qualitatively superior to the evidence of *x* in the other case. Yet, if the court in both cases were to apply the balance of probabilities test, it would have reached a decision in favour of *x*, that is to say, finding *x* to be >0.5 on a scale of 0 to 1. There would be no problems of consistency and evaluation if they both concerned a simple breach of contract. But if they were both civil cases involving fraud, then the court in the other case may not find in favour of the plaintiff on the ground that it was not satisfied that *x* was >0.5, *ie*, more than *y*. It will be seen, therefore, that the two cases could have been presented at different levels. Hence, the test of a balance of probabilities, by itself a simple test of ascertaining >0.5 on a scale of 0 to 1, may vary according to the levels at which the evidence is presented as well as the nature of the issues in dispute. In other words, in the case of a case involving fraud, the court's expectation of proof of >0.5 on a scale of 0 to 1 would be higher, bearing in mind that in each case the court is balancing the case of the plaintiff against the case of the defendant. Thus, it has no concern with what evidence some other plaintiff or defendant may adduce.

133 It is humbly submitted that the reasoning in *Tang Yoke Kheng* may be open to challenge on the following grounds:

> (a) first, the standard of proof, whether the civil standard or criminal standard, is an *objective standard*. To say that "to determine the balance of probabilities, one would be assuming that there is an objective standard by which evidence

(quantitatively and qualitatively) may be assessed inerrably. But that is rarely possible, if at all", is not quite correct. The standard of proof must remain, and always is, an objective standard. The evidence on the particular facts must be assessed "inerrably" in order to conclude whether the standard of proof has been met. The evidence available to the judge hearing the matters, must be finally decided by the judge as having been proved (or not) to the required standard, that is, in our present case, the civil standard;

(b) second, Lord Hoffmann did not speak of any apportioning of "grades to evidence". It would be wrong to apportion any grades to any evidence. What must and is necessarily done by the judge is an assessment of all the evidence before him from all sides. He then concludes in a civil case (including hybrid cases) whether the party has proven his assertion as being more probable than not (that is, the civil standard). The judge necessarily must collate and *assess the subjective evidence* and decide whether it has *crossed the objective threshold* of the civil standard;

(c) third, following from the above, the explanation of the two hypothetical situations is not quite accurate. In the two hypothetical situations, whether *x* in one case is quantitatively and qualitatively superior to the other, the fact is that the sum of evidence in both cases satisfied the civil standard. Thus there cannot be a situation where the civil standard would be met in both cases in a simple breach of contract case, but not in a situation of "civil fraud";

(d) even if the hypothetical situations involved "civil fraud" cases, the fact that in one case *x* is "qualitatively and quantitatively superior" to another does not make any difference. The final position in the two situations must still remain the same. Even in the case where *x* is not "qualitatively and quantitatively superior", the fact is that it has still crossed the threshold of proof of ">0.5", that is, the civil standard. There is no basis for not holding that the civil standard has been met by *x* in each case, notwithstanding that there is civil fraud. The perplexion of the quality and quantity of the evidence does not change in a civil fraud, and neither is it a relevant issue;

(e) thus it is not quite correct to say that "in other words, in the case of a case involving fraud, the court's expectation of proof of >0.5 on a scale of 0 to 1 would be higher, bearing in mind that in each case the court is balancing the case of the plaintiff against the case of the defendant";

(f) in every civil case, whether it involves hybrid cases or not, the court is always balancing the case of the plaintiff

> against the case of the defendant. This balancing is not peculiar to hybrid cases. Thus this balancing exercise cannot be a basis to require that "proof of >0.5 … would be higher" for hybrid cases.

134 In conclusion, one must at all times avoid "confusing"[181] the *objective* standard of proof with the *subjective* consideration of the facts of the case. *Subjectively*, on the facts of each case, the judge may require more evidence in order to be convinced. This is applicable to any civil case and is not peculiar to hybrid cases. This remains the judge's subjective requirement. It is for the judge to finally conclude whether his subjective requirements on the facts have been satisfied to cross the threshold of the objective standard of proof, that is, the civil standard. One cannot combine the *objective standard* and the *subjective consideration* to make it into one objective standard applicable to hybrid cases.

XXIV. Some developments in the UK after *In re B (Children)*

135 The UK Supreme Court subsequently in *In re S-B*[182] endorsed the position in *In re B*. The UK Supreme Court reiterated:[183]

> Apart from cases in the first category, therefore, 'the time has come to say, once and for all, that there is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not'.

136 *In re S-B* rejected "the nostrum, 'the more serious the allegation, the more cogent the evidence needed to prove it'".[184]

137 Despite the above strong position by both the House of Lords in *In re B* and the UK Supreme Court in *In re S-B*, subsequent cases have continued to use such or similar "nostrum". Some recent cases since *In re B* that have directly or indirectly considered the standard of proof in relation to a hybrid case or a case similar to a hybrid case are considered below.

138 The first is the case of *Red Bull GmbH v Sun Mark Ltd*.[185] In this case, there was an issue of bad faith. The judge held that an allegation of bad faith was serious, and thus notwithstanding the standard of proof being the civil standard, "cogent evidence" was still required due to the

181 See *In re B (Children)* [2009] 1 AC 11 at [5], *per* Lord Hoffmann.
182 *In re S-B Children* [2009] UKSC 17 at [10]–[11].
183 *In re S-B Children* [2009] UKSC 17 at [11].
184 *In re S-B Children* [2009] UKSC 17 at [31]; the UK Court of Appeal also applied the position in *In re B (Children)* [2009] 1 AC 11 in *Dadourian Group International Inc v Paul Francis Simms* [2009] EWCA Civ 169 at [32].
185 [2012] EWHC 1929 (Ch).

seriousness of the allegation.[186] It is to be noted that, in this case, no reference was made to *In re B*.

139 The second is the case of *Food Co UK LLP v Henry Boot Developments Ltd*[187] ("*Food Co UK*"), where Lewison J, in respect of a case involving fraudulent misrepresentation, stated the position at law:[188]

> The burden of proof lies on the tenant to establish their case. They must persuade me that it is more probable than not that Henry Boot made fraudulent misrepresentations. Although the standard of proof is the same in every civil case, where fraud is alleged cogent evidence is needed to prove it, because the evidence must overcome the inherent improbability that people act dishonestly rather than carelessly. On the other hand, inherent probabilities must be assessed in the light of the actual circumstances of the case: *In re B*.

140 This position of Lewison J was subsequently applied by Vivien Rose J in *Ludsin Overseas Ltd v Eco3 Capital Ltd*[189] ("*Ludsin Overseas*"), where the judge applied the above observations of Lewison J:[190]

> The standard of proof in a claim for deceit is the civil standard, but since allegations of fraud are levelled at the defendants, convincing evidence is needed.

141 It can be seen that these recent cases in England are still coming to terms with the decision in *In re B*.[191] Lewison J in *Food Co UK* accepted the position in *In re B* and, in fact, emphasised the aspect of "inherent improbability". However, Vivien Rose J in *Ludsin Overseas* seems to have reverted to the position before *In re B*, though citing *Food Co UK* in support.

142 It is to be noted that *Food Co UK* did not stop at considering the requirement of "cogent evidence". To the extent that it required "cogent evidence" as an objective requirement in any case where fraud is alleged, it is at variance with the decisions in *In re B* and *In re S-B*.[192] It is submitted that Lewison J in *Food Co UK* was merely considering the issue of "cogent evidence" in relation to the "inherent improbability" on the facts of the particular case before him.

143 If *Food Co UK* and *Ludsin Overseas* sought to revert to the position of law before *In re B* then that may not be a correct position

186 *Red Bull GmbH v Sun Mark Ltd* [2012] EWHC 1929 (Ch) at [133].
187 [2010] EWHC 358 (Ch).
188 *Food Co UK LLP v Henry Boot Developments Ltd* [2010] EWHC 358 (Ch) at [3].
189 [2012] EWHC 1980 (Ch).
190 *Ludsin Overseas Ltd v Eco3 Capital Ltd* [2012] EWHC 1980 (Ch) at [51].
191 *In re B (Children)* [2009] 1 AC 11 at [70].
192 *In re S-B Children* [2009] UKSC 17 at [10]–[11].

at law. However, if they sought to rely on the issue of "inherent improbability", then it is still in line with the decision of *In re B*. Whether something is inherently improbable or not (terms used in relation to the assessment of particular facts), it is in any event not a "nostrum" to be applied. It is merely the subjective opinion of the judge in the assessment process, of the particular evidence or facts before him.

144 There is then the recent case of *Relfo Ltd v Bhimji Velji Jadva Varsani*[193] ("*Relfo*"). There, Sales J said:[194]

> I accept the submission of Mr Macpherson for the Defendant that, although the Liquidator only has to establish his claims on the balance of probabilities on the facts, there is a substantial onus on him, in view of the seriousness of the allegations he has made, to show that the case he maintains – depending in effect on an allegation that Mr Gorecia fraudulently diverted money from Relfo to Bhimji Varsani – is made out. [internal citations omitted]

145 Again the nostrum, the "seriousness of the allegations", rears its ugly head. However, in that case, Sales J only made this observation after having been convinced, applying a "cautious approach",[195] that the particular allegation was made out.[196]

146 It is humbly submitted here that no matter what the judges sought to do in the above cases since *In re B*, they must clearly accept that *In re B* reiterates that there is only the civil standard applicable to hybrid cases. In fact, there is at least one recent case in England that has appreciated the position in *In re B*. This is the case of *Mckay v Centurion Credit Resources LLC* where Keyser QC said:[197]

> There is some attraction in that approach, but Judge Mackie was not purporting to state a legal proposition and it is necessary to enter a *caveat*. There is a single standard of proof that applies in all civil cases, namely proof on the balance of probabilities. While it is true as a matter of fact and common sense that one will more easily be persuaded of some things than of other things, that consideration has no part to play in the formulation of the standard of proof: see *In re B* [2008] UKHL 35 and *In re S-B* [2009] UKSC 17. If in principle the defendant was able informally to waive clause 1.1 (l) and satisfaction of the conditions precedent to a valid request for an advance, the proper approach of the court must in my judgment simply be to assess the evidence in the case and, if that evidence persuades on the balance of probabilities that there has been a waiver, to find accordingly. This is not, of course, to deny that, in assessing the evidence, one may be

193 [2012] EWHC 2168 (Ch).
194 *Relfo Ltd v Mr Bhimji Velji Jadva Varsani* [2012] EWHC 2168 (Ch) at [48].
195 *Relfo Ltd v Mr Bhimji Velji Jadva Varsani* [2012] EWHC 2168 (Ch) at [59].
196 *Relfo Ltd v Mr Bhimji Velji Jadva Varsani* [2012] EWHC 2168 (Ch) at [59].
197 [2011] EWHC 3198 (QB) at [56].

> assisted by regard to the inherent probabilities. As to the question whether an oral variation could be effective in principle, I shall proceed on the basis of the defendant's concession, for the purposes of this case, that it could be effective. I should anyway regard the concession as rightly made.[198] [emphasis in original]

147 Only the civil standard applies to hybrid cases; there is nothing more or nothing less. One cannot use "inherent improbabilities" based on the facts of a particular case to be of general application. Rarely, if at all, will the facts of one case be exactly the same as another. A judge's views on the facts of a case in which he considers the inherent improbabilities as being important does not necessarily, if at all, apply to the facts of another case. The evidence may show no inherent improbabilities at all in another case.

148 "Inherent improbability" is not an objective test; it is a matter of subjective consideration for the judge on the facts of the particular case before him. As Baroness Hale had stated in *In re B*, "inherent probability" only comes into play "where relevant".[199] It cannot and it must not be elevated to an objective principle of law so as to require something more or additional to the civil standard to be satisfied in hybrid cases.

XXV. Case law in Singapore since the decision of *In re B (Children)*

149 Case law in Singapore since 2009 seems not to have referred to the position in *In re B*.[200] A more recent reflection of the law in Singapore can be seen in *Kon Yin Tong*, where the High Court, in adopting the position in *Tang Yoke Kheng*, stated:[201]

> When the case went on appeal, the Court of Appeal held:
>
> > In the context of an allegation of fraud, the objective standard of what an honest person would have done in the circumstances could be a useful device to test the honest intention of the person concerned against all the other

198 See also the case of *Theodore Ion Soutzous v Joseph Asombang* [2010] EWHC 842 at [112] where Newey J said:

> The burden of proof rests, of course, on Dr Soutzos, and the standard of proof is the ordinary civil standard. It is, accordingly, incumbent on Dr Soutzos to establish his case on the balance of probabilities. If and to the extent that what he alleges is inherently improbable, that is a factor to be taken into account when considering whether the event in question is more likely than not to have occurred.

199 *In re B (Children)* [2009] 1 AC 11 at [70].

200 See *Cheng William v DBS Bank Ltd* [2010] SGHC 34; *Lim Weipin v Lim Boh Chuan* [2010] 3 SLR 423; *Ching Chew Weng Paul, deceased v Ching Pui Sim* [2011] 3 SLR 869; *Kon Yin Tong v Leow Boon Cher* [2011] SGHC 228.

201 *Kon Yin Tong v Leow Boon Cher* [2011] SGHC 228 at [43].

> evidence available, including, and especially, the explanation by that person of his deviation from what an honest person would have done in his circumstances. However, to rely on the objective standard as the sole test would be exceptional as it would require the court to be convinced that the negative answer given in the factual circumstances was sufficiently indicative of fraud to warrant a finding of fraud.
>
> The civil standard of proving on a balance of probabilities applied where fraud was the subject of a civil claim, despite the infusion of a criminal element (*ie*, fraud). However, because of the severity and potentially serious implications attaching to a fraud, the court's expectation of proof would be higher even in a civil trial. The more serious the allegation, the more the party on whom the burden of proof fell had to do in order to establish his case on a balance of probabilities.
>
> It is generally recognised, as enunciated above, that in order to make a finding of fraud, the court requires a greater degree of proof than it would when coming to a finding on issues of fact that do not involve fraud.

150 This position since 2010 is similar to the position taken by case law before that.[202] From the more recent case law, it can be seen that the seriousness of the allegation places a "higher expectation of proof".[203] The question that arises, then, is whether such a position would still be taken in Singapore, bearing in mind the above position in the UK. It would seem that, as shown above, the genesis of Singapore's position emanates from *Hornal*, as that was the position adopted by the Court of Appeal in *Tang Yoke Kheng*.[204] Since then, it can be seen that the Singapore case law has developed on the strength of the position taken by the Court of Appeal in *Yogambikai* and *Tang Yoke Kheng*. It would seem that this is the current position notwithstanding the change or clarification in the UK.

151 However, what is yet to be seen is the position that the courts would take when this position in English law is highlighted to them. It is

---

202 See, for example, *Tjoa Elis v United Overseas Bank Ltd* [2003] 1 SLR(R) 747 at [55]; *Vita Health Laboratories Pte Ltd v Pang Seng Meng* [2004] 4 SLR(R) 162 at [30]; *Trans-World (Aluminium) Ltd v Cornelder China (Singapore)* [2003] 3 SLR(R) 501 at [31]; *Industrial & Commercial Bank Ltd v Banco Ambrosiano Veneto SpA* [2003] 1 SLR(R) 221 at [247]–[248]; *Pertamina Energy Trading Ltd v Credit Suisse* [2006] SGHC 4 at [56], [58]; *Wishing Star Ltd v Jurong Town Corp* [2008] 2 SLR(R) 909 at [20]; *Nagase Singapore Pte Ltd v Ching Kai Huat* [2007] 3 SLR(R) 265 at [151]; *Paillart Philippe Marcel Etienne v Eban Stuart Ashley* [2007] 1 SLR(R) 132 at [57]; *Wu Yang Construction Group Ltd v Zhejiang Jinyi Group Co, Ltd* [2006] 4 SLR(R) 451 at [94]–[95].

203 *Ching Chew Weng Paul, deceased v* Ching *Pui Sim* [2011] 3 SLR 869 at [60], *per* Steven Chong J.

204 *Tang Yoke Kheng v Lek Benedict* [2005] 3 SLR(R) 263 at [11]–[13].

submitted that the better view is that the Singapore position can be brought in line with the clarified position in the UK. There would be nothing inconsistent with such a clarified position. It would still be a position that is in accordance with the Act. The burden of proof is on the civil standard. The requirement of subjective evidence will still be a matter to convince the judge who is sitting in the proceedings.

XXVI. Conclusion on hybrid cases – There is no third standard of proof or additional requirements to the civil standard[205]

152 In the final analysis, the learned judges at the highest levels in England and Singapore have decided that there can only be two standards in all cases, that is, the criminal standard and the civil standard. There cannot be a third standard that exists between the criminal standard and the civil standard. It would seem that historically this position is entrenched.

153 The existence of only two standards is now ingrained into the thinking of common law lawyers. The concept of the creation of a third standard is something alien and unknown, and the creation of a third standard may give rise to confusion and uncertainty. As Lord Nicholls of Birkenhead remarked in *In re H*:[206]

> Proof beyond reasonable doubt, in whatever form of words expressed, is one standard. Proof on a preponderance of probability is another, lower standard having the in-built flexibility already mentioned. If the balance of probability standard were departed from, and a third standard were substituted in some civil cases, it would be necessary to identify what the standard is and when it applies. Herein lies a difficulty. If the standard were to be higher than the balance of probability but lower than the criminal standard of proof beyond reasonable doubt, what would it be? The only alternative which suggests itself is that the standard should be commensurate with the gravity of the allegation and the seriousness of the consequences. A formula to this effect has its attraction. But I doubt whether in practice it would add much to the present test in civil cases, and it would risk causing confusion and uncertainty. As at present advised I think it is better to stick to the existing, established law on this subject. I can see no compelling need for a change.

154 Historically there are two standards: the civil standard and the criminal standard. As to which of the two standards apply to a particular

205 See, for *eg*, Jeffrey Pinsler, *Evidence and the Litigation Process* (LexisNexis, 2010) at p 446, para 12.93, where the suggestion is for a third standard. However, it must be noted that the learned author seems not to have referred to the House of Lords case of *In re B (Children)* [2009] 1 AC 11 or the UK Supreme Court case of *In re S-B Children* [2009] UKSC 17.

206 *In re H (Minors)* [1996] AC 563 at [76].

case will depend on the nature of the proceedings.[207] Plainly, the common law has rejected the existence of any third standard. Further, it has also rejected the requirement of proving beyond the civil standard, in respect of hybrid cases.

155 It must be noted that even if civil fraud in civil cases may have been proved to the civil standard, that does not mean that the same facts may result in a crime – that has to be proved to the criminal standard.[208] It may, however, be that the quality and quantity of evidence in a civil case resulting in the finding of a civil fraud may equally result in the finding of a criminal fraud on the very same facts. That, though, is a matter that would have to be separately decided in separate criminal proceedings.

156 Common law judges need not be troubled by hybrid cases just because they may involve criminal or other serious implications. They need not seek to protect an individual in a civil case (whether hybrid case or not) beyond requiring proof to the level of the civil standard. The yardstick they still have to use as provided by the law in hybrid cases is the civil standard.

157 The discomfort that a finding on the civil standard of fraud in a hybrid case, bearing in mind the criminal element, is something that may have been overstated. A civil cause of action succeeding in a hybrid case does not necessarily mean that a crime on the criminal standard has also been proven.

158 It is established that when a person is charged with a crime, the court expects the State to prove the crime beyond reasonable doubt. That is a historical standard imposed by law. It is not good enough for the Prosecution in a criminal proceeding to succeed on a balance of probabilities. The seriousness of penal sanctions that are imposed when a person is convicted of a crime demands proof beyond reasonable doubt.

---

207 *Public Prosecutor v Yuvaraj* [1970] 2 WLR 226 at 226.

208 The distinction was clearly noted by the trial judge in *Hornal v Neuberger Products Ltd* [1957] 1 QB 247 at 250 where Denning LJ cited the trial judge:

> If I have to be satisfied beyond all reasonable doubt I say at once that I should not be so satisfied in regard to the statement that it was Soag reconditioned. I have come to the conclusion on the preponderance of probability that that statement was made; but in my view no jury would dream of convicting a defendant of a fraud based on that statement, and if I had to consider whether sitting as magistrates trying a case of false pretences I should convict Mr Neuberger, I have no hesitation whatever in saying that I should not dream of doing so.

159 It must be remembered that criminal proceedings generally involve the State. The resources of the State are engaged when prosecuting a person accused of a crime. It is in the State's interest to prove a crime when one has committed the same, to ensure that there are preventive measures taken to restrain the defendant for the benefit of the community.[209] Further, criminal proceedings are there to punish the convicted person and to deter other persons from committing a crime.[210]

160 On the other hand, civil proceedings are meant to establish the plaintiff's right to a remedy, upon the plaintiff proving a cause of action existing in his favour. The law only requires the plaintiff to prove on a simple balance of probabilities, that is, the civil standard.

161 Thus the position in Singapore for civil matters, whether they are hybrid cases or not, is that the civil standard applies. There is nothing more and nothing less that needs to be done. It is humbly submitted that, notwithstanding the position taken by the Court of Appeal in *Yogambikai*[211] and *Tang Yoke Kheng*, one must revert to the clear position at law in applying the standard of proof to hybrid cases – there is only the civil standard to be applied. There are no additional requirements.

162 It may be that in hybrid cases, the mental exercise of the judge, based on the facts of each case, may entail considering factors like "higher standard of proof", "more" or "cogent" evidence and the "seriousness of allegations or consequences". However, these are considerations that the judge may have in mind when considering the facts of the particular case, the evidence and the credibility of the witnesses. At the end of the day, the court would have to simply conclude on a simple balance of probabilities. The court cannot require that in a civil case involving a hybrid case there must be a higher degree of proof, or that there must be a higher standard of proof. It is merely the civil standard.

---

209 *In re B (Children)* [2009] 1 AC 11 at [68].

210 *In re B (Children)* [2009] 1 AC 11 at [69].

211 The use of the terms "higher standard of proof" or a "higher degree of proof" (see *Yogambikai Nagarajah v Indian Overseas Bank* [1996] 2 SLR(R) 774) is of no legal assistance. See discussion at paras 106–113 above.