12. CONTRACT LAW

GOH Yihan
LLB (Hons) (National University of Singapore), LLM (Harvard);
Advocate and Solicitor (Singapore);
Associate Professor, Singapore Management University,
School of Law.

LEE Pey Woan
LLB (Hons) (London), BCL (Oxford);
Barrister (Middle Temple); Advocate and Solicitor (Singapore);
Associate Professor, Singapore Management University,
School of Law.

THAM Chee Ho
LLB (Hons) (National University of Singapore),
BCL, DPhil (Oxford);
Advocate and Solicitor (Singapore);
Solicitor (England and Wales);
Attorney and Counsellor-at-Law (New York State);
Professor, Singapore Management University,
School of Law.

Formation of a contract

Offer and acceptance

12.1 The general principles concerning the formation of a contract were extensively discussed in the High Court decision of *Tan Kok Yong Steve v Itochu Singapore Pte Ltd*[1] ("*Tan Kok Yong Steve*"). The plaintiff claimed for the payment of a severance package allegedly promised to him by the defendant, his ex-employer. The defendant did not deny it had offered the severance package to the plaintiff, but argued that it was an *ex gratia* payment which was revoked as the plaintiff had breached the non-competition undertaking in the employment agreement.

12.2 The plaintiff had been employed to handle the defendant's cement trade in October 2012. After an initially successful period, the relationship between the plaintiff and defendant began to deteriorate in early 2016. By June 2016, the decision was taken within the defendant's management to terminate the plaintiff's employment. On 23 June 2016,

1 [2018] SGHC 85.

the defendant's human resources general manager ("DW1") informed the plaintiff that his employment would be terminated after 30 June 2016. However, DW1 also informed the plaintiff that if he were to resign, he would be given a severance package, the details of which were not specified at the time. Although the plaintiff's request to waive a non-competition clause was denied by the defendant, he still decided to resign on 30 June 2016 so as to benefit from the severance package. The defendant issued a confirmation letter in response to the plaintiff's resignation letter. The material terms of the confirmation letter read:

> Your letter of resignation dated **30 June 2016** is accepted with much regret.
>
> On mutual agreement the company has decided to an early release. Your last day of service is on 30 June 2016.
>
> We wish to confirm the following:
>
> You will be paid:
>
> a. The salary for 1 – 30 June 2016 (which was paid on 24 June 2016)
>
> b. One month salary in lieu of notice
>
> c. *Ex-gratia* payment of 3.70 months' basic salary
>
> d. Pro-rated Annual Wage Supplement (AWS) for the year 2016
>
> e. Annual leave balance as at 30 June 2016
>
> f. Variable bonus of 6.33 months
>
> (Basic Salary x 3.55 months) x [(0.75 (BC Rating) x 0.7) + (2.14 (Dept Ratio) x 0.3)] x 1.4 + S$3,700
>
> The total amount payable to you after deduction of deductible CPF shall be paid to you no later than 25 July 2016.

12.3 Subsequently, the plaintiff engaged in commercial conduct that violated the non-competition clause. Therefore, the plaintiff's claim for the severance package was understandably resisted by the defendant. The plaintiff argued that there was a valid agreement concluded between the parties on 30 June 2016 when he tendered his resignation and the defendant sent the confirmation letter in reply. On the other hand, the defendant argued that the severance package was an *ex gratia* goodwill payment and was not a valid agreement. Alternatively, the defendant also argued that even if there were a purported valid agreement for the severance package, it was void for uncertainty and/or lack of consideration. Both parties were also at odds over the effect of the non-competition clause: the plaintiff argued that its compliance was neither an express nor implied condition of the agreement of the severance package, whereas the defendant argued that it was.

12.4 Leaving aside the validity of the non-competition clause itself, which the plaintiff argued was in restraint in trade, the pertinent issue to be discussed here concerns the enforceability of the severance package.

12.5 Tan Siong Thye J held that, in order to ascertain whether there was a valid contract between the parties, the court had to look at the whole course of negotiations between the parties.[2] Accordingly, the learned judge regarded that it would be incorrect to confine the search for evidence of a contract to just the events of 30 June 2016. Rather, the search had to start from 23 June 2016, which was when DW1 first offered the plaintiff the severance package.

12.6 Upon examining the evidence, Tan J was satisfied DW1 did offer the severance package in exchange for the plaintiff's resignation. As to whether this amounted to a valid offer, Tan J relied on the definition of an offer in *Aircharter World Pte Ltd v Kontena Nasional Bhd*:[3]

> An offer … is an expression of willingness to contract made with *the intention (actual or apparent)* that it shall become binding on the person making it as soon as it is accepted by the person to whom it is addressed. [emphasis added by the court]

12.7 On the facts, Tan J found that the defendant had made a valid offer to the plaintiff. It was clear that DW1 conveyed to the plaintiff that the severance package would only be available if the plaintiff were to resign. Although DW1 did not detail the monetary value of the severance package, this was not necessary at this initial meeting. Tan J found that the plaintiff was entitled to think that this was a serious offer considering that DW1 was the general manager of the defendant's human resources department. Furthermore, as the learned judge also noted, it was reasonable for the plaintiff to believe that his employment with the defendant was coming to an end given the parties' deteriorating relationship.

12.8 Tan J similarly found that the plaintiff had validly accepted the defendant's offer. The learned judge accepted the definition of a valid acceptance in *Gay Choon Ing v Loh Sze Ti Terence Peter*[4] as "a final and unqualified expression of assent to the terms of an offer".[5] In this case, the plaintiff makes clear his intention to resign from the defendant in his letter of resignation. Furthermore, DW1 also sent the plaintiff the confirmation letter that stated clearly that the defendant accepted the

2 *Tan Kok Yong Steve v Itochu Singapore Pte Ltd* [2018] SGHC 85 at [40].
3 [1999] 2 SLR(R) 440.
4 [2009] 2 SLR(R) 332.
5 *Gay Choon Ing v Loh Sze Ti Terence Peter* [2009] 2 SLR(R) 332 at [47].

plaintiff's resignation. Accordingly, Tan J concluded that there was a valid agreement between the parties in relation to the severance package.

Consideration

12.9 Another formation issue in *Tan Kok Yong Steve*[6] concerned whether the agreement for the severance package was supported by consideration. The defendant denied that there was consideration as the plaintiff's resignation was not requested by the defendant and the resignation was of no benefit to the defendant.

12.10 As to the defendant's first argument here, Tan J agreed that an act of promise will only constitute valid consideration if it had been requested by the promisor.[7] On the facts, it is clear that DW1, acting on behalf of the defendant, was the "promisor" who promised the plaintiff payment of the severance package in exchange for his resignation.

12.11 On the defendant's second argument here, Tan J found that the plaintiff's resignation had benefitted the defendant. Although the defendant was entitled to terminate the plaintiff without giving any reason by giving the requisite notice period, the plaintiff's resignation in the circumstances still benefited the defendant by sparing it the trouble of dealing with the plaintiff's union. Even assuming that the defendant had valid reasons to terminate the plaintiff's employment, it would still have to expend resources to convince the union that this was indeed the case. Thus, the plaintiff's resignation was the most expedient way for the defendant to end his employment, and there was no doubt that the defendant benefited from this arrangement. More broadly, Tan J's treatment of the facts accords with how courts both in Singapore and abroad find consideration most readily in commercial matters.[8]

Intention to create legal relations

12.12 In the High Court decision of *Tan Swee Wan v Johnny Lian Tian Yong*,[9] George Wei J held that agreements made in the business and commercial context are generally presumed to be legally binding. However, this presumption may be rebutted where, for example, the

6 See para 12.1 above.

7 *Tan Kok Yong Steve v Itochu Singapore Pte Ltd* [2018] SGHC 85 at [56], citing *Gay Choon Ing v Loh Sze Ti Terence Peter* [2009] 2 SLR(R) 332 at [17].

8 See, *eg*, *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2004] 2 SLR(R) 594 at [139] and *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric* [2007] 1 SLR(R) 853 at [29].

9 [2018] SGHC 169.

terms are so uncertain or incomplete such that the parties would not have reasonably been taken to intend an agreement. In that case, Wei J found that the alleged oral agreement failed because, even though it had arisen in a commercial or business context, there was much uncertainty over the date or period over which it was formed and the terms such that it was not possible to conclude that any agreement had been made.

Certainty and completeness

12.13 Yet another formation issue in *Tan Kok Yong Steve*[10] concerned whether the agreement for the severance package was uncertain and hence unenforceable. The defendant had argued that the agreement for the severance package was uncertain as DW1 had not discussed any figures with the plaintiff.

12.14 In response to this argument, Tan J held that, while certainty of terms is an essential requirement for the enforceability of contracts, what is "sufficiently certain" is a matter of degree such that courts do not expect contracts to be drafted with utmost certainty.[11] More specifically, Tan J held that a contract would not be rendered:[12]

> … uncertain even though there is a term to be determined in the future, provided that the contract itself provides the means for ascertainment of that term.

Applying that to the present case, the learned judge found that the confirmation letter had in fact specified the formula to ascertain the monetary sum of each component of the severance package to be paid. Since the confirmation letter formed part of the contract between the parties, the agreement did not fail for uncertainty since the letter did provide a method to ascertain the eventual figure to be paid under the severance package.

12.15 However, where a contract is still fraught with uncertainty or incompleteness despite the court's best efforts to ascertain the parties' intentions, it would not be enforceable. Such was the case in the District Court decision of *Schenker Singapore (Pte) Ltd v WK Asia-Pacific Environmental Pte Ltd*,[13] where District Judge Chiah Kok Khun found a contract unenforceable as there were no particulars given on the rates basis and no evidence adduced on what the parties might have agreed on how the rates basis operate. In short, there was simply no agreed mechanism between the parties for determining the actual sums payable

10 See para 12.1 above.
11 *Tan Kok Yong Steve v Itochu Singapore Pte Ltd* [2018] SGHC 85 at [68].
12 *Tan Kok Yong Steve v Itochu Singapore Pte Ltd* [2018] SGHC 85 at [68].
13 [2018] SGDC 42.

under the rates basis. With respect, this must be correct as a court cannot end up writing the contract for the parties, even as it can try its best to ascertain the parties' intentions in the face of an incomplete contract.

Capacity

12.16 In the High Court decision of *Resorts World at Sentosa Pte Ltd v Lee Fook Kheun*[14] ("*Resorts World*"), Valerie Thean J had to consider whether a party was so intoxicated as to have lost the capacity to contract. In that case, the plaintiff, a licensed casino operator, extended credit facilities totalling $10m to the defendant. Subsequently, the plaintiff sued the defendant to recover the outstanding sums. The defendant argued that he had signed credit arrangements when he was intoxicated, and did not understand the nature and effect of the transactions, rendering them voidable. In essence, the defendant did not have the capacity to enter into the credit arrangements.

12.17 Thean J rejected the defendant's argument premised on intoxication. Her Honour held that a person seeking to rescind a contract due to intoxication must show that he was, firstly, so drunk when he entered into the transaction that he was unable to understand the general nature and effect of the transaction. Secondly, the other party to the agreement must have known of this infirmity. On the evidence, the learned judge was not convinced that the defendant was so intoxicated. Furthermore, Thean J also placed consideration on the defendant's subsequent conduct in finding that he did, in fact, understand the nature of the transaction he had entered into. Indeed, despite being an experienced businessman, the defendant did not seek legal advice immediately or soon after he entered into the credit arrangements, which he argued were defective. The defendant also made several repayments to the plaintiff and even signed a settlement agreement in an attempt to pay off the outstanding amounts.

12.18 Tan Siong Thye J in the High Court decision of *Chan Gek Yong v Violet Netto*[15] ("*Chan Gek Yong*") also had to deal with the issue of incapacity, this time under the influence of medication as opposed to alcohol. In *Chan Gek Yong*, the plaintiff had argued that she was under the influence of medication that affected her mental faculties during the mediation up till the signing of the settlement agreement concerned. For that reason, the plaintiff sought to set aside the agreement. Referring to *Resorts World*, the learned judge opined that there was no reason why

14 [2018] 5 SLR 1039.
15 [2018] SGHC 208.

the principles in that case should not apply equally to a party who alleged that he was under the influence of medication. In essence, the learned judge held that the plaintiff had to satisfy two requirements to successfully set aside the contract based on incapacity from an impairment of mental faculties:[16]

> (a) when she signed the [s]ettlment [a]greement she was so mentally incapacitated that she was unable to understand the general nature and effect of the [s]ettlment [a]greement; and
>
> (b) the defendants knew of her infirmity.

12.19 On the facts, Tan J did not find the plaintiff to have satisfied these requirements. On the first requirement, the plaintiff failed to produce any medical evidence that her mental faculties were affected. Moreover, she did not raise any complaint of her deteriorated mental state during the pretrial conferences leading up to the mediation. Finally, she was able to conduct herself during the mediation and was an active participant. On the second requirement, there was simply no evidence that the plaintiff informed anyone of her alleged infirmity. As such, the learned judge rejected the plaintiff's argument that she was incapacitated from the influence of medication.

Requirements for oral agreement to be formed

12.20 In the High Court decision of *Lim Seng Choon David v Global Maritime Holdings Ltd*,[17] Choo Han Teck J had occasion to consider the requirements that must be satisfied before an oral agreement can be formed. In that case, the plaintiff was an employee of the first defendant and a director of the second defendant. On 24 November 2014, the plaintiff was asked by Gary Anthony Hogg, a director of both defendants, to retire early. The plaintiff alleged that he made an oral agreement with the defendants – through Hogg – in which he agreed to terminate his employment immediately and waive the requirement of one month's notice. However, in return, the second defendant allegedly promised the plaintiff a number of financial incentives, such as encashing the plaintiff's utilised holiday entitlement and paying the plaintiff six months' salary in exchange for a six-month non-competition period.

12.21 The defendants denied the existence of such an oral agreement. In particular, they contended that the negotiations between the plaintiff and Hogg were subject to contract. They argued further that the alleged

16 *Chan Gek Yong v Violet Netto* [2018] SGHC 208 at [39].
17 [2019] 3 SLR 218.

oral agreement was incompatible with written correspondence between the parties, such as a draft "Separation Agreement" and "Share Purchase Agreement".

12.22 Choo J did not believe that an oral agreement had been formed. In doing so, his Honour laid down three requirements for an oral agreement to be formed. First, in order to establish an oral agreement:[18]

> … there must be clear evidence that all parties to the alleged agreement intended to create legal obligations by their exchange of words and conduct.

In the present case, the parties' discussion on 24 November 2014 merely consisted of negotiations between them and did not amount to an agreement between them. Furthermore, the plaintiff himself seemed to believe that negotiations were still ongoing and that the parties had not settled on a final agreement.

12.23 Secondly, Choo J also held that the terms orally agreed to should be consistent with the contemporaneous documents.[19] Of course, this does not mean that the oral agreement had to be evidenced by a written form of the terms. However, what this does mean is that, in the absence of any contemporaneous documentary proof, it would be less likely for the plaintiff to succeed in his claim. In the present case, the learned judge did not think that the plaintiff had produced sufficient documentary proof in support of his claim. Indeed, it was pertinent that the draft Separate Agreement was silent on the terms as alleged by the plaintiff.

12.24 Thirdly, Choo J held that an oral agreement must contain terms that are clear enough to be enforced.[20] In this regard, the learned judge did not think that the terms as alleged by the plaintiff were certain or clear. For example, the parties had different understandings as to the plaintiff's obligations in relation to the alleged six months' compensation. The learned judge also found it difficult to believe that the defendants, a multinational company, would allow its employees to accrue leave in an unlimited fashion and compensate them for unused leave by way of an oral agreement. For these reasons, the learned judge found that there was no oral agreement between the parties.

12.25 Choo J's judgment is helpful in laying down the principles as to whether an oral agreement has been formed. However, one should also be careful not to allow the requirements of consistency with

18 *Lim Seng Choon David v Global Maritime Holdings Ltd* [2019] 3 SLR 218 at [6].
19 *Lim Seng Choon David v Global Maritime Holdings Ltd* [2019] 3 SLR 218 at [7].
20 *Lim Seng Choon David v Global Maritime Holdings Ltd* [2019] 3 SLR 218 at [10].

contemporaneous documents and enforceability to obscure the formation of a true oral agreement. By its very nature, it is unlikely that an oral agreement would be recorded in the contemporaneous documents. It is also unlikely that parties would agree on the meaning of any alleged oral agreement – this is the very reason why there is litigation in the first place.

12.26 Moreover, whether a term of an oral agreement (or a written contract) is "unbelievable" or commercially absurd should not be reason by itself for a court to deny that the contract had been formed. As the Court of Appeal has held in *YES F&B Group Pte Ltd v Soup Restaurant Singapore Pte Ltd*[21] in the area of contractual interpretation, the courts' task is to implement the parties' intentions and not rewrite them. As such, even if a term were "unbelievable" from an objective basis, that does not necessarily mean that the parties could not have agreed to it.

12.27 More fundamentally, it would do well to return to first principles that an oral agreement, apart from its form, is very much a contract that admits of identical requirements of formation. Indeed, in the High Court decision of *Tan Swee Wan v Johnny Lian Tian Yong*,[22] George Wei J helpfully reiterated that whether an oral agreement amounts to a binding contract depends on whether the following well-established legal requirements are satisfied: (a) offer and acceptance; (b) intention to create legal relations; (c) certainty of terms; and (d) consideration.[23]

12.28 Similarly, in the High Court decision of *Tan Li Yin Michel v Avril Rengasamy*[24] ("*Tan Li Yin Michel*"), Ang Cheng Hock JC provided a very helpful summary of the relevant principles to determine the existence of an oral agreement:[25]

> In ascertaining the existence of an oral agreement, the court has to consider the relevant documentary evidence and contemporaneous conduct of the parties at the material time (*Tribune Investment Trust Inc v Soosan Trading Co Ltd* [2000] 2 SLR(R) 407 at [39]). The test for determining the existence of any such agreement is objective (at [40]). The Court of Appeal has also emphasized the importance of looking to the relevant documentary evidence *first* as they would be more reliable than a witness' oral testimony given well after the fact, and which may be coloured by the onset of subsequent events and the dispute between the parties (*OCBC Capital Investment Asia Ltd v Wong Hua Choon* [2012] 4 SLR 1206 at [41]). Where there is little or

21 [2015] 5 SLR 1187.
22 See para 12.12 above.
23 *Tan Swee Wan v Johnny Lian Tian Yong* [2018] SGHC 169 at [222].
24 [2018] SGHC 274.
25 *Tan Li Yin Michel v Avril Rengasamy* [2018] SGHC 274 at [29].

> no documentary evidence, the court will "attempt its level best by examining closely (and in particular) the precise factual matrix" (*Gay Choon Ing v Loh Sze Ti Terence Peter and another appeal* [2009] 2 SLR(R) 332 at [60]). [emphasis in original]

12.29 As can be seen, although the learned judicial commissioner did caution that the absence of documentary evidence may make the oral agreement harder to prove, such absence does not, by itself, mean that an oral agreement can *never* be proved. However, in *Tan Li Yin Michel* itself, Ang JC could rely on WhatsApp messages that were exchanged between the parties as being indicative of the parties' intentions in relation to the alleged oral agreement.

12.30 The principles discussed above apply equally to ascertaining the terms of an oral agreement as they do to determining the existence of such an agreement. Thus, in the High Court decision of *Naughty G Pte Ltd v Fortune Marketing Pte Ltd*,[26] the parties, which were in the business of drinks retail, entered into an oral agreement for the defendant to take over all of the plaintiff's stock in Singapore. The defendant also agreed to periodically purchase more products from the plaintiff and take over the plaintiff's warehouse. In return, the defendant was to pay a handover price to the plaintiff over four instalments. However, the parties' relationship deteriorated and they never concluded a written contract. The defendant refused to pay the third instalment and alleged that the products it took over from the plaintiff were defective. The parties ended up suing each other and an essential question was the terms of the oral agreement (as opposed to its existence) that had been entered into by the parties.

12.31 Chan Seng Onn J agreed with the High Court in *Forefront Medical Technology (Pte) Ltd v Modern-Pak Pte Ltd*[27] ("*Forefront Medical*"), which had held that a holistic approach comprising the consideration of both documentary evidence and witness testimony should be taken in ascertaining the terms of an oral agreement. The learned judge further agreed that the general guidelines in ascertaining the existence of an oral agreement as laid down by the High Court in *ARS v ART*[28] are equally applicable in ascertaining the terms within the agreement. While Chan J noted that the relevant documentary evidence and the parties' contemporaneous conduct would be useful evidence, the absence of either (or both) should not be fatal to a claim that an oral agreement exists or its alleged contents.

26 [2018] 5 SLR 1208.
27 [2006] 1 SLR(R) 927.
28 [2015] SGHC 78.

Terms of a contract

Incorporation

12.32 The Singapore International Commercial Court had occasion in *Macquarie Bank Ltd v Graceland Industry Pte Ltd*[29] to consider the rather basic question of the incorporation of terms into a contract. Macquarie Bank Ltd ("Macquarie") had argued that the agreement between the parties was that the transaction concerned would be on the terms of the revised long form confirmation ("LFC") (which incorporated the terms of the 2002 International Swaps and Derivatives Association Inc Master Agreement ("ISDA Form")) with full details of the swap as contained in the LFC to Graceland for Graceland's execution. On the other hand, Graceland argued that the LFC and ISDA Form were not incorporated into the agreement between the parties.

12.33 Sir Bernard Eder IJ regarded the applicable principles to be basic. Given that the agreement was unsigned, this was not a case governed by the rule in *L'Estrange v F Graucob Ltd*[30] which provides that a party who signs a contract would be bound by the terms contained within. On the contrary, as this case did not concern a signed document, the court could scrutinise the parties' intentions by considering anything reasonably available to the parties that would have affected the way in which the language of the document would have been understood by the reasonable person. Put simply, the agreement of the parties is to be found in the e-mails which "crossed the line", or information that is common to both parties. On the facts, Macquarie and Graceland Industry Pte Ltd agreed that the swap would be on the terms of the LFC dated 21 May 2014 which, on its face, made an express and direct reference to the ISDA Form and was effective to incorporate its terms.

12.34 The Court of Appeal in *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd*[31] had to consider whether an exclusive jurisdiction clause ("EJC") was incorporated into the contract concerned by way of previous course of dealings between the parties. In the case, the parties had between December 2013 and October 2014 entered into four contracts for the sale and purchase of chemical commodities. All four contracts contained an EJC conferring jurisdiction over disputes arising to the High Court of England. In November 2014, the appellant entered into a contract with the

29 [2018] 4 SLR 87.
30 [1934] 2 KB 394.
31 [2018] 2 SLR 1271.

respondent to purchase styrene monomer. The appellant argued that the EJC was a term of the contract but this was disputed by the respondent.

12.35 The Court of Appeal considered if the EJC was incorporated into the contract by way of a course of dealings. The court accepted that the basis on which a term is incorporated into a contract by a course of dealings is that:[32]

> … the circumstances are such that, at the time of contracting, both parties, as reasonable persons, would have assumed the inclusion of the [term] in the offer and acceptance.

However, the court also noted that a high threshold must be met for a party to be "entitled to infer" that a term sought to be incorporated is part of the contract. Citing the English case of *SIAT Di Del Ferro v Tradax Overseas SA*,[33] the term will only be incorporated if the parties thought it a "definite yes" that it is in the contract, as opposed to "possibly".

12.36 The court also set out the following factors that are relevant in determining if a term is so incorporated: the number of previous contracts, how recent they are, whether they have a similar subject matter and whether they were made in a consistent manner.[34] Ultimately, there is no magic number that will be sufficient to meet the threshold. It all depends on the context of the case. However, where a party had earlier transactions with a different party than the counterparty at suit, the court can take those transactions into account if they were with a different company within the same group of companies.

12.37 Finally, the court added two more propositions to the above:

(a) First, in general:[35]

> … it will be easier to establish incorporation by a course of dealing[s] where both parties are in business, rather than where one is a consumer.

32 *The Law of Contract* (Michael Furmston gen ed) (LexisNexis, 6th Ed, 2017) at para 3.18.
33 [1978] 2 Lloyd's Rep 470 at 490.
34 *Capes (Hatherden) Ltd v Western Arable Services Ltd* [2010] 1 Lloyd's Rep 477 at [35].
35 *The Law of Contract* (Michael Furmston gen ed) (LexisNexis, 6th Ed, 2017) at para 3.18.

(b) Second, a term may be more easily incorporated if it is not unusual or unreasonable.[36]

12.38 Applying these principles to the present case, the court regarded that there was a good arguable case that the EJC was incorporated by the parties' course of dealings. First, the appellant had made four contracts in the one-year period leading to the formation of the contract concerned. Those four contracts all contained the EJC. Second, all four contracts were for the purchase of chemical commodities, which was the same subject matter as the contract concerned. All the contracts were also concluded in the same manner. Third, both parties were contracting in the course of business and the EJC was not an onerous term. Finally, the parties had acted in accordance with the course of dealings following the conclusion of the contract, which showed that they understood the contract was made on that basis.

Parol evidence rule

12.39 The ambit and application of the parol evidence rule were discussed in the High Court decision of *MatthewsDaniel International Pte Ltd v Kith Marine & Engineering Sdn Bhd*.[37] The main issue in the case concerned who the proper parties to the contract concerned were. The plaintiff had claimed from the defendant moneys due from three invoices. The plaintiff had issued those invoices for marine warranty services it had provided to the defendant. The defendant disputed that it was a party to the contract as it had contracted with the plaintiff as an agent for a third party, Dragon. As such, so the defendant argued, it could not be personally liable for the invoiced moneys, even though, as was undisputed, it had signed the contract without any qualification that it was contracting on behalf of Dragon.

12.40 Andrew Ang J found in favour of the plaintiff. His Honour held that the law of agency places very strict requirements before a purported agent who signed a contract could argue that it was merely contracting on behalf of a principal. In particular, as the learned judge held, where a contract is objectively construed not to indicate in clear terms that the signatory is contracting on behalf of someone else, the signatory will be held personally liable under the contract. On the present facts, there was

36 *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] 2 SLR 1271 at [58]. See *The Law of Contract* (Michael Furmston gen ed) (LexisNexis, 6th Ed, 2017) at para 3.18, citing *Circle Freight International Ltd v Medeast Gulf Exports Ltd* [1988] 2 Lloyd's Rep 427 at 433, where Taylor LJ suggested that the court may take different considerations into account if the term to be incorporated was "particularly onerous or unusual".

37 [2018] 4 SLR 1452.

nothing on the face of the contract that the defendant had not intended to contract personally. Indeed, its signature to the contract was unqualified. This alone was sufficient to find that the defendant was personally liable under the contract.

12.41 However, the defendant additionally relied on an e-mail sent on 17 September 2013 to argue that the plaintiff must have known that the contract was between it and Dragon. That e-mail was sent by the defendant's general manager to the plaintiff's director and informed the plaintiff that the defendant will provide the appointment letter. Importantly, the e-mail was also copied to Dragon's project manager. Also within the same e-mail was a quote from Dragon's project manager to the defendant's general manager, with the former asking the latter to arrange for the marine warranty services concerned. Although the e-mail did not expressly state that the defendant was acting on behalf of Dragon, the defendant argued that this must have been clear from Dragon being copied on the e-mail, as well as the quoted portion of the correspondence between Dragon's project manager and the defendant's general manager. The question for the court was whether this e-mail could be used to contradict the specific terms of the agreement, which was that the defendant was not contracting on behalf of another party.

12.42 Ang J held that, as a general matter, the courts do not allow extrinsic evidence to be adduced to contradict or reinterpret the express terms of a contract where these terms are clear and unambiguous.[38] In the specific context of agency, the learned judge, citing *Bowstead & Reynolds on Agency*, held that although extrinsic evidence is admissible to identify the parties to a contract by way of exception to the parol evidence rule, extrinsic evidence is not admissible to show that a party clearly named in the contract as a contracting party is not otherwise so.[39] Ang J noted that there was academic disagreement as to whether extrinsic evidence could be used to "add" a party to the contract, but felt that he need not decide the issue as the present case concerned the defendant seeking to absolve liability, or to "delete" itself as a party to the contract.[40]

12.43 Applying these principles, Ang J found that there was no ambiguity in the contract concerned. The defendant had signed it without qualification or equivocation. As such, extrinsic evidence in the

38 *MatthewsDaniel International Pte Ltd v Kith Marine & Engineering Sdn* [2018] 4 SLR 1452 at [44].

39 *Bowstead & Reynolds on Agency* (Peter G Watts gen ed) (Sweet & Maxwell, 20th Ed, 2006) at para 9-039.

40 *MatthewsDaniel International Pte Ltd v Kith Marine & Engineering Sdn* [2018] 4 SLR 1452 at [47].

form of the e-mail could not be admitted to prove the defendant was not personally liable. In any case, the learned judge also held that, even if he had found the e-mail to be admissible, it would not have assisted the defendant. This was because the e-mail only showed that the plaintiff was aware of Dragon's existence, but did not otherwise show that it was contracting with Dragon as opposed to the defendant. The more reasonable interpretation, from the plaintiff's perspective, was that the defendant was personally procuring the marine warranty survey services from the plaintiff, and it would later seek reimbursement from Dragon, which was kept in the loop.

12.44 The District Court decision of *Baek Jae Pte Ltd v K-Inc Konstruct Pte Ltd*[41] provides an example in which one of the exceptions of the parol evidence rule as set out in s 94 of the Evidence Act[42] was argued (albeit in a setting-aside application where only an arguable case needed to be shown). The parties in this case were both companies in the building and construction business. The plaintiff sued the defendant for money owing for work done as the defendant's subcontractor in a construction project. The defendant failed to enter an appearance in time, and the plaintiff entered judgment against the defendant. In the present case, the defendant sought to set aside the final judgment entered in default of appearance.

12.45 In essence, the defendant argued that there was an oral agreement between the parties that gave it the right to withhold payment to the plaintiff as the latter's right to be paid would follow payment to the defendant under the main contract. However, the plaintiff resisted this argument as such an oral agreement would vary or contradict or add to the terms of the written contracts between the parties, and so be rendered inadmissible by virtue of the parol evidence rule in s 94 of the Evidence Act.

12.46 Deputy Registrar Lim Wen Juin agreed with the plaintiff that unless the defendant could invoke one of the provisos set out in ss 94(*a*) to 94(*f*) of the Evidence Act, it would not be allowed to admit any evidence of the oral agreement. The learned deputy registrar considered that it was arguable that the defendant could avail itself of the proviso in s 94(*b*), which permits a party to prove the existence of a separate oral agreement "as to any matter on which a document is silent and which is not inconsistent with its terms". On the facts, Deputy Registrar Lim found that the earlier contracts were silent on the manner in which the plaintiff was to be paid, and none of its written terms were inconsistent with the oral agreement alleged by the defendant. Deputy Registrar Lim

41 [2018] SGDC 11.
42 Cap 97, 1997 Rev Ed.

further considered that because the parties' written contract was rather informal (being a mere page in length), it was plausible that a trial judge could conclude that the parties did not intend that document to be exhaustive of their rights and obligations. As such, it was arguable that the defendant could be permitted to adduce evidence of an oral agreement that concerned how the plaintiff was to be paid. Finally, Deputy Registrar Lim rightly pointed out that the general principles articulated by the Court of Appeal in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd*[43] ("*Zurich Insurance*") in relation to s 94(*f*) were inapplicable to s 94(*b*) as the latter is a true exception. In contrast, s 94(*f*) describes a formal rule of interpretation and is not a true exception as such.

Subject to contract clauses

12.47 The Court of Appeal in *Bumi Armada Offshore Holdings Ltd v Tozz Srl*[44] had the opportunity to discuss the effect of "subject to contract" clauses. In that case, the appellants were awarded the contract for a project to, among others, design gas processing facilities consisting of seven topside process modules. The appellants later contacted the respondent to provide engineering, procurement and construction services for three of the seven modules. The appellants later agreed to give the respondent a right of first refusal in respect of all seven modules. This was recorded in the minutes to the meeting, which also contained a final unnumbered paragraph, which stated that the discussions were subject to "mutual agreement and execution of a formal contract". When the appellants later did not give the respondent the right of first refusal, the latter sued for breach of contract. At issue was the effect of the subject to contract clause outlined above.

12.48 The Court of Appeal held that conventionally, a clearly expressed "subject to contract" stipulation in an arrangement negatives the existence of a contract. However, this does not mean that a court will always find that a "subject to contract" clause results in there being no contract. Indeed, all relevant and admissible features of the arrangement have to be taken into account in ascertaining the effect of such a clause on the existence of a contract. However, as the court stated, given the importance of certainty and clarity in the law, especially in the commercial space:[45]

43 [2008] 3 SLR(R) 1029.
44 [2019] 1 SLR 10.
45 *Bumi Armada Offshore Holdings Ltd v Tozz Srl* [2019] 1 SLR 10 at [22].

> … any court should be very cautious before holding that an arrangement which is clearly and unambiguously expressed to be 'subject to contract' nonetheless gives rise to a binding contract.

12.49 However, on the facts, the "subject to contract" clause ultimately became irrelevant as the lower court had found (which the Court of Appeal in turn accepted) that the appellants had given the respondent a legally enforceable right of first refusal via an oral agreement at the parties' meeting.

Anti-oral variation clause

12.50 The High Court in *Benlen Pte Ltd v Authentic Builder Pte Ltd*[46] ("*Benlen*") had occasion to consider the enforceability of an anti-oral variation clause. The parties' dispute had arisen out of a contract for the construction of a condominium development. The defendant was the main contractor for the project, and the plaintiff was subsequently engaged by the defendant as a subcontractor to install/maintain the mechanical ventilation and air-conditioning system of the project. It is important that cl 14 of this subcontract provided as follows:

> This Sub-Contract sets out the entire agreement of the parties and supersedes all prior agreements, warranties, representations, and undertakings, whether made verbally or in writing.
>
> This Sub-Contract *shall be varied or modified only with prior written consent from both parties*.
>
> [emphasis added by the High Court]

12.51 The defendant resisted the plaintiff's claim on the basis that the latter's payment claim was invalidly served. Among its various claims, the plaintiff argued that the defendant had varied the subcontract to allow the former to serve its payment claim in the time it did. Chan Seng Onn J thought that the presence of cl 14.2 did not, by itself, exclude the possibility of an oral agreement that varied the written terms of the subcontract. His Honour pointed to English cases, such as *Globe Motors Inc v TRW LucasVarity Electric Steering Ltd*[47] and *MWB Business Exchange Centres Ltd v Rock Advertising Ltd*,[48] which concluded that a term of the contract which states that the contract can only be varied in writing will not preclude the possibility of there being an oral variation. Citing an academic text,[49] the learned judge concluded that:

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46 [2018] SGHC 61.
47 [2016] EWCA Civ 396 at [95]–[113].
48 [2016] EWCA Civ 553 at [34].
49 Sean Wilken & Karim Ghaly, *The Law of Waiver, Variation, and Estoppel* (Oxford University Press, 3rd Ed, 2012) at p 26.

> … the effect of a term requiring variation to be in writing is, at best, not to prohibit consensual oral variation but to raise a rebuttable presumption that, in the absence of writing, there had been no variation, and that this presumption will be rebutted only by strong evidence that both parties intended to orally vary the terms of the contract.

As such, Chan J held that he also needed to look to the oral facts and circumstances to consider if there was any collateral oral agreement to vary the contract. In the end, the learned judge concluded that there was no such oral agreement as there was nothing on the evidence to indicate that the plaintiff had accepted any such offer. Indeed, the plaintiff had not subsequently served its payment claim pursuant to the dates in the alleged oral agreement.[50]

12.52 Some two months after *Benlen* was decided, the UK Supreme Court handed down its decision in *Rock Advertising Ltd v MWB Business Exchange Centres Ltd*[51] ("*Rock Advertising*"). It unanimously upheld the effectiveness of a no oral modification clause. This overruled the slate of English cases Chan J had referred to; the latest English position is that the law will uphold contractual provisions requiring specified formalities to be observed in order for a variation to a contract to be effective. The UK Supreme Court's decision now puts a stop to parties like the plaintiff in *Benlen* arguing the existence of an oral agreement that varied the written contract, despite clear contractual language prohibiting such manner of variation. As can be seen by Chan J's thorough treatment of the issue, the possibility of such variation can lead to extensive litigation and give rise to uncertainty. It is suggested that the latest position in *Rock Advertising* should be followed or at least seriously considered by the Singapore courts at the next available occasion.[52]

50 Although the judge took the plaintiff's subsequent conduct to be only of "neutral probative value": *Benlen Pte Ltd v Authentic Builder Pte Ltd* [2018] SGHC 61 at [53]. With respect, evidence can only be probative or not probative, so it is not entirely clear what the learned judge meant by the evidence being "neutrally" probative.

51 [2019] AC 119; [2018] UKSC 24.

52 The Court of Appeal in *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979 (decided about a month before the UK Supreme Court decided *Rock Advertising Ltd v MWB Business Exchange Centres Ltd* [2019] AC 119; [2018] UKSC 24) had seemingly cited the English Court of Appeal decision of *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2016] EWCA Civ 553 at [34] with approval.

Entire agreement clauses

12.53 A similar clause to the anti-oral variation clause is the entire agreement clause. In the High Court decision of *Sunray Woodcraft Construction Pte Ltd v Like Building Materials (S) Pte Ltd*[53] ("*Sunray Woodcraft*") the parties were both construction companies. The applicant was a subcontractor for a project, who in turn awarded a subcontract to the respondent for certain works in the project. The respondent submitted its payment claim on 27 March 2018 and its intention to apply for adjudication on 11 April 2018. Although the applicant served its payment response on 13 April 2018, the adjudicator took the view that she was prohibited by the terms of the Building and Construction Industry Security of Payment Act[54] from considering the payment response as it was served out of time. The applicant then applied in the present case to set aside the adjudication determination on the basis that the adjudicator did not have jurisdiction. The applicant argued that the parties had agreed to a timeline for a payment response in a document called the "Technical Bid Evaluation" ("TBE"). By its terms, the respondent's application for adjudication would have been premature. In turn, the respondent argued that the TBE was excluded by an entire agreement clause in the prior letter of award entered into by the parties. This clause (cl 2.4) provided as follows:

> 2.4 Except as provided above in the list of correspondences and documents forming the Sub-Contract, *all other correspondences with the Employer and/or Consultants and/or us shall be excluded from this Sub-Contract. Similarly, all representations, statements and/or prior negotiations are specifically excluded.* [emphasis added by the High Court]

12.54 In interpreting this clause, Ang Cheng Hock JC held that the effect of an entire agreement clause is a matter of contractual interpretation. As a starting point, courts would:[55]

> … in the interests of certainty, strive to give effect to the parties' expressed intent and legitimate expectations if they are found in a clearly worded entire agreement clause that 'clearly purports to deprive any pre-contractual … agreement of legal effect'.

In addition, the court should adopt the contextual approach – which the entire agreement clause does not exclude – in interpreting such clauses by considering the relevant context that satisfies the tripartite

53 [2019] 3 SLR 285.

54 Cap 30B, 2006 Rev Ed.

55 *Sunray Woodcraft Construction Pte Ltd v Like Building Materials (S) Pte Ltd* [2019] 3 SLR 285 at [45], citing the Court of Appeal decision of *Lee Chee Wei v Tan Hor Peow Victor* [2007] 3 SLR(R) 537 at [25] and [35].

requirements in *Zurich Insurance*.[56] Ultimately, the court is to determine whether:[57]

> … the agreement in its final form is *intended* to constitute the entire agreement, thereby superseding and replacing all representations that might have inspired and culminated in such an agreement in the first place, but which were never actually incorporated in the written agreement. [emphasis in original]

12.55 Applying these principles, Ang JC held that the TBE did not come within the terms of cl 2.4, which excluded "representations, statements and/or prior negotiations". The TBE was instead a document that recorded an agreement that had been reached by the parties on certain terms after negotiations between them. As such, the TBE was not excluded by the clause and was instead part of the contract between the parties. The learned judicial commissioner also considered the context that led to the letter of award and TBE. Although the letter of award was dated 22 June 2015, it was only executed on 14 August 2015. In the meantime, the parties continued to negotiate the terms in the TBE. In fact, the applicant even chased the respondent for the completed TBE before the letter of award was eventually awarded. The evidence thus showed that the applicant was not prepared to finalise the award of the subcontract until all the contractual terms, including the TBE, had been finalised and agreed by the respondent in writing.

12.56 Finally, Ang JC also referred to cl 2.5, which appeared just after the entire agreement clause:

> 2.5 In addition, where your responses to the various questionnaires, clarifications and addenda include the phrases 'We Confirm' or 'We noted' or 'Yes' or 'We agree' or 'We Comply' or any other phrases construed to have the same meaning and/or intention; it shall be deemed to mean your unconditional confirmation at no extra costs or time to the Sub-Contract.

12.57 The learned judicial commissioner thought that the TBE was precisely such a document contemplated in cl 2.5. This was because the TBE contained a list of terms that required the respondent's answer or confirmation in respect of each of those items.

12.58 *Sunray Woodcraft* is a good example of how entire agreement clauses should be interpreted. As Ang JC demonstrated, such clauses need to be interpreted pursuant to the usual principles of contractual

56 See para 12.46 above.

57 *Sunray Woodcraft Construction Pte Ltd v Like Building Materials (S) Pte Ltd* [2019] 3 SLR 285 at [45], citing *Lee Chee Wei v Tan Hor Peow Victor* [2007] 3 SLR(R) 537 at [35].

interpretation, bearing in mind the text and context. In that case, it is also clear that such clauses may not always work to exclude a subsequent document forming part of the overall agreement, especially if both the text and context militated against this outcome.

Sole discretion clauses

12.59 The High Court in *AL Shams Global Ltd v BNP Paribas*[58] had to consider the operation of sole discretion clauses in a banking document. One example of the relevant clauses was:

> 3.5 Deposits
>
> …
>
> (D) Deposits in cash will be subject to such limits as the Bank may, from time to time, decide. *The Bank shall be entitled at its sole discretion to refuse to accept any deposit* (whether by cash deposit, telegraphic transfer or any other payment method whatsoever) in any account at the Bank *for any reason whatsoever*. In particular but without limitation it *may refuse* to accept any such deposit *if any information or documentation for which it may request, relating to the origin of any such cash, is not provided or, in the opinion of the Bank is insufficient or unsatisfactory*.
>
> [emphasis added by the High Court]

12.60 Although Kannan Ramesh J ultimately found that there was no evidence of the bank acting in bad faith, his Honour's articulation of the general principles in relation to these clauses was very helpful. His Honour held that even though such clauses conferred on a contracting party the "sole discretion" to make certain decisions, the law obliged that party to exercise the discretion in a manner that was not arbitrary, capricious or perverse.[59] Thus, applying this to the present case, the bank did not have an untrammelled discretion to refuse to accept payments into the account under cl 3.5(D).

12.61 More broadly, the learned judge also rejected the argument that good faith is an "essential ingredient" of every contract and that this underpinned the principle that discretion must be exercised in an acceptable way. Ramesh J drew reference from several Court of Appeal decisions[60] to the effect that there is no implied term of good faith in law, although it remained possible for the parties to agree to a term of good faith between themselves. Thus, without a general doctrine of

58 [2018] SGHC 143.

59 *AL Shams Global Ltd v BNP Paribas* [2018] SGHC 143.

60 *Ng Giap Hon v Westcomb Securities Pte Ltd* [2009] 3 SLR(R) 518; *The One Suites Pte Ltd v Pacific Motor Credit (Pte) Ltd* [2015] 3 SLR 695.

good faith, parties to a contract have the freedom to perform their obligations in their own self-interest and in a manner that maximises their benefit, subject only to the limits imposed by the general law (such as the law against the arbitrary exercise of discretion) and the terms of their contract.

"Do all that may be necessary" clauses

12.62 The Court of Appeal in *Lim Sze Eng v Lin Choo Mee*[61] ("*Lim Sze Eng*") had to deal with a "do all that may be necessary" clause that the parties agreed had been implied into the settlement agreement concerned. The relevant clause read:

> … the parties 'shall take reasonable endeavours and/or do all that may be necessary to give effect to the spirit and intent of the Settlement Agreement and to implement the terms of the Settlement Agreement', and the 'parties would cooperate to enable the sale of the [FEP Unit] and/or not to prevent performance of the sale of the [FEP Unit] by their acts and/or omissions'.

12.63 The court referred to its previous judgment in *KS Energy Services Ltd v BR Energy (M) Sdn Bhd*[62] ("*KS Energy*") where it had endorsed the following guidelines that govern the interpretation of "best endeavours" clauses (that were originally set out in the Court of Appeal decision of *Travista Development Pte Ltd v Tan Kim Swee Augustine*):[63]

> (a) The obligor has a duty to do everything reasonable in good faith with a view to procuring the contractually-stipulated outcome within the time allowed. This involves taking all those reasonable steps which a prudent and determined man, acting in the interests of *the obligee* … and anxious to procure the contractually-stipulated outcome within the available time, would have taken.
>
> (b) The test for determining whether a 'best endeavours' obligation has been fulfilled is an objective test.
>
> (c) In fulfilling its obligation, the obligor can take into account its own interests.
>
> (d) A 'best endeavours' obligation is not a warranty to procure the contractually-stipulated outcome.
>
> (e) The amount or extent of 'endeavours' required of the obligor is determined with reference to the available time for procuring the

61 [2019] 1 SLR 414 at [62].
62 [2014] 2 SLR 905.
63 [2008] 2 SLR(R) 474. *KS Energy Services Ltd v BR Energy (M) Sdn Bhd* [2014] 2 SLR 905 at [47].

> contractually-stipulated outcome; the obligor is not required to drop everything and attend to the matter at once.
>
> (f) Where breach of a 'best endeavours' obligation is alleged, a fact-intensive inquiry will have to be carried out.
>
> [emphasis in original]

12.64 The court further noted that the test for determining whether an all reasonable endeavours obligation has been fulfilled should be the same as the test applicable to a best endeavours clause. It also laid down the further principles that apply to both best endeavours and all reasonable endeavours clauses:[64]

> (a) Such clauses require the obligor 'to go on using endeavours until the point is reached when all reasonable endeavours have been exhausted' … or 'to do all that it reasonably could' …
>
> (b) The obligor need only do that which has a significant … or real prospect of success … in procuring the contractually-stipulated outcome.
>
> (c) If there is an insuperable obstacle to procuring the contractually-stipulated outcome, the obligor is not required to do anything more to overcome other problems which also stood in the way of procuring that outcome but which might have been resolved …
>
> (d) The obligor is not always required to sacrifice its own commercial interests in satisfaction of its obligations …, but it may be required to do so where the nature and terms of the contract indicate that it is in the parties' contemplation that the obligor should make such sacrifice …
>
> (e) An obligor cannot just sit back and say that it could not reasonably have done more to procure the contractually-stipulated outcome in cases where, if it had asked the obligee, it might have discovered that there were other steps which could reasonably have been taken …
>
> (f) Once the obligee points to certain steps which the obligor could have taken to procure the contractually-stipulated outcome, the burden ordinarily shifts to the obligor to show that it took those steps, or that those steps were not reasonably required, or that those steps would have been bound to fail …

12.65 In *Lim Sze Eng*, the court held that the guidelines laid down in *KS Energy* should apply in the present case. In doing so, it noted that even though the clause concerned does not state that the parties are to take all reasonable endeavours or take their best endeavours, it requires the parties to "do all that may be necessary" to implement the terms of

64 *KS Energy Services Ltd v BR Energy (M) Sdn Bhd* [2014] 2 SLR 905 at [93].

the settlement agreement. The court took this phrase to import the relevant principles relating to best endeavours and reasonable endeavours clauses.

Interpretation of terms

General approach

12.66 The Court of Appeal in *PT Bayan Resources TBK v BCBC Singapore Pte Ltd*[65] ("*PT Bayan Resources*") laid down the general principles that govern the interpretation of contractual terms. Referring to its previous decision in *CIFG Special Assets Capital I Ltd v Ong Puay Koon*[66] ("*CIFG*"), the court reiterated the principles as follows:

> (a) The starting point is to look to the text of the contract.
>
> (b) The court may have regard to the relevant context if that is clear, obvious and known to both parties.
>
> (c) Examples of the relevant context include the entirety of the contract, and the entirety of the commercial documents entered into as part of the transaction which is the subject matter of the contract.
>
> (d) Generally, the meaning ascribed to the contractual terms must be one that the expressions used by the parties can reasonably bear.

The Court of Appeal in that case had to deal with an issue of interpretation in the light of the presumption against redundant words in the context of standard form contracts. This will be discussed below.

12.67 Apart from the Court of Appeal decision of *PT Bayan Resources*, the High Court in *Nanyang Medical Investments Pte Ltd v Kuek Bak Kim Leslie*[67] ("*Nanyang Medical*") set out a very comprehensive summary of the relevant principles in relation to contractual interpretation, drawing reference from several previous Court of Appeal decisions. Constraints of space prevent a summary of that discussion – which, in any event, is already succinctly captured by the Court of Appeal's summary in *PT Bayan Resources*. We will discuss *Nanyang Medical* in the context of the court's consideration of prior negotiations and subsequent conduct

65 [2019] 1 SLR 30.

66 [2018] 1 SLR 170 at [44], citing *MGA International Pte Ltd v Wajilam Exports (Singapore) Pte Ltd* [2010] SGHC 319 at [102]–[106]; *Edwards Jason Glenn v Australia and New Zealand Banking Group Ltd* [2012] SGHC 61 at [100]–[101].

67 [2018] SGHC 263.

later. The High Court in *Solomon Alliance Management Pte Ltd v Pang Chee Kuan*[68] ("*Solomon Alliance*") likewise set out a comprehensive summary of the relevant principles of contractual interpretation. In essence, Aedit Abdullah J held that the court must balance both the text and context of the agreement, even as the text served as the starting point. However, even if the text appeared plain and unambiguous, the court should then examine the context to determine if the text were indeed unambiguous to begin with. The Court of Appeal in *Lim Sze Eng*[69] held the same. Moreover, the context must be weighed in the light of the objective evidence so that an absurd result should not be evaded if the objective evidence shows that the absurd result was indeed within the parties' contemplation.

12.68 In *Solomon Alliance*, the plaintiff was a company in the business of promoting, marketing and selling assets-backed investment products. The defendant was appointed Vice President of the plaintiff one day after it was incorporated. Under the contract, the defendant was to market certain products promoted and marketed by the plaintiff. The dispute concerned the scope of the contract: whether only the "Villages Product" fell within the contract or if the "Dolphin Product" fell within it as well. This would determine if the contract was frustrated when the "Villages Product" ceased. As a starting point, the textual interpretation of the contract suggested that the contract was only concerned with the Villages Product. This was because the text provided that "you are being appointed … to market product(s) stipulated in Schedule A as an independent contractor". Schedule A only contained the Villages Product.

12.69 However, the context suggested otherwise. The court thought that the commercial objective of the contract was to govern the relationship between the parties rather than a single product. It was premised on an ongoing relationship between the parties. Because of this, Abdullah J regarded that it would be incongruous for a contract intended to govern the entirety of a long-term relationship between the parties to have included only obligations relating to one product. Schedule A only contained one product because that was the only product sold by the plaintiff at the time the contract was concluded; it was not intended to delimit the entirety of the parties' relationship thereafter. This was also in line with other provisions of the contract which suggested a broader remit than just the Villages Product.

68 [2018] SGHC 139.
69 *Lim Sze Eng v Lin Choo Mee* [2019] 1 SLR 414 at [62].

12.70 Abdullah J's interpretation in *Solomon Alliance*[70] therefore showed the importance of considering not only the text, but also the context. In this case, the context yielded a different result from just a bare consideration of the contractual text. The learned judge also considered the relevance of subsequent conduct in the interpretation which will be dealt with below.

12.71 Although primarily concerned with the issues of breach of contract, inducement of breach of contract and various intellectual property law questions, the High Court decision of *PropertyGuru Pte Ltd v 99 Pte Ltd*[71] provides a helpful application of the principles for contractual interpretation. Briefly stated, the parties were competitors in the business of providing online property classifieds. The plaintiff claimed that the defendant had, among others, breached the terms of a settlement agreement between the parties by providing a service that allowed agents to cross-post listings from the plaintiff's website on the defendant's website. The settlement agreement had come about from the parties' past dealings. When the defendant first commenced operations, it took listings from the plaintiff's website by means of a software and posted them on its website. The plaintiff was understandably unhappy about this and contacted the defendant through its solicitors. Eventually, the parties reached a settlement agreement that was the subject of the current case. The settlement agreement began with the following preamble:

> **WHEREAS**
>
> (A) PropertyGuru believes that 99 had accessed and reproduced content ('the **Content**') from the website http://propertyguru.com.sg owned by PropertyGuru (the '**Website**'), and 99 denies the above.
>
> (B) PropertyGuru regards such accessing and reproduction of the Content by 99 as a breach of the Terms of Service and Acceptable Use Policy of the website and/or an infringement of PropertyGuru's copyright in the Content (the '**Dispute**').
>
> (C) The Parties wish to resolve the dispute amicably, without recourse to litigation.

12.72 The preamble was then followed by, among others, cl 2.1, which provided:

> 2.1 Without any admission as to liability, 99 shall undertake to, within 30 days of the date of this agreement, and where applicable:
>
> (a) Not, whether by itself or by its affiliate companies, affiliate websites, administrators, officers, managers, and/or

70 See para 12.67 above.
71 [2018] SGHC 52.

> agents, substantially reproduce any of the Content, or any contents found on any website owned by PropertyGuru, without PropertyGuru's consent. To avoid doubt, nothing herein precludes 99 from taking Content pertaining to a user or agent pursuant to the user or agent's request;
>
> (b) Not connect to, for the purposes of posting property listings and/or any other information on, the Website, or any website owned by PropertyGuru, through any of 99's websites, programs, applications, servers, or services or authorise any of its clients, users, affiliate companies, affiliate websites, administrators, officers, managers and/or agents to do the same;
>
> (c) Take reasonable efforts to delete any of the Content from its own website (at 99.co) and to destroy any copies of such Content; and
>
> (d) Take reasonable efforts to delete or destroy any materials prepared based on any of the Content.

12.73 The plaintiff alleged that the defendant breached the settlement agreement by substantially reproducing the "Content (as defined in the Settlement Agreement)" without the plaintiff's consent or approval. Here, the plaintiff argued that "Content" referred to classifieds that had been taken and reproduced prior to the settlement agreement. This was significant because, on the facts, only the classifieds listed before the settlement agreement were reproduced at the defendant's request. Indeed, the defendant denied these breaches and disagreed with the plaintiff's meaning of "Content". In any event, the defendant argued that any such acts of reproduction were committed by the property agents or at the request of such agents.

12.74 Hoo Sheau Peng J held that, in order to decide whether the defendant breached the various clauses, the court was required to interpret them. As a starting point, the learned judge held that the purpose of contractual interpretation:[72]

> … is to give effect to the objectively-ascertained expressed intentions of the contracting parties as it emerges from the contextual meaning of the relevant contractual language.

This starting point leads to a number of key principles:[73]

> First, both the text sought to be interpreted and its context must be considered. Second, it is the objectively-ascertained intentions of the parties, and not their subjective intentions, which are relevant. Third,

72 *PropertyGuru Pte Ltd v 99 Pte Ltd* [2018] SGHC 52 at [29].
73 *PropertyGuru Pte Ltd v 99 Pte Ltd* [2018] SGHC 52 at [29].

> given that the object of interpretation is the verbal expressions used by the parties, the text of their agreement is of first importance: see the Court of Appeal's decision in *Yap Son On v Ding Pei Zhen* [2017] 1 SLR 219 at [30].

12.75 As such, although representatives from the plaintiff and defendant were cross-examined as to the meaning of the clauses, especially the meaning of "Content", Hoo J did not think that was helpful as interpretation is ultimately an exercise in determining the *objectively-construed* meaning of the contractual terms. This much was held by the Court of Appeal in *Centre for Laser and Aesthetic Medicine Pte Ltd v GPK Clinic (Orchard) Pte Ltd*.[74] As such, the learned judge chose to place more emphasis on:[75]

> … the plain and ordinary meaning of the contractual language as they would be understood objectively, than on the parties' subjective views of their meaning.

This approach must be correct, and one might add that while the plain and ordinary meaning is an appropriate starting point, that should also be taken in conjunction with the overall context, which may at times lead to a different interpretation from the literal meaning.

12.76 Applying these principles to the case, Hoo J found that "Content" referred to listings that had already been reproduced by the defendant prior to the settlement agreement. Her Honour based this on two reasons. First, in line with taking first guidance from the plain and ordinary meaning, the word "Content" was defined in the preamble as referring to content that the defendant had already "accessed and reproduced". The use of past tense was important as it referred only to what the defendant had already accessed and reproduced. Secondly, the word "Content" as used in cll 2.1(c) and 2.1(d) suggested that the defendant should delete "any of the Content" from its website and destroy materials prepared based on such "Content". Taking the internal context of the agreement into consideration, this suggested that "Content" referred to what had *already* been reproduced. Otherwise, the use of the word would make no sense as it would then oblige the defendant to delete materials it would copy in the future when the overarching purpose of the settlement agreement was to stop the defendant from copying from its commencement.

12.77 More broadly, Hoo J also considered whether the defendant should be liable for copying done by agents outside of its control. Her Honour found that cl 2.1(a) was meant to prevent the defendant from

74 [2018] 1 SLR 180 at [65].
75 *PropertyGuru Pte Ltd v 99 Pte Ltd* [2018] SGHC 52 at [30].

taking classifieds from the plaintiff's website and reproducing them on its website. However, the clause was not meant to make the defendant liable for all "Content" or "contents" found on its website regardless of who had reproduced them. Clause 2.1(a) was very clear on its face; it provided that the defendant could not "whether by itself or by its affiliate … 'substantially reproduce' either the Content or any contents". As such, the clause only governed the defendant, as a corporate entity, and the people under its control. Moreover, such a reading was also consistent with the purpose of the settlement agreement, which was to stop the defendant from cross-posting. Taking these points into mind, Hoo J found that the defendant had breached cl 2.1(a), albeit in a more limited manner than that contended for by the plaintiff. More broadly, Hoo J's close reading of the text, coupled with the context (including the commercial purpose of the settlement agreement) serves as a good illustration of how to interpret contracts.

Use of prior negotiations and subsequent conduct

12.78 In *Nanyang Medical*,[76] the parties sought to rely on prior negotiations and subsequent conduct in the interpretation of the relevant contractual clauses. Before considering whether they can be admitted to interpret the contract concerned, Mavis Chionh JC explained that the Court of Appeal had expressed reservations about prior negotiations and subsequent conduct. In respect of prior negotiations, the learned judicial commissioner highlighted the Court of Appeal decisions of *Sembcorp Marine Ltd v PPL Holdings Pte Ltd*[77] ("*Sembcorp Marine*") and *Xia Zhengyan v Geng Changqing*[78] ("*Xia Zhengyan*") which together showed that the Court of Appeal took a cautionary approach towards such evidence. Indeed, in both cases, the Court of Appeal had preferred to leave the precise legal limits concerning the admissibility of prior negotiations to be decided when the issue was next fully argued before it. In the meantime, as the court said in *Xia Zhengyan*, prior negotiations that satisfy the tripartite requirements in *Zurich Insurance*[79] will merely serve as a confirmatory (as complementary and subsidiary) function. Chionh JC in *Nanyang Medical* accepted these propositions.

12.79 Applying these principles, Chionh JC found that the e-mails adduced by both parties did not comply with the requirements of the contextual approach. This was probably because both parties were

76 See para 12.67 above.
77 [2013] 4 SLR 193.
78 [2015] 3 SLR 732.
79 See para 12.46 above.

simply adducing evidence of what they had thought the contract to mean, which is of course inadmissible evidence of their subjective intentions. Moreover, the learned judicial commissioner also thought that the e-mails did not provide the evidence that the parties had argued for. All in all, the learned judicial commissioner rejected the parties' reliance on prior negotiations, opining that this was a different instance from the English case of *Inglis v John Buttery & Co*,[80] which was cited in *Xia Zhengyan* as a good example of when prior negotiations might be admissible to shed light on the parties' intentions.

12.80 In so far as subsequent conduct is concerned, Chionh JC in *Nanyang Medical* likewise referred to the Court of Appeal decision of *Xia Zhengyan*, which likewise sounded a note of caution towards such evidence. In essence, the court had said that:[81]

> … the relevance of subsequent conduct remains a controversial and evolving topic that will require more extensive scrutiny by this court at a more appropriate juncture.

Applying these principles to the facts, Chionh JC was not inclined to give any weight to the subsequent conduct in that case. Her Honour held that the evidence did not satisfy (at the very least) the third of the *Zurich Insurance* requirements, in that the e-mails adduced were equivocal and did not shed light on the relevant context.

12.81 The more restrictive approach towards prior negotiations and subsequent conduct stands in contrast to the approach taken in the High Court decision of *Solomon Alliance*.[82] Here, in contrast to *Nanyang Medical*, the parties succeeded in adducing evidence of subsequent conduct to interpret the contract. The plaintiff, who argued that the contract concerned included products other than "Villages Product", pointed to the defendant's subsequent conduct of selling other products in support of its interpretation. Abdullah J held that while subsequent conduct could be considered in the interpretation of a contract, it had to be treated with caution. In doing so, the learned judge alluded to the Court of Appeal's decision in *Hewlett-Packard Singapore (Sales) Pte Ltd v Chin Shu Hwa Corinna*,[83] where the court had said:[84]

> [W]e are not endorsing a blanket prohibition on the use of subsequent conduct. Like the question of the admissibility of prior negotiations, the question of the admissibility of subsequent conduct remains an

80 (1873) 3 App Cas 552.
81 *Xia Zhengyan v Geng Changqing* [2015] 3 SLR 732 at [73].
82 See para 12.67 above.
83 [2016] 2 SLR 1083.
84 *Hewlett-Packard Singapore (Sales) Pte Ltd v Chin Shu Hwa Corinna* [2016] 2 SLR 1083 at [56].

> open one that should be decided on a more appropriate occasion (see the decision of this court in *Xia Zhengyan v Geng Changqing* [2015] 3 SLR 732 at [62]). We do, however, reiterate that any such evidence must satisfy the tripartite requirements of relevancy, reasonable availability and clear and obvious context mentioned in *Zurich Insurance* ([52] *supra*) before it may be admitted to interpret a contract. The requirements of civil procedure established in the decision of this court in *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [73] must also be borne in mind. …

12.82 Abdullah J also referred to the Court of Appeal's decision in *Centre for Laser and Aesthetic Medicine Pte Ltd v GPK Clinic (Orchard) Pte Ltd*[85] that references to subsequent conduct would generally only be allowed if it provided cogent evidence of the parties' agreement at the time the contract was concluded. Moreover, the subsequent conduct invoked also could not contradict the express terms of the contract.[86]

12.83 In the present case, Abdullah J found that the tripartite requirements of relevancy, reasonable availability and clear/obvious context as established in *Zurich Insurance*[87] had been satisfied. The learned judge found that the defendant's subsequent conduct of selling other produces was relevant since it shed light on what the parties had regarded their obligations to be under the contract. The fact that the defendant sold other products was reasonably available to all parties and also related to a clear/obvious context. Thus, the fact that the defendant sold other products after the "Villages Product" ceased, and that he was remunerated in a manner consistent with the contract, showed that the parties intended for the contract to cover more than one product at the time the contract was concluded.

12.84 Abdullah J's consideration of the parties' subsequent conduct is to be welcomed, and one hopes it would lead to a broader consideration as a matter of principle whether there should be a restrictive approach towards subsequent conduct (and prior negotiations). The learned judge's application of the *Zurich Insurance* requirements showed that all types of subsequent conduct could potentially be of relevance in ascertaining the parties' intentions. Indeed, the learned judge did not quite explain *why* the subsequent conduct here fulfilled the requirements apart from saying that they did, along with the way the requirements are framed. While Abdullah J's approach can be contrasted with that taken by Chionh JC in *Nanyang Medical* in terms of the outcome, in one sense, their approaches were the same. This is how they both approached the *Zurich Insurance* requirements by simply saying

85 See para 12.75 above.
86 *Gay Choon Ing v Loh Sze Ti Terence Peter* [2009] 2 SLR(R) 332 at [88].
87 See para 12.46 above.

that they were not satisfied without much explanation. To be fair, given the fine distinctions within the *Zurich Insurance* requirements, it would not be right to expect courts to explain with certainty just why they were or were not satisfied. However, this shows that it may be better to regard the question of subsequent conduct as one of weight as opposed to admissibility, the latter of which would require courts to make fine distinctions or explanations within the *Zurich Insurance* requirements that may be hard to justify.

12.85 It remains to be said that, most recently, the Court of Appeal in *Simpson Marine (SEA) Pte Ltd v Jiacipto Jiaravanon*[88] acknowledged that the law in this regard is uncertain, but, because full arguments were not heard, declined to reach any firm views on the admissibility, relevance and probative value of subsequent conduct for the purpose of either contract formation or interpretation. It is hoped that when the next occasion arises before the courts, they might consider whether it is better to simply regard the difficult question of admitting prior negotiations and subsequent conduct as a matter of weight, rather than admissibility. The binary enquiry in relation to admissibility may require courts to make too fine distinctions in so far as the legal requirements are concerned.

Redundancy in standard form contracts

12.86 In *PT Bayan Resources*,[89] one of the questions was whether the respondents breached the joint venture deed by causing the joint venture company ("KSC") to incur debt in excess of $100,000 without the appellants' consent. To resolve this, the Court of Appeal had to interpret cl 7.1 of the deed. The relevant clauses were as follows:

> 7.1 Matters requiring unanimous consent
>
> The Members agree that despite anything to the contrary in this Deed, or in the Constitution, the unanimous consent of the Members or the Directors (as appropriate as the case may be in accordance with the Applicable Law) is required for [KSC] to do any of the following, unless such act, matter or thing is dealt with in an approved Business Plan:
>
> …
>
> (f) make any decision about the requirements for, and the raising of, further finance or working capital for [KSC];
>
> …

88 [2019] 1 SLR 696.
89 See para 12.66 above.

> (bb) permit [KSC] to incur any indebtedness in excess of $100,000 in total outstanding, or increase the total amount of its borrowings to a figure greater than that provided in the Business Plan;
>
> (hh) *create any contract or obligation to pay money or money's worth to any Member or its Related Bodies Corporate or to any person as a nominee or associate of any such person* (including any renewal of or any variation in the terms of any existing contract or obligation) other than as set out in this Deed …
>
> [emphasis added by the Court of Appeal]

12.87 Reading cll 7.1(f) and 7.1(bb) by themselves, it was arguable that they would be breached should either party decide unilaterally to cause KSC to incur a debt exceeding $100,000. However, these clauses had to be read in the light of cl 7.1(hh). In the court's view, unilateral funding from a member to KSC would not necessarily constitute a breach of cl 7.1(hh) unless such funding gave rise to an obligation on KSC's part to repay the funds advanced. In contrast, cl 7.1(f), which was concerned with raising of further finance or working capital, and cl 7.1(bb), which was concerned with the incurring of indebtedness above $100,000, both deal with situations where the funds advanced to KSC came from a third party.

12.88 According to the court, to interpret cl 7.1 otherwise would render cl 7.1(hh) redundant. Here, the court had regard to its observation in *Travista Development Pte Ltd v Tan Kim Swee Augustine*[90] that there is a presumption against redundant words in contractual interpretation. In this context, the court accepted that some academics considered this presumption to be a weak one in the context of standard form contracts, which usually have redundancy drafted into them.[91] However, on the facts, the joint venture deed was far from a standard form contract as the parties were of comparative bargaining weight. Moreover, the deed had multiple drafts being exchanged before the final version was arrived at.

90 [2008] 2 SLR(R) 474 at [20]. See para 12.63 above.

91 See Kim Lewison, *The Interpretation of Contracts* (Sweet & Maxwell, 6th Ed, 2015) at para 7.03.

Implication of terms

Procedural requirements

12.89 In *Ten Leu Jiun Jeanne-Marie v National University of Singapore*[92] ("*Ten Leu Jiun Jeanne-Marie*"), the plaintiff sued the defendant university, alleging that the latter had, among others, breached its contract by not conferring her an academic degree despite the fact that she had satisfied all academic requirements. The defendant argued that there was an implied term to the effect that "the Plaintiff was required to comply with such rules, requirements and procedures as might be implemented by [the defendant] from time to time".[93] In essence, the defendant argued that the plaintiff was supposed to meet both academic and administrative requirements as it may impose from time to time, even after the contract was entered into. The plaintiff denied the existence of such an implied term and argued that the defendant had breached the contract by imposing new administrative requirements before she could be granted her degree.

12.90 More importantly for present purposes, the plaintiff argued that the defendant's pleading of the term to be implied was lacking in specificity. In this regard, Woo Bih Li J referred to *Sembcorp Marine*[94] and para 35A of the Supreme Court Practice Directions, which imposed several procedural requirements before a court will consider whether a term should be implied:

> (a) First, parties who contend that the factual matrix is relevant to the construction of the contract must plead with specificity each fact of the factual matrix that they wish to rely on in support of their construction of the contract.
>
> (b) Second, the factual circumstances in which the facts in (a) were known to both or all the relevant parties must also be pleaded with sufficient particularity.
>
> (c) Third, parties should in their pleadings specify the effect which such facts will have on their contended construction.
>
> (d) Fourth, the obligation of parties to disclose evidence would be limited by the extent to which the evidence is relevant to the facts pleaded in (a) and (b).

92 [2018] SGHC 158.

93 *Ten Leu Jiun Jeanne-Marie v National University of Singapore* [2018] SGHC 158 at [269].

94 See para 12.78 above.

12.91 Woo J thought that the *Sembcorp Marine* guidelines should be adjusted for different contexts; in the particular case, unlike *Sembcorp Marine*, the parties were not commercial parties and had not negotiated the terms of the contract. In this context, the learned judge thought the defendant should have elaborated more on the factual matrix giving rise to the implied term. However, it was not so deficient as to preclude the defendant from pleading the implied term. Moreover, the Court of Appeal in *Sembcorp Marine* did not say that the lack of specificity will preclude a party from relying on an implied term, only that the opponent may be entitled to request further and better particulars of the pleading. Finally, the plaintiff was not prejudiced by the defendant's pleading as the factual matrix was never in dispute.

Sembcorp Marine *three-step process*

12.92 In *Ten Leu Jiun Jeanne-Marie*,[95] Woo J then moved to the three-step process for the implication of terms in fact laid down in *Sembcorp Marine* as follows:[96]

> (a) The first step is to ascertain how the gap in the contract arises. Implication will be considered only if the court discerns that the gap arose because the parties did not contemplate the gap.
>
> (b) At the second step, the court considers whether it is necessary in the business or commercial sense to imply a term in order to give the contract efficacy.
>
> (c) Finally, the court considers the specific term to be implied. This must be one which the parties, having regard to the need for business efficacy, would have responded 'Oh, of course!' had the proposed term been put to them at time of the contract. If it is not possible to find such a clear response, then, the gap persists and the consequences of that gap ensue.

12.93 On the first step, the learned judge found that there was a gap in the contract as it did not mention whether a student also had to meet administrative requirements that may be imposed by the defendant from time to time.

12.94 On the second and third steps, Woo J found that it was necessary in the operation of a tertiary institution like the defendant to imply a term that a student would also have to meet administrative requirements as may be imposed by the defendant from time to time before a degree is awarded. Since administrative requirements may change and the institution is not expected to foresee them (for example,

95 See para 12.89 above.
96 *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [101].

the onset of electronic documentation), it is right that the defendant retains the right to impose such additional administrative requirements, provided that they are objectively reasonable.

12.95 For all these reasons, the court found that there was indeed the implied term as argued for by the defendant. In the result, the plaintiff's case for breach of contract failed since the defendant could rely on the implied term as the basis for imposing the additional administrative requirements as it did. It is noteworthy that Woo J combined the analysis of the second and third steps in his judgment. Practically speaking, this should not have affected the outcome, although it is respectfully submitted that it may conduce towards conceptual clarity for the two steps to be analysed separately.

12.96 Another case where the *Sembcorp Marine* three-step process featured was *Tan Kok Yong Steve*.[97] In that case, Tan J regarded that it was important that the defendant had rejected the plaintiff's request to be excused from the non-competition undertaking during their discussion of the severance package. Thus, the effect of the undertaking on the severance package was a live issue and it was open to the defendant to expressly insert a term stating that any breach of the non-competition undertaking would disentitle the plaintiff from the severance package. As the defendant did not do this, Tan J found that there was no express term to this effect that bound the plaintiff.

12.97 In the alternative, the defendant argued that even if the severance package was pursuant to a valid and enforceable contract, there was nonetheless an express or implied condition that the plaintiff had to comply with the non-competition undertaking before he could take the benefit of the package. In dealing with this argument, Tan J first set out the three-step process for determining if a term could be implied by fact, as laid down by the Court of Appeal in *Sembcorp Marine*.[98]

12.98 Applying this process, Tan J did not think that the term the defendant sought to imply satisfied the "business efficacy" or "officious bystander" tests. In his Honour's view, the severance package and the non-competition undertaking represented two distinct sets of obligations under two separate contracts that could exist independently. Whereas the severance package was meant to avoid the hassle the defendant would have had in dealing with the union, the non-competition clause was meant to stop the plaintiff from harming the defendant's business interests. As such, there was no need to imply the term concerned to give business efficacy to the severance package

97 See para 12.1 above.
98 See para 12.78 above.

agreement. Moreover, the learned judge held, without explanation, that:[99]

> … circumstances surrounding the severance agreement also do not give rise to an implied term as it was not obvious to any bystander that the parties must have impliedly agreed to this condition.

12.99 While the outcome is surely correct in this case, it is respectfully submitted that the learned judge could have analysed the issue more in line with the three-step process in *Sembcorp Marine*. Indeed, as Tan J explained in an earlier part of the judgment, it must surely be relevant in the context of that process that the defendant had the opportunity to insert an express term with the same effect as the term it sought to imply. Given that the parties did not insert such a term, the first stage of the *Sembcorp Marine* process ought to have been sufficient to dispose of the implied term: because the parties contemplated the very issue the implied term was supposed to deal with, but yet decided not to provide an express term, the court could not effectively rewrite the contract for the parties by implying such a term. Furthermore, the learned judge's treatment of the business efficacy and officious bystander tests as alternative tests does not fit with how the tests are to be applied pursuant to the *Sembcorp Marine* process. It should be noted that the second stage of the process contemplates a broader use of the business efficacy test, and the third stage combines the two tests in the manner contemplated by the High Court in *Forefront Medical*.[100]

Vitiating factors

Misrepresentation

12.100 If a contracting party makes a representation that is clearly contradicted by a contractual term, would the representee who did not read the contract before signing be able to rescind the contract for misrepresentation? The Court of Appeal considered this interesting issue in *Broadley Construction Pte Ltd v Alacran Design Pte Ltd*[101] ("*Broadley*"). In this case, the plaintiff claimed it was fraudulently misled by the defendant to sign an undertaking. The undertaking effectively assigned a receivable of the defendant to the plaintiff but – unknown to the plaintiff – also set out an "indemnity clause" that clearly extinguished the defendant's liability to the plaintiff. At the time of signing the undertaking, the plaintiff had specifically informed the defendant that it would continue to look to the defendant for payment

99 *Tan Kok Yong Steve v Itochu Singapore Pte Ltd* [2018] SGHC 85 at [76].
100 See para 12.31 above.
101 [2018] 2 SLR 110.

under the contract if the third party should default on payment. The latter, however, said nothing to contradict that statement. In the High Court,[102] the trial judge held that this silence on the part of the defendant constituted a dishonest representation that induced the plaintiff to sign the undertaking. But this holding was overruled on appeal. Although the Court of Appeal adopted the trial judge's factual findings, it held that the circumstances were not such as to impose on the defendant a duty to respond. The parties were negotiating from opposing positions so it was undoubtedly in the defendant's interests to be absolved from all liabilities. As such, the defendant's silence was ambiguous at best and could not be construed as an unequivocal assent to the plaintiff's position.

12.101 Importantly, the Court of Appeal went on to consider whether the misrepresentation, assuming it was established, could be said to have induced the undertaking. It held that the representation did not so induce because the misstatement was in fact "corrected" by the (subsequent) express incorporation of the indemnity clause in the undertaking. Steven Chong JA, who delivered the court's judgment, explained that such "correction" is better understood as an aspect of inducement. In deciding whether an earlier misstatement has been corrected by a subsequent statement, the court has to decide "whether the earlier misrepresentation was still operative in that it still had the effect of inducing the representee to enter into the contract".[103] The subsequent statement will only constitute a "correction" if it was brought to the attention of the representee *before* the contract was entered into.[104] It would not suffice if it was merely a truth that the representee *could* have discovered. Applying these principles, Chong JA concluded that the misrepresentation (assuming it was made) was dispelled by the express terms of the contract.

12.102 An important authority that Chong JA cited in support of this reasoning is *Peekay Intermark Ltd Ltd v Australia and New Zealand Banking Group Ltd*[105] ("*Peekay*"). In that case, the claimant contracted with the defendant bank to invest in certain financial products linked to Russian government bonds. In the oral communications leading to the contracts, the defendant misrepresented that the investments would confer upon the investor proprietary interests in the bonds. This was untrue as the investment was merely a derivative product linked to the bonds. Nevertheless, the claimant's action for misrepresentation failed as the English Court of Appeal held that the claimant did not in fact act in

102 *Alacran Design Pte Ltd v Broadley Construction Pte Ltd* [2017] SGHC 162.
103 *Broadley Construction Pte Ltd v Alacran Design Pte Ltd* [2018] 2 SLR 110 at [33].
104 *Broadley Construction Pte Ltd v Alacran Design Pte Ltd* [2018] 2 SLR 110 at [34].
105 [2006] 2 Lloyd's Rep 511.

reliance on the misstatement. The crucial factors were that the claimant was an experienced investor, the investment was verbally described to him in an "informal" and "rough and ready" manner, and that it was obvious on the face of the contracts that the product was a derivative rather than an interest in a bond.[106] Against that backdrop, the documents provided the only means by which the claimant could have verified the nature of the product, and his failure to do so showed that he was acting on his *own assumption* that the product as described in the contract corresponded to the description that he had been given earlier.[107]

12.103 In *Broadley*, Chong JA summed up the proposition of *Peekay* as follows:[108]

> [A] plaintiff would not ordinarily be held to be induced by a misrepresentation if the express contractual terms, which the plaintiff placed importance on, read and signed, and which the defendant expected that the plaintiff would read and understand, contradict or correct the defendant's misrepresentation.

12.104 Chong JA went on to note, and dispel, the criticism that this approach (in *Peekay*) has undermined *Redgrave v Hurd*,[109] which held that a contract may be set aside for innocent misrepresentation even if the representee has had a chance to verify the truth of the statement but failed to do so. In his Honour's view, *Peekay* did not impose upon representees the obligation to verify the truth of representations made to them. However, the position is different where the true position is clearly reflected by the terms of the contract. In such a case, it would be consistent with the basic principle that a party is bound by the contract he signs even if he has not read it to hold that:[110]

> [A] claimant *should be taken to have actually read* the contract and known the falsity of the earlier representation. To hold otherwise would undercut the basis of the conduct of commercial life – that businessmen with equal bargaining power would read their contracts and defend their own interests before entering into contractual obligations, and that they would rely on their counterparties to do the same. [emphasis added]

12.105 For Chong JA, the facts of *Broadley* fell squarely within the principle laid down in *Peekay*. As the undertaking was clearly intended

106 *Peekay Intermark Ltd Ltd v Australia and New Zealand Banking Group Ltd* [2006] 2 Lloyd's Rep 511 at [25] and [52].
107 *Peekay Intermark Ltd Ltd v Australia and New Zealand Banking Group Ltd* [2006] 2 Lloyd's Rep 511 at [52].
108 *Broadley Construction Pte Ltd v Alacran Design Pte Ltd* [2018] 2 SLR 110 at [36].
109 (1881) 20 Ch D 1.
110 *Broadley Construction Pte Ltd v Alacran Design Pte Ltd* [2018] 2 SLR 110 at [36].

to be an important and operative document, it was incumbent on the claimant to read the document and to refrain from signing if it did not agree to its terms. If it chose to sign the agreement without reading it, then it would have been acting on its own assumption as to the agreement's content rather than the defendant's representation. As such, the defendant's misrepresentation (if there was one) did not induce the claimant to enter into the undertaking.

12.106 *Broadley* is an important decision that seeks to mediate the classic tension between the competing demands of fair process and contractual certainty. Despite Chong JA's denial, it seems reasonably clear that the decision has effectively qualified *Redgrave v Hurd*. Although it remains generally the case that an action for misrepresentation is not barred simply because the representee had the opportunity but failed to investigate the truth of a representation, such obligation may arise when the representation relates to an *express* provision of the contract. Chong JA's reasoning also appears to suggest that such obligation would only arise when it is *reasonable* to expect the representee to verify the representation by reading the contract. In the case, his Honour emphasised two considerations that made such expectation reasonable: the first was the parties' undisputed intention to effect their agreement by a written contract and the second was the easy observability of the term – it was clearly set out in a brief document rather than buried in a mass of small print.[111] But that inevitably leaves open the question how other circumstances would be construed. It may be that experienced commercial parties would generally be hard put to justify reliance on oral representations that can be easily verified against the contract, but what of persons falling outside that category? Would the complexity or value of the transaction make it more or less reasonable to expect parties to check the contract? These questions arise because "inducement" ceases to be a question of pure fact once account is taken of what the representee *ought* to have done. It effectively prescribes a threshold level of conduct expected of contracting parties.

12.107 Where a contract is induced by an actionable misrepresentation, the representee would have the option to elect either to affirm or rescind it. To affirm the contract, the representee must have communicated his intention to affirm the contract in a clear and unequivocal manner. Further, there is authority to suggest that the representee's election to affirm will only be binding if the representee had knowledge not only of the *facts* giving rise to the right to elect, but that he has *that right* in the first place. In *Peyman v Lanjani*[112] ("*Peyman*"), the English Court of Appeal held that a plaintiff who took possession and made part payment

111 *Broadley Construction Pte Ltd v Alacran Design Pte Ltd* [2018] 2 SLR 110 at [38].
112 [1985] Ch 457.

towards the purchase of a lease *after* having learnt of the defect in the defendant-seller's title was nevertheless entitled to subsequently set aside the contract of sale. The plaintiff's conduct did not amount to an unequivocal affirmation because he was not then aware that he had a right to choose between affirmation and rescission. In *Strait Colonies Pte Ltd v SMRT Alpha Pte Ltd*[113] ("*Strait*"), the Court of Appeal had the opportunity to consider whether *Peyman* should be followed in Singapore. Here, a tenant sued by its landlord for unpaid rent pleaded in defence that the tenancy was induced by the landlord's misrepresentations. At trial, the judge found that the landlord had indeed fraudulently misrepresented that the tenant would be allowed to operate a pub, a bar and club providing live entertainment at the premises. However, the tenant could not rescind the lease on account of this misrepresentation as, on the trial judge's findings, it had affirmed the lease by taking possession of the premises and commencing business thereon after learning of the truth. On appeal, the tenant argued, *inter alia*, that the tenant's conduct could not have amounted to affirmation as it was not then aware of its right to elect between affirmation and rescission.

12.108 The Court of Appeal rejected this argument. Delivering the court's judgment, Tay Yong Kwang JA cited several reasons for declining to follow *Peyman*. First, *Peyman* was a case of unusual facts involving a claimant who spoke no English and was erroneously advised by his lawyer as to his rights. His exceptional vulnerability may therefore have influenced the English court to prefer a higher threshold for affirmative conduct, which would not otherwise have been appropriate in the commercial context. Secondly, the authority of *Peyman* may be doubted on the grounds that the authorities it cited were not directly concerned with the election of rights, and *Peyman* itself has not been followed in subsequent English decisions. Australian courts,[114] too, have departed from the position in *Peyman*. Third, and most importantly, there are strong policy reasons why the position in *Peyman* should not be adopted. Fundamentally, to insist that only a person with knowledge of his legal rights could exercise the right to elect is inconsistent with the general rule that a person cannot take advantage of his own ignorance of the law. It would "lead to unfairness if the representee is allowed to hide behind his ignorance of the law and to choose deliberately not to seek legal advice".[115] Moreover, the *Peyman* position would lead to practical difficulties, for how is a representor faced with ostensibly affirmative conduct to seek confirmation of the representee's state of knowledge? Ordinarily, it would not even occur to him to verify, for he would not

113 [2018] 2 SLR 441.
114 *Sargent v ASL Developments Ltd* (1974) 131 CLR 634.
115 *Strait Colonies Pte Ltd v SMRT Alpha Pte Ltd* [2018] 2 SLR 441 at [61].

have accepted that there was misrepresentation in the first place. Apart from (unlikely) cases of express acknowledgement, proof of the representee's knowledge would also impose too onerous a burden on the representor. As Tay JA explained:[116]

> Perhaps one way of proving knowledge of legal rights is by showing that the representee had legal advice when he did the acts in ostensible affirmation of the contract. However, how does one show what sort of legal advice was given when solicitor-client privilege stands firmly in the way? Other problems may also arise. For instance, what is the significance of a representee's delay in seeking legal advice, as the appellant did in the present case? What happens if the legal advice obtained by the representee is erroneous or defective, as it was on the facts of *Peyman*? These are some of the thorny questions which may have to be dealt with if the court is required to inquire into whether a party had knowledge of his legal right of rescission before his affirmation could be regarded as binding. Commercial relationships may then become fraught with uncertainty.

12.109 *Strait* is undoubtedly a significant clarification that is aimed at preserving certainty in the commercial context. The price of certainty, however, is often to eclipse the court's ability to respond to demands of justice in less usual cases. In *Peyman*, for example, it would surely have been harsh to have held the plaintiff to his "affirmation" when his conduct was the result of erroneous legal advice. Some commentators have, moreover, doubted[117] the appropriateness of strict adherence to the legal maxim "ignorance of the law is no excuse" in the private law context. While that maxim may rightly apply with vigour in the criminal context, it has arguably less relevance in the current context where "the electing party is not seeking to escape a legal duty or shelter from the consequences of his or her own wrongdoing".[118] What, perhaps, was not sufficiently canvassed in *Strait* was whether an alternative defence in estoppel would have been available to the representor if the representee had indeed affirmed in ignorance of its right of election. In any event, the trial judge found (and the Court of Appeal affirmed) on the facts of *Strait* that the tenant was aware of its legal right to rescind at the time of its affirmation. This may suggest that proof of knowledge may often be inferred from circumstantial evidence and it would generally be disingenuous for seasoned commercial parties to deny the relevant knowledge.

116 *Strait Colonies Pte Ltd v SMRT Alpha Pte Ltd* [2018] 2 SLR 441 at [63].

117 See, *eg*, Rick Bigwood, "Circumscribing Election: Reflections on the Taxonomization and Mental Componentary of Affirmation of a Contract by Election" (2011) 30 *University of Queensland Law Journal* 235 at 265–266.

118 Rick Bigwood, "Circumscribing Election: Reflections on the Taxonomization and Mental Componentary of Affirmation of a Contract by Election" (2011) 30 *University of Queensland Law Journal* 235 at 265–266.

Undue influence

12.110 It is settled law that a bank is obliged to take such steps as are reasonable to ensure that a wife giving security for the husband's liabilities does so with informed consent and free from his undue influence. In *Royal Bank of Scotland v Etridge (No 2)*[119] ("*Etridge*"), the House of Lords identified the relevant steps to include direct communication with the wife, advising her to seek independent legal advice, explaining to her the legal and practical implications of the documents and furnishing relevant financial information to her solicitor. In practice, these obligations are further reinforced by industry codes.[120] In *Sudha Natrajan v The Bank of East Asia Ltd*[121] ("*Sudha*"), the Singapore Court of Appeal considered (*obiter*) whether the norms laid down in *Etridge* and relevant industry codes could be extended to support a general rule of evidence that resolves an ambiguity in favour of the victim (wife) when a bank fails to adhere to the standards prescribed in that case.

12.111 In *Sudha*, the respondent bank had brought an action to enforce a deed that charged the appellant's matrimonial home as collateral for the debts of her husband's (Rajan) company. The appellant pleaded forgery in defence – that she did not sign the deed and her signature was forged. This defence failed at trial but succeeded on appeal. The Court of Appeal found, on balance, that the evidence did not support the finding that the appellant had signed the deed.

12.112 Though unnecessary, the Court of Appeal proceeded to consider the appellant's argument that where a bank fails to act in accordance with the prescriptions of *Etridge* and relevant industry codes, any ensuing evidential ambiguity must be construed against the bank. This argument has the effect of "transpos[ing] the substantive principle of equity laid down in *Etridge* to the sphere of evidence".[122] Delivering the court's judgment, Sundaresh Menon CJ acknowledged the "intuitive appeal" in the submission. Once it is accepted that banks owe the *Etridge* obligations, an errant bank who failed to take the necessary precautions cannot be in a better position only because the innocent party had pleaded forgery instead of undue influence. Or, as Menon CJ elaborated:[123]

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119 [2002] 2 AC 773.

120 See, *eg*, cl 6 of the Code of Consumer Banking Practice issued by The Association of Banks in Singapore.

121 [2017] 1 SLR 141. This decision was reported in 2017 but inadvertently omitted from last year's review.

122 *Sudha Natrajan v The Bank of East Asia Ltd* [2017] 1 SLR 141 at [60].

123 *Sudha Natrajan v The Bank of East Asia Ltd* [2017] 1 SLR 141 at [61].

> … the errant bank is seemingly placed in a better position where forgery is alleged because the allegation appears to take the focus away from the bank's own actions and whether it had discharged the duties outlined in *Etridge*, so much so that the bank no longer has to face the consequences of not having done so.

12.113 Moreover, the suggested rule may be defended as an application of the maxim *omnia praesumuntur contra spoliatorem* (everything is presumed against the wrongdoer). Had the bank performed its obligations, the evidential dispute (as to whether the appellant did consent to and sign the deed) would not have arisen in the first place. Seen in that light, the bank's failure is factually an aspect of the evidential dispute.[124]

12.114 Despite the force of these arguments, the Court of Appeal ultimately took the provisional view that the suggested approach would represent too significant a departure from the law as it stood. Menon CJ noted that the principal argument in favour of the rule is that banks ought to be held to the same standard of conduct whether the pleaded defence laid in forgery or undue influence but this overlooks the conceptual distinction of the two defences. His Honour explained:[125]

> Forgery concerns the complete absence of consent while the exercise of undue influence *vitiates* consent. The latter is predicated on an act capable of being construed as giving consent while the former is premised on there having been no such act. Because of this essential difference in the defences, it seems to us that it might be plausible to hold that there is no necessary contradiction in having the appellant's claim on forgery fail even if the circumstances might give rise to a presumption of undue influence. To put it another way, the fact that the circumstances might give rise to a presumption of undue influence says nothing about whether the Deed was or was not forged. However, the presumption of undue influence was never pleaded or raised. Had it been pleaded, it might well have been possible for the case to be mounted that if the Deed was not forged, a presumption of undue influence would have arisen on the facts presented and that it was incumbent on the respondent to rebut that presumption for the reasons and in accordance with the principles set out in *Etridge* …; and as we see it at present, this could possibly co-exist with the case on forgery as an alternative on the basis of what we have said at [60] above. [emphasis in original]

12.115 Thus, there is no inconsistency in the current position so long as the two defences can be pleaded in the alternative. Menon CJ stressed, however, that the expressed views are only provisional. His

124 *Sudha Natrajan v The Bank of East Asia Ltd* [2017] 1 SLR 141 at [61].
125 *Sudha Natrajan v The Bank of East Asia Ltd* [2017] 1 SLR 141 at [64].

Honour also acknowledged a further perspective – that the principles in *Etridge* are in fact no more than evidential aids, in which case they would apply whether or not undue influence has not been pleaded. It is worth noting, too, that Menon CJ did categorically find the respondent bank reprehensible for not having complied with the *Etridge* duties.[126] On the established facts, the bank had neither given the appellant advice nor advised her to seek independent legal advice. It also made no attempt to meet the appellant.

12.116 Though *obiter*, this discussion in *Sudha* has important practical implications for lenders. At the heart of the issue is the extent of banks' obligations towards vulnerable sureties. If the *Etridge* principles were extended as rules of evidence, banks would effectively bear a greater responsibility for insuring spouses against the risks not only of undue influence but also of fraud and even mistakes. It is not clear that the law should go that far given that banks already bear the burden of proving the surety's consent.

12.117 In the last review, the authors considered *BOK v BOL*,[127] a case where the High Court set aside a deed of trust ("DOT") on the grounds of misrepresentation, mistake, undue influence and unconscionability. To recall, the plaintiff (husband) in this case had executed the DOT shortly after his mother's death, the effect of which was to gift all his assets to his infant son. The DOT was drafted by the defendant (the plaintiff's wife), whom the court found had misled the plaintiff to sign the DOT by falsely representing that he would be free to deal with his assets prior to his death. In addition, Valerie Thean J found that both Class 1 (actual undue influence) and Class 2A (presumed undue influence) were established on the facts. In respect of the former, the defendant had exploited the plaintiff's vulnerability at a time when he was experiencing acute grief and a strong sense of isolation after his mother's death, and hence particularly susceptible to her influence. This influence was exacerbated by her lie as to the legal effects of the DOT, which was corroborated by her father, a senior practising lawyer. As regards Class 2A (presumed) undue influence, the court held that there was an implied retainer between the parties which gave rise to an irrebuttable presumption of trust and confidence. The transaction was also manifestly disadvantageous to the plaintiff as it divested him of *all* his assets. Together, these facts gave rise to the presumption that the trust was executed under the defendant's undue influence, which the defendant had failed to rebut.

126 *Sudha Natrajan v The Bank of East Asia Ltd* [2017] 1 SLR 141 at [65].

127 [2017] SGHC 316. For a review of this decision, see (2017) 18 SAL Ann Rev 304 at 329–332, paras 12.74–12.79.

12.118 The defendant's appeal against the High Court's decision has since been considered by the Court of Appeal in *BOM v BOK*[128] ("*BOM*"). In relation to undue influence, Andrew Phang Boon Leong JA (who delivered the court's judgment) first dealt with the preliminary argument to confine the doctrine to situations where the party exerting the undue influence is also the party benefitting from the tainted disposition or transaction. Rejecting this argument, Phang JA held there was no reason why the doctrine should be so restricted since the primary mischief that the doctrine seeks to redress is the "wrongful exercise of influence".[129] Such impropriety may take the form of an abuse of trust (in the case of Class 2A undue influence) or the domination of the victim's mind so as to substantially undermine the independence of his decision (for Class 1 undue influence). Where these elements are established, the transaction is tainted and liable to being set aside notwithstanding that the beneficiary has not personally exercised the improper influence.

12.119 Turning to other substantive grounds of appeal, the appellate court affirmed the lower court's finding of Class 1 actual undue influence. To succeed on this ground, the plaintiff had to establish that:[130]

> (i) the defendant had the capacity to influence him; the influence was exercised; (iii) it exercise was undue; and (iv) its exercise brought about the transaction.

The trial judge was entitled to conclude that the plaintiff was susceptible to the defendant's influence as the evidence established that the plaintiff was suffering from acute grief. It is not necessary, for this purpose, to prove that the victim lacked mental capacity. Instead, it suffices to show that his free will was impaired by reason of the defendant's "bullying or importunity".[131] In the court's view, this case exemplified such bullying or importunity because the wife had badgered the husband into signing the DOT under threat of chasing him out of the family home when she knew he was in no state of mind to execute a will (*a fortiori*, an immediate disposition of all his assets via a trust) and was a lonely individual who had no family left except her and their son. Actual undue influence was made out because the defendant had procured the DOT by exploiting his acute sense of loneliness in a time of grief.

12.120 However, the Court of Appeal disagreed with the High Court's finding of Class 2A undue influence as it did not think an implied

128 [2019] 1 SLR 349.
129 *BOM v BOK* [2019] 1 SLR 349 at [103].
130 *BOM v BOK* [2019] 1 SLR 349 at [101(a)].
131 *BOM v BOK* [2019] 1 SLR 349 at [106].

retainer could be justified on the acts. The central enquiry for determining whether an implied retainer exists is "whether the circumstances are such that a contractual relationship 'ought fairly and properly' be imputed to all the parties".[132] The inquiry is objective and is based on the holistic and careful consideration of the entire factual matrix. Relevant factors include whether the putative client and solicitor reasonably considered that they were in a solicitor–client relationship, whether the putative solicitor had advised the putative client to seek independent legal advice, and whether the putative solicitor had given advice without qualification. No one factor, however, is conclusive. Applying these principles, Phang JA concluded that the case did not support an implied retainer. Of critical importance was the context of a marital relationship that was "far removed from the commercial contexts in which implied retainers are typically found".[133] On the facts of this case, it could not be inferred from the mere facts that the wife was legally trained and the husband had traditionally relied on her advice that the parties had intended to constitute a solicitor–client relation. To hold otherwise would be undesirable and inconsistent with the reality of marital relationships, rendering it extremely onerous for a legally trained person to share her legal knowledge with her spouse. However, Phang JA was quick to add that the court would not completely foreclose the possibility of an implied retainer as between spouses, only that it would be a very exceptional case where such a scenario is found to arise.

Unconscionability

12.121 Undoubtedly, the most significant aspect of *BOM* has to be its discussion of the doctrine of unconscionability. In addition to mistake, misrepresentation and undue influence, the Court of Appeal also agreed with the High Court's decision to set aside the DOT for unconscionability. As this marked a novel and significant development in the law, Phang JA took the opportunity to outline the parameters of the doctrine and consider its surrounding controversies.

12.122 For a start, Phang JA confirmed that there exists in Singapore law a *narrow* doctrine of unconscionability that applies where a plaintiff demonstrates that he was suffering from an infirmity that was evident, or ought to have been evident, to the party procuring the transaction, and the latter exploited that infirmity to procure the transaction. Once these requirements are established, the defendant has the burden of demonstrating that the transaction was fair, just and reasonable. For this

132 *BOM v BOK* [2019] 1 SLR 349 at [109], citing *Anwar Patrick Adrian v Ng Chong & Hue LLC* [2014] 3 SLR 761 at [53].

133 *BOM v BOK* [2019] 1 SLR 349 at [112].

purpose, "infirmity" is not limited to poverty and ignorance but extends to "other forms of infirmity – whether physical, mental and/or emotional in nature".[134] That said, it is not every infirmity that suffices but only that which is of such "gravity as to have acutely affected the plaintiff's ability to 'conserve his own interests'".[135]

12.123 Phang JA further clarified that it is not a requirement of the doctrine that the transaction must have been entered into at a considerable undervalue, or that the victim has had no access to independent legal advice. Nevertheless, these remain "very important factors" that the court will "invariably consider", for it would be extremely hard to demonstrate that a transaction entered into at considerable undervalue and without the benefit of independent legal advice was fair, just and reasonable.[136]

12.124 In adopting the narrow approach, Phang JA categorically rejected the broad doctrine of unconscionability exemplified by *The Commercial Bank of Australia Ltd v Amadio*,[137] a decision of the Australian High Court. On this approach, a transaction is *prima facie* liable to be set aside as unconscionable if a party to the transaction (a) suffers from a "special disability" that (b) places the parties on unequal terms and (c) the disability is sufficiently evident to the stronger party. In Phang JA's view, this approach is "phrased in too broad a manner inasmuch as it affords the court too much scope to decide on a subjective basis" and "comes dangerously close to the ill-founded principle of 'inequality of bargaining power' that was introduced in *Lloyd's Bank v Bundy* [1975] QB 326".[138]

12.125 Likewise, Phang JA considered the English doctrine of unconscionability – which requires not only the terms of the transaction to be harsh or improvident but also the stronger party to have acted in "a morally reprehensible manner"[139] – to be too broad. Specifically, Phang JA thought the requirement for morally culpable conduct unhelpful as it introduced "*even more subjectivity*" [emphasis in original] into the analysis.[140] Rather than act as an additional limiting criterion, the phrase was meant "merely to emphasise that the defendant's conduct had to be ***more*** than the mere taking of advantage

134 *BOM v BOK* [2019] 1 SLR 349 at [141].
135 *BOM v BOK* [2019] 1 SLR 349 at [141].
136 *BOM v BOK* [2019] 1 SLR 349 at [142].
137 (1983) 151 CLR 447.
138 *BOM v BOK* [2019] 1 SLR 349 at [133].
139 *Multiservice Bookbinding Ltd v Marden* [1979] Ch 84 at 110; endorsed in *Alec Lobb Ltd v Total Oil* [1983] 1 WLR 87 at 94–95.
140 *BOM v BOK* [2019] 1 SLR 349 at [136].

in a situation of inequality of bargaining power"[141] [emphasis in original]. Ultimately, therefore, the English formulation is, "in substance, no different from that in *Amadio*".[142]

12.126 A further reason that (in Phang JA's view) buttressed the rejection of the broad doctrine of unconscionability is its weak historical foundation. The historical evidence that exists suggests that the narrow doctrine of unconscionability was in fact a type of Class 1 (actual) undue influence, which means that the broad doctrine had in fact developed from a non-existent doctrine of unconscionability. Seen in that light, the broad doctrine was "flawed" in the sense that it was not founded on any prior legal principle. And although it is always open to the courts to fashion a new (and broad) doctrine of unconscionability, such a development would be a "misstep" because the resultant formulation would not "contain or embody – *in and of itself* – the elements of principle accompanied by a datum level of *certainty and predictability*"[143] [emphasis in original].

12.127 This emphatic renunciation of the broad doctrine prompts, naturally, the more critical and practical question – how is the narrow doctrine (as outlined by Phang JA) in fact more restrictive than the broad approach adopted in *Amadio*?[144] The answer is not apparent on a superficial comparison of the two formulations. Though they differ in their choice of terminology, both formulations are predicated on the existence of weakness ("infirmity" or "special disability") in one party, the perceptibility of the weakness and the use or exploitation of that weakness to procure a transaction. Both formulations are also similar in not requiring transactional disadvantage or the absence of independent legal advice. Addressing this difficulty, Phang JA accepted that the two approaches do overlap but considered the narrow approach to be distinguished by a more limited notion of infirmity. In his view, the *Amadio* notion of "special disability" is broader in that it may encompass fact situations that extend beyond the range of "infirmity" contemplated under the narrow approach.[145] On this view, then, the crux of the distinction lies in a restrictive application of "infirmity". However, given that *BOM* accepted emotional vulnerability as a sufficient form of infirmity, it is not immediately clear how the concept can, or will, be circumscribed in a narrow way. Would, for instance, emotional dependence arising from an infatuation suffice for purposes

141 *BOM v BOK* [2019] 1 SLR 349 at [139].
142 *BOM v BOK* [2019] 1 SLR 349 at [139].
143 *BOM v BOK* [2019] 1 SLR 349 at [148].
144 See para 12.124 above.
145 As to which, see para 12.122 above.

of the narrow doctrine?[146] Perhaps the answer lies in recognising that the distinction between "broad" and "narrow" is of significance mainly as a general caution against too liberal an approach to unsettling transactions. At a more specific level, the more crucial question is whether the infirmity or vulnerability is of such severity as to have impaired the victim's ability to appreciate the true effects of the transaction. This, as Phang JA underlined, is an "intensely fact-sensitive"[147] inquiry to which considerations of breadth or narrowness may have no immediate relevance.

12.128 Another question that Phang JA considered in relation to the narrow doctrine is whether it is in fact redundant given that it may be coincident with, or at least substantially overlap with Class 1 undue influence. Phang JA acknowledged the force of this argument but noted there is no particular traction for abolishing the narrow doctrine of unconscionability as its acceptance is consistent with the approach of other Commonwealth jurisdictions and "would ***not*** lead to any obvious *legal anomalies*"[148] [emphasis in italics and bold italics in original].

12.129 Returning to the facts of the case, the Court of Appeal affirmed the lower court's finding that the DOT ought also to be set aside for unconscionability. The plaintiff-husband had suffered from an infirmity of sufficient gravity because his acute grief impaired his ability to make decisions and rendered him susceptible to the defendant's influence. The defendant, on the other hand, knew about his infirmity and took advantage of it "by leveraging on his sense of isolation".[149] Aggravating the exploitation were the absence of independent legal advice and the transaction's gross undervalue – both of which are factors that weighed heavily in favour of a finding of unconscionability.

12.130 Having rejected the broad doctrine of unconscionability, it was not necessary for the court to consider the merits of merging the doctrines of duress, undue influence and unconscionability under an "umbrella doctrine of unconscionability". Nevertheless, Phang JA did canvass the arguments for and against such a development in a coda to the judgment. The learned judge noted that there are close conceptual links between all three doctrines but finally concluded that such a development would be undesirable as the doctrine ultimately provides no "*practically workable legal criteria*" [emphasis in original] for

146 See, *eg*, *Louth v Diprose* [1992] 110 ALR 1, where the High Court of Australia held that such emotional dependence constituted a special disadvantage that was susceptible to exploitation by the donee of the property.

147 *BOM v BOK* [2019] 1 SLR 349 at [141].

148 *BOM v BOK* [2019] 1 SLR 349 at [152].

149 *BOM v BOK* [2019] 1 SLR 349 at [154].

identifying unconscionable behaviour.[150] Moreover, it would not be possible to constrain this umbrella doctrine by the existing legal criteria of undue influence and duress because these doctrines are, in substance, heavily correlated to the narrow doctrine of unconscionability. Limiting the doctrine by such criteria would therefore only cause the broad umbrella doctrine to "***collapse back*** *into the narrow doctrine of unconscionability*"[151] [emphasis in italics and bold italics in original]. Those considerations led Phang JA to conclude that:[152]

> … in the ***absence*** of ***principled as well as practical legal criteria*** that would enable an umbrella doctrine of unconscionability (that *subsumes* within itself the doctrines of duress and undue influence) to ***function in a coherent as well as practical manner***, it is our view that such a novel as well as radical shift towards such an umbrella doctrine should *not* be undertaken. As we have seen, the ***broad*** *doctrine of unconscionability* that constitutes the ***premise as well as basis*** for such umbrella doctrine *might not even be viable in the first place* because it might possibly be historically flawed and, if so, would therefore *not* have been developed in a coherent and principled manner. Put simply, what could, in the final analysis, pass legal muster as ***a coherent and principled doctrine of unconscionability was – at best – a narrow one.*** [emphasis in italics and bold italics in original]

Illegality and public policy

12.131 If a person transferred assets to nominees so as to shield them from creditors in the event of personal bankruptcy, would he subsequently be barred from asserting beneficial ownership of the assets on account of illegality? This question was considered by the High Court (Family Division) in *UJF v UJG*,[153] a case concerned with the division of matrimonial assets under the Women's Charter.[154] Among the assets to be divided between the divorced couple were some businesses registered in the wife's name. Alleging that the husband had transferred these businesses to her in order to put them out of his creditors' reach, the wife argued that his claim to a division of the assets was barred by his illegality.

12.132 Aedit Abdullah J rejected this argument. No illegality was established in the first place because there was, in the absence of any dishonest intention to defraud creditors, nothing illegal about using nominees to front a business. But even if the husband's conduct were illegal, Abdullah J was satisfied that it would not bar a claim in the

150 *BOM v BOK* [2019] 1 SLR 349 at [176].
151 *BOM v BOK* [2019] 1 SLR 349 at [179].
152 *BOM v BOK* [2019] 1 SLR 349 at [180].
153 [2019] 3 SLR 178.
154 Cap 353, 2009 Rev Ed.

matrimonial division of assets as "there is no cause of action to speak of in such an exercise".[155] Although it is not entirely clear, this appears to suggest that the illegality doctrine is precluded because matrimonial proceedings are not, unlike ordinary civil claims, concerned with vindicating parties' rights or claims.[156] However, the learned judge then went on to observe that it is the *absence of creditor involvement* in such proceedings that renders the illegality irrelevant. With respect, this is difficult to understand because the doctrine of illegality is based on the judicial policy of not aiding a person who founds an action on his own illegal act, rather than mediating the relative merits of disputing parties.[157] Hence, the fact that creditor interests are not harmed is not a relevant reason for deciding if the doctrine applied in the first place.[158]

12.133 Interestingly, Abdullah J also considered the effects of the doctrine if it were applicable on the facts. Given that the appointment of nominees is not *per se* an illegal purpose, the alleged illegality would reside in the *purpose* of the transaction. Applying the framework set out by the Court of Appeal in *Ochroid Trading Ltd v Chua Siok Lui*,[159] the denial of the husband's claims would only be appropriate if it were a proportionate response to the illegality. For this purpose, the relevant factors to take into account are:[160]

> … the purpose of the prohibiting rule, the nature and gravity of the illegality, the remoteness of the illegality to the contract, the object of the parties and the consequences of denying the claim.

Applying these factors, Abdullah J concluded that the illegality was not of such degree to warrant the denial of the husband's entitlement. The reasons were that:[161]

> Whatever may be the position *vis-à-vis* third parties, creditors or the authorities, between the Husband and the Wife, the Wife is not affected or prejudiced by the illegality in relation to her interests. In other words, the illegality is remote from the claim made under

155 *UJF v UJG* [2019] 3 SLR 178 at [68].

156 Although such vindication would surely have been implicit if the court proceeded on the antecedent assumption that the husband was the beneficial owner of the businesses.

157 *Ting Siew May v Boon Lay Choo* [2014] 3 SLR 609 at [23]–[26].

158 See, *eg*, *Tribe v Tribe* [1995] 3 WLR 913, where a father gratuitously transferred shares to his son to protect it from creditors though the apprehended liability did not in fact materialise. When the father subsequently sought to recover the shares, it was accepted that the claim would ordinarily have been barred by the illegal purpose although an exception may arise if the illegal purpose has not in fact been carried into effect.

159 [2018] 1 SLR 363.

160 *Ochroid Trading Ltd v Chua Siok Lui* [2019] 3 SLR 178 at [70], citing *Ting Siew May v Boon Lay Choo* [2014] 3 SLR 609 at [66], [70] and [77].

161 *UJF v UJG* [2019] 3 SLR 178 at [71].

> matrimonial law. Allowing the Husband's claim here would not also to my mind undermine the policy of the bankruptcy provisions – the creditors' rights against the Husband remain unaffected. Ironically, it would be denying his share of the matrimonial assets that would affect his creditors' interests as the Husband's assets would then be lowered as a result of his failure to obtain a share in the matrimonial pool.

12.134 This analysis usefully illustrates that "proportionality" is inevitably a normative and policy-based assessment. The learned judge was surely right to point out that the policy underpinning bankruptcy provisions would justify the restoration of the husband's assets for the benefit of creditors. On the other hand, to allow recovery of assets previously transferred for creditor-shielding purposes may, perversely, condone such evasive schemes by allowing the asset owner to "have his cake and eat it": the owner would be able to distance himself from the asset in the event of bankruptcy but also assert ownership should the apprehended risk of bankruptcy not materialise. That has the effect of prioritising the property rights of the beneficial owner over the judicial policy against abetting illegality. It is a position that the court may legitimately adopt bearing in mind that the alternative would result in a windfall to the nominee. But that a policy choice is involved should also be recognised.

12.135 At common law, contracts savouring of maintenance and champerty are void against public policy. For this purpose, "maintenance" occurs when a disinterested party offers assistance to encourage the institution or defence of law suits. "Champerty" is a type of maintenance that includes an agreement to share the fruits of the action with the assister. While this doctrine has the effect of prohibiting litigation funding generally, it is well established that a statutory exception is permitted under s 272(*c*) of the Companies Act[162] ("CA"). In *Re Vanguard Energy Pte Ltd*[163] ("*Re Vanguard*"), the High Court confirmed that a company's causes of action are a type of "property" that the liquidator is empowered to sell under s 272(*c*). The doctrine against maintenance and champerty thus has no application to assignments that fall within the ambit of s 272(*c*). In *Solvadis Commodity Chemicals GmbH v Affert Resources Pte Ltd*,[164] the High Court applied the same reasoning to uphold a liquidator's assignment of a company's causes of action. Audrey Lim JC confirmed that the transaction was not objectionable merely because the assignee stood to profit from it. The reason is that:[165]

162 Cap 50, 2006 Rev Ed.
163 [2015] 4 SLR 597.
164 [2018] 5 SLR 1337.
165 *Solvadis Commodity Chemicals GmbH v Affert Resources Pte Ltd* [2018] 5 SLR 1337 at [29].

> Litigation funders would realistically and sensibly expect to be compensated for the risks that they take in funding an insolvent company's litigation. To expect that litigation funders should not seek a profit is commercially unrealistic and would stifle the ability for insolvent companies to pursue meritorious claims and thereby prejudice creditors.

12.136 However, the profitability of litigation funders is not unconstrained in so far as the liquidator's power of sale is subject to the control of the court under s 272(3) of the CA. That is because the level of the funder's profit is one of various indicia that the court may review in considering whether the liquidator has exercised its statutory power of sale in good faith.

12.137 In *Re Fan How Kin*,[166] Aedit Abdullah J also confirmed that a funding agreement that involves assigning the benefits or proceeds of claw-back claims to the funder is not champertous so long as the assignee has no control over the conduct of proceedings. Although this agreement was made by trustees in bankruptcy in the course of bankruptcy proceedings, Abdullah J was of the view that an approach similar to that in *Re Vanguard* (which concerned corporate insolvency) applied.

12.138 In *Teng Wen-Chung v EFG Bank AG, Singapore Branch*,[167] the issue arose as to whether a *prima facie* valid indemnity agreement governed by Singapore law was nevertheless unenforceable by reason of foreign illegality. Under the agreement, the appellant ("Teng") had agreed to indemnify the respondent bank ("EFG") against losses arising from two loan facilities that the bank extended to a company named "Surewin". The loans were also secured by pledges granted by companies related to Singfor, a company owned and controlled by Teng. Singfor subsequently went into government receivership and the pledges were found to be illegal and void under Taiwanese law. Having failed to realise its security, the bank sued Teng on the indemnity. In defence, Teng argued that the indemnity agreement was unenforceable as it was part of a fraudulent scheme to cause Singfor to use its assets as collateral for the indebtedness of an unrelated third party (Surewin). Teng's defence was rejected both at trial and on appeal. In a brief judgment, the Court of Appeal found that Teng had adduced no evidence at all as to the existence of a fraudulent scheme. There was nothing to indicate how the indemnity was linked to the illegal pledges, or that EFG was in any way responsible for the alleged scheme. As such, Teng failed in his appeal against summary judgment granted by the High Court.

166 [2019] 3 SLR 861.
167 [2018] 2 SLR 1145.

12.139 Although the Court of Appeal affirmed the decision of the High Court, it nevertheless took the opportunity to clarify the legal principles governing issues concerning foreign illegality. Noting that the trial judge had cited and relied on *Euro-Diam Ltd v Bathurst*[168] ("*Euro-Diam*"), Andrew Phang Boon Leong JA observed that the principles laid down in *Euro-Diam* need to be re-examined in light of significant recent developments in the law on contractual illegality. Specifically, the principles in *Euro-Diam* require courts to first consider if the foreign illegality is one that would affect the contract's enforceability locally and if so, whether the foreign illegality is sufficiently proximate to the disputed transaction as to render it unenforceable. In deciding the first step (of local unenforceability), *Euro-Diam* had assumed that the relevant tests to be the "reliance test"[169] and the "conscience test".[170] In Singapore, however, it is reasonably clear that both tests have either been superseded or (in respect of the "reliance test") substantially reformulated by the Court of Appeal in *Ting Siew May v Boon Lay Choo*[171] and *Ochroid Trading Ltd v Chua Siok Lui*.[172] Consequently, the principles of *Euro-Diam* do not currently represent the law in Singapore and will need to be reconsidered in the future.

Restraint of trade

12.140 A covenant in restraint of trade ("ROT") is *prima facie* void unless it satisfies the requirements of reasonableness and is imposed for the protection of legitimate proprietary interests. In *DyStar Global Holdings (Singapore) Pte Ltd v Kiri Industries Ltd*[173] ("*Dystar*"), the Singapore International Commercial Court rejected an attempt to strike down two ROT clauses. In this case, the clauses were set out in a shareholders' agreement, which the court equated with the commercial sale of a business. The shareholders could be regarded as:[174]

> … buying into the goodwill of the joint venture which may be depreciated unless either shareholder is restrained from competing with the joint venture business.

Unlike the context of employment contracts, parties to a shareholders' agreement are also more likely (though not invariably) to have

168 [1990] 1 QB 1.
169 Derived from *Bowmakers Ltd v Barnet Instruments Ltd* [1945] KB 65.
170 Derived from *Beresford v Royal Insurance Co Ltd* [1938] AC 586.
171 [2014] 3 SLR 609.
172 [2018] 1 SLR 363.
173 [2018] 5 SLR 1.
174 *DyStar Global Holdings (Singapore) Pte Ltd v Kiri Industries Ltd* [2018] 5 SLR 1 at [292].

bargained at arm's length. As such, a more liberal approach (than that applicable to employment contracts) is appropriate in this context.

12.141 The covenants in question comprised the usual non-compete and non-solicitation obligations. The defendants (the minority shareholder and related parties) alleged to have acted in breach of the covenants argued that they were unreasonable because (a) they were asymmetrical in imposing restraints only on the defendants but not the majority shareholder of the joint venture company; (b) the scope of the prohibited activities was too wide; and (c) the geographical restraint went beyond what was necessary to protect the company's legitimate interests. Kannan Ramesh J rejected all three arguments. The restraint clauses were not unreasonable merely because they operated asymmetrically. They could well have been the result of arm's length commercial bargaining. The scope of the prohibited activities was also reasonable as the defendants were only prohibited from engaging in activities that were *substantially similar to or competing with* those of the company. They would not be prohibited from carrying on businesses that would not compete with those of the company in a particular jurisdiction. On a geographical scope, Ramesh J observed that a restraint could apply to an entire country if it were necessary for the protection of the covenantee's legitimate interests:[175]

> It would be reasonable for [the company] to protect its business in an entire country even if initially it may be carrying on business in only a small part of that country. That is how many businesses obtain a foothold in a new market. Once a country has been identified as a potential market by [the company], there would be a legitimate proprietary interest to be protected in that country as a whole.

12.142 Although the ROT clauses were upheld as reasonable, Ramesh J ultimately dismissed all but a few of the alleged breaches. This was because both ROT clauses had incorporated generous saving provisions that allowed the defendants to carry on the businesses and custom existing at the time of contract and most of the alleged breaches fell within the scope of these savings.

12.143 In *Dystar*, Ramesh J had stressed that its conclusion on the reasonableness of the covenants' geographical scope was context-specific.[176] Indeed, it was the size and extent of Dystar's global business that justified the particularly generous view of the geographical reach of

175 *DyStar Global Holdings (Singapore) Pte Ltd v Kiri Industries Ltd* [2018] 5 SLR 1 at [302].

176 *DyStar Global Holdings (Singapore) Pte Ltd v Kiri Industries Ltd* [2018] 5 SLR 1 at [302].

the ROT in that case. In *Tan Kok Yong Steve v Itochu Singapore Ptd Ltd*[177] ("*Tan Kok Yong*") a no-competition undertaking was also construed to apply to entire countries (*viz*, Vietnam and the Philippines). Specifically, Tan Siong Thye J held a covenant would be reasonable as long as there is proof of sufficient goodwill in the prohibited country.[178] The covenantee (in this case, the employer) is not required to prove it has custom in every part of the country. However, Tan J went on to caution that the analysis may differ for very large countries:[179]

> [I]f the prohibited country is very big, such as China and the United States of America which have many major cities in which commerce and trade are done on a large scale, the situation may be different and the issue of reasonableness will be put to the test if the non-Competition Undertaking is to cover the whole of such country. At the end of the day it is not one size fits all. The issue of reasonableness on the geographical coverage for the Non-Competition Undertaking will have to depend on the facts of each case.

12.144 An example of a ROT clause that was struck down as being too wide (and hence unreasonable) occurred in *Powerdrive Pte Ltd v Loh Kin Yong Philip*.[180] This was a case brought by the plaintiff against its former employees for breach of a ROT clause. However, the High Court found that the clause was unreasonably wide because (a) it applied to all employees regardless of seniority, nature of work or level of access to confidential information; (b) the scope of the prohibition was excessive as it was not confined to what the employee was doing when employed by the claimant; and (c) the two-year duration of the prohibition was arbitrary as it applied even to defendants with no fixed term of employment. The court also emphasised that where a ROT clause is, on its face, worded too widely, the court is not obliged to rewrite the agreement by adopting a narrow interpretation pleaded by the employer. To do so would perversely:[181]

> … encourage employers to start with a widely worded ROT provision and then, when challenged, to say that the provision should be construed narrowly in context so as to save its enforceability.

Remedies

12.145 In 2018, as in 2017, two difficult areas in relation to the award of damages to remedy contractual breaches were addressed and further clarified in the Singapore courts.

177 See para 12.1 above.
178 *Tan Kok Yong Steve v Itochu Singapore Pte Ltd* [2018] SGHC 85 at [100].
179 *Tan Kok Yong Steve v Itochu Singapore Pte Ltd* [2018] SGHC 85 at [101].
180 [2019] 3 SLR 399.
181 *Powerdrive Pte Ltd v Loh Kin Yong Philip* [2019] 3 SLR 399 at [45].

Wrotham Park damages

12.146 Although the Court of Appeal had briefly touched on the problematic issue of what are commonly known as *Wrotham Park* damages in *PH Hydraulics & Engineering Pte Ltd v Airtrust (Hong Kong) Ltd*[182] ("*PH Hydraulics*"), *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua*[183] ("*Turf Club*") presented it with a further opportunity to clarify Singapore's law in this area, as contrasted with the English position.[184] It also made certain *obiter* comments about the possibility of *Attorney-General v Blake* ("*AG v Blake*") damages being awarded as a matter of Singapore law.[185]

12.147 *Wrotham Park* damages[186] are characterised by their mode of quantification. In brief, they are quantified by reference to such

182 [2017] 2 SLR 129.

183 *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] 2 SLR 655.

184 Until it is revisited by the UK Supreme Court, the English position has been crystallised in *One Step (Support) Ltd v Morris-Garner* [2018] 2 WLR 1353. Similarities and differences between the Singapore and English approaches to *Wrotham Park* damages are set out in *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] 2 SLR 655 at [270]–[288]. *Inter alia*, one significant difference between the two approaches appears to be that, unlike the approach taken by the UK Supreme Court, as a matter of Singapore law, availability of *Wrotham Park* damages does not depend on first identifying the party-in-breach having taken away a "valuable asset" (at [278]–[283]).

185 These damages were awarded by the House of Lords in *Attorney-General v Blake* [2001] 1 AC 268 ("*AG v Blake*"), the facts and decision of which are summarised by the Court of Appeal in *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] 2 SLR 655 at [146]. Although the Court of Appeal did not conclusively rule on the point, it indicated that given the uncertainty for their application even as a matter of English law (at [251]–[253]), and given its view that *AG v Blake* itself might have been rationalised as a case where (at [254]):

> … the law has a ***legitimate*** ***basis*** *for* ***punishing*** *the defendant and* ***deterring*** *non-performance because the contract involves* ***a public interest*** *which goes beyond the private interests of the parties themselves* … [emphasis in italics, bold italics and underlined bold italics in original]

such remedy might thus only be available only in an exceptional class of contracts.

186 Strictly speaking, *Wrotham Park* damages were not awarded in *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798, the case after which such damages are named. In that case, damages were awarded in lieu of an order of specific performance pursuant to the statutory power granted under the UK Chancery Amendment Act 1858 (c 27) (more popularly known as "Lord Cairns' Act"). Such statutory damages awarded by the court acting within its equitable jurisdiction could be readily characterised to be by way of a *quid pro quo* in lieu of having to perform that which one would otherwise be duty-bound to do. However, in *Surrey County Council v Bredero Homes* [1974] 1 WLR 798, the English Court of Appeal recognised that under English law, an analogous form of damages could be awarded within the court's common law jurisdiction. As a result, the label "*Wrotham Park* damages" has come to be applied to cases where the damages in question were awarded solely within the court's common law jurisdiction, where no issue of Lord Cairns' Act damages arose.

hypothetical bargain as objective men in the positions of the contractual promisee and the contractual promisor might have struck in exchange for the promisor being released from performing the relevant contractual promise which had been breached, hence their alternative nomenclature of "negotiating damages".[187]

12.148 *Wrotham Park* damages are quantified objectively by reference to what is, in effect, a hypothetical licence- or release-fee in exchange for releasing the promisor from the relevant contractual promise.[188] In the Court of Appeal's own words:[189]

> [I]t is well-established that *Wrotham Park* damages are to be measured by *such sum of money as might reasonably have been demanded as a* quid pro quo *for relaxing the covenant* [which had been or was under threat of being breached by the contractual promisor] … The assessment is *objective* and [is] by reference to a *hypothetical bargain rather than the actual conduct and position of the parties*. … [emphasis in original]

Hence, *Wrotham Park* damages are damages or money awards granted by a court in response to a breach of contract, but these damages are quantified using a particular technique, namely, by using the measure of a hypothetical bargain for a release fee.

12.149 By way of contrast, the notion of a hypothetical bargain for a release fee is absent when an award of *AG v Blake* damages is made. Instead, their effect (and purpose) appears to be to simply strip the defaulting promisor of its gains resulting from the breach.

12.150 As the discussion below will explain, the Court of Appeal held that *Wrotham Park* damages are a recognised head of contractual damages within Singapore law.[190] However, the Court of Appeal suggested that the award of *AG v Blake* damages as a part of Singapore

187 The term "negotiating damages" in place of "*Wrotham Park* damages" appears to have become the preferred usage for this type of award in the UK following *Lunn Poly Ltd v Liverpool v Lancashire Properties Ltd* [2006] EGLR 29 and *One Step (Support) Ltd v Morris-Garner* [2018] 2 WLR 1353 at [3], *per* Lord Reed. However, in *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] 2 SLR 655 at [270], the Court of Appeal took the view that the preference for the term "negotiating damages" in these cases was "more a matter of form as opposed to substance"; thus, the court saw "no real prejudice in continuing with the term '*Wrotham Park* damages'".

188 *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] 2 SLR 655 at [180].

189 *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] 2 SLR 655 at [244].

190 *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] 2 SLR 655 at [167].

law was improbable, given the "uncertainty of the legal criteria to be applied in awarding such damages".[191]

The facts in Turf Club

12.151 The facts and decision in *Turf Club*[192] are complex, and merit discussion in a full-length case note or article. As to the facts, for the purposes of this chapter of the Annual Review, the following bare-bones summary is probably sufficient.

12.152 The contractual dispute in *Turf Club* pertained to repudiatory breaches of the terms of a consent order ("the Consent Order"), which had been entered into to bring litigation between two rival groups of shareholders in a number of joint venture companies ("the JV Companies") to an end. In principle, the Consent Order operated as a form of settlement agreement, and had its terms been fully performed, a bidding exercise ("the Bidding Exercise") between the two rival groups would have been conducted within stipulated time frames. Had the Bidding Exercise been conducted, the higher bidder would purchase the shares of the lower, and the latter would then resign as directors of the JV Companies. Unfortunately, the group which held the majority of the shares in the JV Companies breached the terms of the Consent Order: in particular, it breached a requirement aimed at keeping matters on an even keel until the Bidding Exercise was carried out that they were not to act in such a way as would impact the operations of the JV Companies. This obligation was breached, chiefly by the majority shareholders abstracting for themselves the head lease for certain premises, and not granting a sub-lease to the JV Companies for those premises ("the Repudiatory Breaches"). This led to a situation where the Bidding Exercise could not be carried out. Consequently, proceedings were brought by the minority shareholding group (the respondents) against the majority shareholding group (the appellants)[193] in respect of those breaches, *inter alia*, to recover damages for losses arising when the Bidding Exercise was not held.

191 *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] 2 SLR 655 at [252], reiterating observations previously made in *MFM Restaurants Pte Ltd v Fish & Co Restaurants Pte Ltd* [2011] 1 SLR 150.

192 See para 12.146 above.

193 The respondents had been the plaintiffs at first instance, and the appellants had been the defendants: see *Yeo Boong Hua v Turf Club Auto Emporium Pte Ltd* [2018] 3 SLR 806.

12.153 Given these bare facts, for the purposes of this Ann Rev, the following will attempt to highlight the Court of Appeal's clarificatory points as to why, when, and how damages awarded on the *Wrotham Park* basis can be made to remedy a breach of contract as a matter of Singapore law, as well as set out some potential points for further discussion and analysis in relation thereto.

Why may Wrotham Park *damages be awarded? Are* Wrotham Park *damages punitive, restitutionary, or compensatory?*

12.154 Having recognised that *Wrotham Park* damages are a recognised head of contractual damages within Singapore law, the Court of Appeal held that such damages were awarded to compensate plaintiff-promisees for losses which would otherwise not be substantially compensated for owing to a lacuna in the remedial responses available to the court. It held that such damages were not "punitive" in purpose. Nor were they awarded for the purpose of achieving "restitutionary" goals – that is, for the purpose of denying defendant-promisors any gains or profits which they might have made from their breaches – although *Wrotham Park* damages might have that effect in some cases.

Wrotham Park *damages are not punitive, but are compensatory*

12.155 First, as to the non-punitive purpose of *Wrotham Park* damages, the Court of Appeal reiterated a point it had made in *PH Hydraulics*.[194] Although it did not rule out the possibility that punitive damages might be awarded in respect of a breach of contract (whilst tentatively suggesting that the *AG v Blake* damages as had been awarded by the House of Lords might well have been punitive in purpose),[195] the Court of Appeal held that breaches of contract were awarded not to punish but to compensate for losses which had been inflicted on the contractual promisee by reason of the contractual promisor's breach of contract,[196] and "such compensatory damages are ordinarily to be assessed by reference to the *plaintiff's loss*"[197] [emphasis in original]. Hence, "so far

194 *PH Hydraulics & Engineering Pte Ltd v Airtrust (Hong Kong) Ltd* [2017] 2 SLR 129 at [80].

195 *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] 2 SLR 655 at [254], though taking care to leave open the question whether *AG v Blake*-type damages form part of Singapore law in the first place (at [250]).

196 *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] 2 SLR 655 at [123].

197 *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] 2 SLR 655 at [123]. But *quaere*: what has the plaintiff-promisee lost when the contractual promisor breaches his contractual promise(s)? This is discussed at paras 12.156–12.169 below.

as money can do it, [the plaintiff is] to be placed in the same situation, with respect to damages, as if the contract had been performed".[198]

If Wrotham Park *damages are compensatory, what loss might they be in compensation for?*

12.156 Second, if *Wrotham Park* damages are awarded by way of compensation, the question arises: what loss might the plaintiff-promisee have sustained to merit such compensation? The Court of Appeal reiterated[199] and clarified that:[200]

> … as a matter of principle, such damages are well-founded if we take the view that the ***overarching rationale*** of *Wrotham Park* damages is ***to protect the plaintiff's interest in performance.*** In this regard, we agree with Prof Goh that, just as with other contractual remedies, *Wrotham Park* damages are awarded to protect and vindicate the interest of *the plaintiff* in obtaining the promised performance … [emphasis in italics and bold italics in original]

12.157 The Court of Appeal distinguished the loss for which *Wrotham Park* damages might be awarded from any consequential loss which the plaintiff-promisee might have sustained by reason of the breach:[201]

> To put it another way, *Wrotham Park* damages are ***objective compensatory awards*** aimed at restoring the value of the lost right *per se* ***regardless of*** any consequential loss sustained by the plaintiff. [emphasis in bold italics in original]

198 *Robinson v Harman* (1848) 1 Exch 850 at 855, cited with approval in *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] 2 SLR 655 at [123]. Although *Wrotham Park* damages awards will leave the promisee in a position where the contractual promise remains unperformed, and with no means to obtain its substitute performance, but with a sum of money representing a fee for releasing the promisor from that performance, such damages still fall within the *Robinson v Harman* principle, since the promisee is to be placed in a position as if the contractual promise had been performed, *so far as* money damages can do so: such an award is merely the best that the common law can provide, given the constraints of a money award.

199 Similar observations had been made in *PH Hydraulics & Engineering Pte Ltd v Airtrust (Hong Kong) Ltd* [2017] 2 SLR 129 at [82].

200 *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] 2 SLR 655 at [170].

201 *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] 2 SLR 655 at [205].

12.158 And:[202]

> ***In summary***, our view is that *Wrotham Park* damages are ***objective compensatory awards*** aimed at compensating the plaintiff for the loss of the performance interest (*ie*, the primary right to performance of the defendant's obligations) which he has been deprived of due to the defendant's breach of contract. … [emphasis in bold italics and underlined bold italics in original]

Though they provide some welcome clarification, with respect, these words should not be taken at face value.

12.159 It is suggested that a distinction can and should be made between the "loss" of something, as opposed to its "non-satisfaction" or "non-fulfilment". When a contractual promise is made, that promise and the entitlements which the law grants the promisee thereto may be satisfied, or not. But if such entitlements are not satisfied, that does not mean that the holders of those entitlements have "lost" them (though one might say that the consequences of such entitlements, had they been satisfied, would certainly be "lost"). This is because contractual rights or entitlements arise from promises, and promises are essentially forward-looking.

12.160 When *X* promises *Y* that he will do *Z*, the content of *X*'s promise at the time of its making is that he *will* do *Z*. The content of X's promise is that *Z* will be done at some future point in time. Even when *P* promises *Q* that he *has done R*, there is still an element of futurity, for in this form of promise, *P* is providing *Q* with assurance, from the time of the making of the promise and into the future, that *R* had been done: if *R* had actually not been done, then *P* will have breached his forward-orientated obligation that *R had* been done. Given this, it is difficult to see how the rights of a contractual promisee, being derived from a future-oriented promise, can be "lost".

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202 *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] 2 SLR 655 at [215]. See also [207]:

> [*Wrotham Park*] damages can be rationalised as ***compensation*** for ***the loss of the performance interest*** which the plaintiff has been deprived of due to the defendant's breach of contract. [emphasis in bold italics in original]

Paradoxically, at [194], the Court of Appeal suggested that:

> … put simply, *Wrotham Park* damages are ***objective awards which are not premised on any actual (subjective) loss made by the plaintiff or actual (subjective) gains made by the defendant***. [emphasis in bold italics and underlined bold italics in original]

Given the court's observations in the paragraphs which followed, it would appear that the court was concerned at [194] with the absence of any loss to the plaintiff as might have been quantified by reference to the "orthodox" expectation and/or reliance measures, and not loss, generally.

12.161 A plaintiff-promisee's interest in the due performance of the contract arises if and only if such contract had been duly formed. Such interest would be satisfied or fulfilled if the contracted-for performance was duly provided (in which case, the contract would be discharged by performance). However, if the contracted-for performance was *not* provided, that would entail a breach of the contract (and possibly, a discharge of the contract by reason of breach if it be an actual or anticipatory repudiatory breach *and* if the plaintiff-promisee exercised its power to discharge the contract by reason of such breach arising in consequence). But the plaintiff-promisee's performance interest can hardly be lost merely because of the defendant-promisor's breach of contract. If the breach led to the plaintiff-promisee losing its interest in the performance in the contract, would that not denote the plaintiff-promisee being no longer interested in the contract's due performance? If so, why would the plaintiff-promisee be bringing proceedings against the defendant for its breach of contract? And, even more pertinently, why should the law provide a judicial remedy to aid a plaintiff-promisee who had "lost" and no longer had such "performance interest" in the contract following its breach? To say that the law intervenes *because* such performance interest had been lost seems to beg the question.

12.162 By way of elaboration, the Court of Appeal suggested that the plaintiff-promisee's performance interest denoted its "primary right to performance of the defendant's [contractual] obligations", the plaintiff-promisee having been deprived of such primary right because of the defendant-promisor's breach. But this seems to bring us no further.

12.163 Again, the plaintiff-promisee's primary right to performance of the defendant's contractual obligations arises upon the formation of the contract. If duly performed, that primary right comes to an end and is discharged by reason of performance. But if not, and the defendant-promisor breaches the contract, the plaintiff-promisee's primary right does *not* come to an end because of the breach, *without more*.

12.164 Even if the breach were repudiatory, that repudiatory breach would give rise to a power in the plaintiff to elect to discharge the contract. Subject to the possible qualification posed by the notion of "legitimate interest" posited in *White and Carter (Councils) Ltd v McGregor*,[203] the plaintiff-promisee is largely free to elect whether to invoke such power to discharge or not. Yet why should the law afford such a power to the plaintiff-promisee if not for the fact that, despite the defendant-promisor's breach, the law recognised that the plaintiff-promisee retained a right to the defendant-promisor's contracted-for performance?

203 [1962] AC 413.

12.165 This is most starkly illustrated by considering the effect of an anticipatory repudiatory breach by a defendant-promisor. As explained by the Court of Appeal in *The STX Mumbai*,[204] an anticipatory repudiatory breach is, in principle, a *present* and actual breach of a duty not to repudiate outstanding obligations in advance of the time of their performance. That is why anticipatory repudiatory breaches grant the promisee the same power to elect to discharge the contract as when an actual repudiatory breach is committed. But if an anticipatory repudiatory breach, without more, led to the loss of the plaintiff-promisee's right that the defendant-promisor perform its contractual obligation, it is unclear how such loss could be taken to be consistent with the promisee's power to affirm the contract (subject to the *White & Carter v McGregor* "legitimate interest" qualification), leaving the contract on foot. Or, for that matter, if the plaintiff-promisee simply failed to exercise its power to discharge the contract upon such anticipatory repudiation, leaving the contract on foot, how is the plaintiff-promisee's right to performance "lost" by the defendant-promisor's anticipatory repudiation?

12.166 Nor is the position any different where the breach is non-repudiatory. In such cases (for example, when the promissory term that had been breached was a mere warranty, or an innominate term whose breach would not deprive the plaintiff of substantially the whole of the benefit of the contract), the contract does not come to an end by reason of such breach and the plaintiff-promisee clearly continues to retain the primary right that the defendant-promisor duly perform that which it had contracted to do such that if the defendant-promisor were to eventually perform such obligations, those obligations would *then* be discharged by performance (though losses caused by the delay in such performance might, in many cases, give rise to a liability in damages for such delay).

12.167 The analysis in the preceding paragraphs[205] suggests that the proposition that the plaintiff would have lost its primary right to performance by reason of the defendant's breach may have slightly overstated matters. Given the lack of discussion on the point, it seems unlikely that the Court of Appeal intended by its language[206] to revolutionise the law on affirmation and discharge of contract following the commission of a repudiatory breach by a contractual promisor. The following puts forward a tentative suggestion as to what the Court of Appeal might be taken to have intended.

204 [2015] 5 SLR 1.
205 See paras 12.163–12.166 above.
206 *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] 2 SLR 655 at [215].

12.168 Though the Court of Appeal did not expressly put the point in this way, perhaps the subject matter whose loss is to be compensated by an award of *Wrotham Park* damages is this: the plaintiff-promisee has lost that performance which the defendant-promisor had contractually bound himself to provide. To coin a phrase, it is suggested that the relevant "loss" sustained by the plaintiff may simply be the "loss of the promised performance", such promised performance being the subject matter of the plaintiff's performance interest.

12.169 If *X* contracts with *Y* that he will cause *Z* to be done in exchange for legally sufficient consideration, *Y* is entitled that *Z* be done. When *X* breaches the contract by failing to cause *Z* to be done, *Y* will have lost that to which he was entitled, namely, that "*Z* be done". Since the sets of "*Z* be done" and "*Z* be not done" are mutually exclusive, it does not seem to be an abuse of language to describe *Y* as having lost the promised performance (that "*Z* be done") given the turn of events (in which *Z* was not done), even though *Y* still retains the entitlement (that is, the right) that Z be done. Whether this suggestion sufficiently accurately reflects the court's intentions, though, remains to be seen.

Wrotham Park damages are not normatively restitutionary, although they may be described as having restitutionary effects

12.170 Third, although the effect of a *Wrotham Park* damages award might (partially) strip a defendant-promisor of gains which it would not have made but for its breach, such restitutionary effects did not render *Wrotham Park* damages to be normatively restitutionary;[207] *Wrotham Park* damages are merely "descriptively" restitutionary.[208]

12.171 It would follow that, although the fact that the defendant-promisor had made gains from his breach could be relevant evidence in the court's assessment of the appropriate *Wrotham Park* "release fee" that might be required as the "price" for releasing the defendant-promisor *ex ante*,[209] such damages could be awarded even in cases where the defendant-promisor had made no gains from his breach of contract: other facts could be considered in the absence of such gains.[210]

12.172 Fourth, since the relevance of any gains which the promisor-defendant might have made from his breach was in providing evidence

207 *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] 2 SLR 655 at [183]–[192].
208 *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] 2 SLR 655 at [151].
209 *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] 2 SLR 655 at [187] and [247].
210 *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] 2 SLR 655 at [188]–[192] and [247].

to aid the court in ascertaining what the appropriate "release fee" might amount to, there could be no sense in applying a causal requirement linking the promisor-defendant's gains (which might be non-existent) and the breach of contract in question. Thus:[211]

> … in our judgment, given that the rationale of *Wrotham Park* damages is to protect the plaintiff's interest in performance through ***an objective award*** assessed by reference to the [*sic*] hypothetical bargain, rather than the disgorgement of subjective gains, it is not clear why the tests of causation and remoteness of damage – which are premised on the need to establish a sufficient link between the defendant's breach and the subjective loss of the plaintiff (or perhaps the subjective gain of the defendant) – would be relevant. Tentatively, our view is that these doctrines are *simply not relevant* to *Wrotham Park* damages. [emphasis in italics and bold italics in original]

12.173 While the proposition in the above passage that causation of *gain* by the defendant-promisor plays no essential part in the exercise of assessing the appropriate quantum of damages to be awarded on the *Wrotham Park* measure of damages (as contrasted to the "orthodox" expectation or reliance loss measures), the Court of Appeal's tentative suggestion that neither causation nor remoteness of loss are relevant concerns with regard to an award of *Wrotham Park* damages raises some issues. These will be touched on below.[212]

Causation, remoteness and mitigation of loss as applied to awards of Wrotham Park damages

12.174 To an extent, so far as the concept of "*Wrotham Park* damages" denotes damages which are awarded by reference to a particular measure, that is, by reference to a hypothetical bargain between the promisee and the promisor for the release of the promisor from the relevant obligation, the Court of Appeal is perfectly correct to say that neither causation nor remoteness is relevant – for those are concepts pertaining to the type of loss sustained by the promisee, and not to its measurement or quantum.

12.175 In respect of causation and remoteness, the court is concerned with establishing whether the defendant-promisor's breach had caused the type of loss claimed by the plaintiff-promisee as a matter of fact (typically, using a test of "but-for" causation); but limiting the defendant-promisor's liability to only such types of loss falling within the first and second limbs of *Hadley v Baxendale*.[213]

211 *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] 2 SLR 655 at [248].
212 See paras 12.174–12.185below.
213 (1854) 9 Exch 341; 156 ER 145.

12.176 If it is correct to say that *Wrotham Park* damages are awarded for the plaintiff-promisee's "loss" of its promised performance,[214] since such loss would not have occurred "but-for" the defendant-promisor's breach, loss of the promised-performance would inevitably be *caused* by the defendant-promisor's breach. And since such loss would entail the plaintiff-promisee being deprived of the very thing which the defendant-promisor had promised (as contrasted with any *consequential* losses which would not have arisen, but for the defendant-promisor's breach), it is difficult to see how such loss of the promised performance could ever be other than a type of loss which an objective reasonable man in the shoes of the defendant-promisor would have within his contemplation at the time of the contract's formation based on the usual state of things (that is, a type of loss that would fall within the "first limb" of *Hadley v Baxendale*). Though the point may well fall to be more fully discussed in future decisions, the Court of Appeal's scepticism as to the impact of causation and remoteness of loss concerns when damages are to be awarded in respect of loss quantified on the *Wrotham Park* measure seems warranted.

12.177 As to the doctrine of mitigation of loss, the Court of Appeal suggested that the concerns addressed by application of mitigation principles might more appropriately "be taken into account in quantifying the award instead … rather than under the doctrine of mitigation".[215] This seems to accept that, in principle, damages awarded pursuant to the *Wrotham Park* measure are subject to mitigation concerns, albeit with a caveat as to whether those concerns might not be better addressed within the process of applying that measure.

12.178 If *Wrotham Park* damages are compensatory, on the principle that like cases should be treated alike, one would expect that mitigation doctrines should play some role in the computation of the final award, as is the case with other forms of damages awarded by way of compensation. However, it is unclear if *all* mitigation concerns may be completely dealt with as part of the hypothetical bargain measure to be applied by a court when quantifying a plaintiff-promisee's loss of the promised performance.

12.179 If mitigation concerns are relevant when an award of damages has been made in respect of a head of loss quantified by the *Wrotham Park* measure, the relevant loss being the plaintiff-promisee's loss of promised performance, it is unclear if *all* mitigatory concerns may be appropriately addressed within the process of quantification. This is

214 As suggested at para 12.168 above.
215 *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] 2 SLR 655 at [248].

because the *Wrotham Park* hypothetical bargain is to be assessed objectively as at the time of the breach:[216]

> In determining the outcome of the hypothetical negotiation … guidance can be taken from the English High Court decision of *Duncan Edward Vercoe v Rutland Fund Management Ltd* [2010] EWHC 42 (Ch) … where it was held that how the notional negotiation would have taken place must be determined 'bearing in mind the information available to the parties and the commercial context at the time that notional negotiation should have taken place' (at [291]). …
>
> It is also well-established that the date of assessment is at the date of breach and that post-breach events are generally irrelevant (see *Pell Frischman*[217] at [50]–[51] and *WWF*[218] … at [53]).

12.180 Mitigation doctrine is concerned with ensuring that (a) actually avoided losses through the taking of mitigatory steps post-breach shall not be made part of the final award of damages; (b) loss which ought to have been avoided by the taking of reasonable mitigatory steps post-breach, but which were not, shall not be made part of the final award of damages; and (c) expenses actually incurred in taking reasonable steps post-breach to mitigate the loss in question shall be made part of the final award of damages.

12.181 In many cases, the concerns in (a) and (c) can only be fully assessed after the fact of breach since they require consideration of the consequential steps which the plaintiff had actually taken (and the expenses incurred), following the breach.

12.182 The same is also true in respect of (b). Ascertaining the "reasonable steps" which *ought* to have been taken, in light of the breach and the circumstances as they stood post-breach, requires an awareness of the circumstances of the case as they actually were, as at and subsequent to the time of breach. If the hypothetical bargain when applying the *Wrotham Park* measure of damages is struck at the time of breach, that exercise cannot obviously take into account post-breach events whose occurrence (or non-occurrence) might make it reasonable (or not) for the plaintiff-promisee to take certain consequential steps which would have reduced the magnitude of its loss.

12.183 Damages for losses assessed on more orthodox compensatory measures are qualified by concerns pertaining to causation and remoteness of loss, and also mitigation of loss. Having recognised that

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216 *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] 2 SLR 655 at [245]–[246].

217 *Pell Frischmann Engineering Ltd v Bow Valley Iran Ltd* [2011] 1 WLR 2370.

218 *WWF-World Wide Fund for Nature v World Wrestling Federation Entertainment Inc* [2008] 1 WLR 445.

Wrotham Park damages are normatively compensatory, the principle that like cases should be treated alike would suggest that these same concerns ought also to be applied to *Wrotham Park* damages.

12.184 On the facts of the case, the Court of Appeal held that two of the three requirements to allow damages to be claimed on the *Wrotham Park* measure were not satisfied (these requirements will be discussed below). Having concluded that such damages were not available, there was no occasion for the court to apply these qualifications to recovery. Therefore, its observations as to the relevance of causation, remoteness, and mitigation of loss would appear to be *obiter dicta*.

12.185 The preceding analysis suggests that the Court of Appeal's observations on these points may merit revisiting, especially with regard to mitigation. Despite *dicta* to the contrary, it may be that mitigatory principles may have a substantial and distinct part to play in claims for *Wrotham Park* damages, after all. It is hoped that some opportunity for clarification of these points may arise in the near future.

When may Wrotham Park *damages be awarded? Requirements for the* Wrotham Park *measure to be applied*

12.186 In the Court of Appeal's judgment, *Wrotham Park* damages "play a *limited role* and apply only in *a specific type of case* …"[219] [emphasis in original] in that:[220]

> … [t]here are ***three legal requirements*** that need to be satisfied before a court can award *Wrotham Park* damages …:
>
> (a) First, as a threshold requirement, the court must be satisfied that orthodox compensatory damages (measure by reference to the plaintiff's expectation or reliance loss) and specific relief are ***unavailable***.
>
> (b) Second, it must, as a general rule,[221] be established that there has been (in substance, and not merely in form) a breach of a ***negative covenant***.

219 *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] 2 SLR 655 at [177].

220 *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] 2 SLR 655 at [217].

221 It is, perhaps, fortunate that the Court of Appeal left this second prerequisite in a less definitive form than the other two, as it is debateable whether *Wrotham Park* damages should always be limited only to cases of breaches of a negative covenant. Suppose *Y*, a property developer, acquires Blackacre from *X*, who retains a neighbouring plot of land, Whiteacre. *Y* plans to subdivide and redevelop Blackacre, and to sell off the subdivisions to sub-purchasers from him. As part of the consideration, *Y* covenants that when he resells the individual subdivisions, he will enter into covenants with each sub-purchaser that each sub-purchaser is to maintain the white paint colour scheme of each individual subdivision. *Y* completes the redevelopment, and subdivides Blackacre into ten plots, which he

(*cont'd on the next page*)

> (c) Third, and finally, the case must ***not*** be one where it would be irrational or totally unrealistic to expect the parties to bargain for the release of the relevant covenant, even on a hypothetical basis. In other words, it must be possible for the court to construct a hypothetical bargain between the parties in a rational and sensible manner.
>
> [emphasis in bold italics and underlined bold italics in original]

12.187 Applying these principles to the case at hand, the Court of Appeal concluded that the respondents' claim to recover damages quantified by the *Wrotham Park* measure failed. Even though the second prerequisite[222] was satisfied on the true construction of the Consent Order,[223] the other two were not.

12.188 As to the first prerequisite:[224]

> This is that the court must be satisfied that orthodox compensatory damages (measured by reference to the plaintiff's expectation or reliance loss) and specific relief are *unavailable*. Put simply, the case must be one where the plaintiff would otherwise be entitled to no, or only nominal damages. [emphasis in original]

12.189 On the facts of the case, the court took the view that the loss sustained by the plaintiff-promisee by reason of the defendant-promisor's breach of its covenants under the terms of the settlement agreement between them might well be "difficult" to measure using the orthodox measures of loss. However, it rejected that mere "difficulty" in applying such measures was enough to entitle recourse to the *Wrotham Park* measure. The court explained:[225]

> [T]he court does not demand that the plaintiff prove with complete certainty the exact amount of damage that he has suffered. In this regard, it is of the first importance to emphases that *mere difficulty in assessing the amount of compensatory contractual damages to be awarded does not justify an award of* Wrotham Park *damages*; instead,

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sells to *Z1*, *Z2 et al*. Unfortunately, he fails to include the covenant as to maintenance of the colour scheme in the deeds of sale with the sub-purchasers, and thus breaches his positive covenant to *X* that he would do so. *Z1* proceeds to repaint his subdivision blue, and *Z2* to *Z10* repaint their respective subdivisions other shades of blue. The effect is not unattractive, and the market value of *X*'s property, Whiteacre, is enhanced. In these circumstances, why should *X* not be permitted to recover damages on the *Wrotham Park* measure for *Y*'s failure to comply with his positive covenant to execute further covenants with *Z1 et al*? This example demonstrates the court's foresight in framing the second prerequisite as a "general" rule, thus leaving it open to be departed in the right circumstances.

222 *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] 2 SLR 655 at [217].

223 *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] 2 SLR 655 at [296].

224 *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] 2 SLR 655 at [218].

225 *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] 2 SLR 655 at [222].

> the court must *simply do the best it can on the evidence available* and adopt a *flexible approach* where it is clear that some substantial loss has been incurred to assess a specific sum to be awarded to the plaintiff for his loss (the *locus classicus* here being the decision of the English Court of Appeal in *Chaplin v Hicks* [1911] 2 KB 786). [emphasis in original]

And:[226]

> … [t]he need for the court to adopt a flexible approach with regard to the proof and assessment of damage emphasised in the above passages would be severely undermined if *Wrotham Park* damages were available whenever it is 'difficult' to assess damages. In such cases, the court must do the best it can on the evidence available rather than too readily turn to *Wrotham Park* damages.

12.190 That said, the Court of Appeal was of the view that:[227]

> [W]here damages are ***practically impossible*** to quantify – we accept that an award of *Wrotham Park* damages will also be justified. However, we should emphasise that this is a ***high threshold*** which will ***not easily be met.*** [emphasis in original]

And as to the appeal before it, "this high threshold has *not* been met in the present case" [emphasis in original].[228]

12.191 The court took the view that it was indisputable that this was not a case where the respondents had sustained no financial loss at all – though this was plainly a case where assessment of such loss was difficult.[229] Yet, assessment was not impossible, once the financial loss was identified as "*the loss of the value of their 37.5% shares in the JV Companies caused by the breaches of the Consent Order*"[230] [emphasis in original], given that the appellants had:[231]

> … entered into the Consent Order in their capacity as shareholders of the JV Companies, and one of the express commercial considerations under the settlement was that the Respondents would, even if they did not succeed in the bid, at least receive the price of their shares.

12.192 In particular, the court pointed out the following:[232]

> It is undeniable that the Repudiatory Breaches of the Consent Order, in particular the acquisition by [the appellants] of the 2007 Head

226 *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] 2 SLR 655 at [224].
227 *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] 2 SLR 655 at [225].
228 *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] 2 SLR 655 at [290].
229 *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] 2 SLR 655 at [290].
230 *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] 2 SLR 655 at [292].
231 *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] 2 SLR 655 at [292].
232 *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] 2 SLR 655 at [293].

> Lease without granting subtenancies to the JV Companies and the appropriation by [the appellants] of the benefit of the 2007 Head Lease for itself, deprived the JV Companies of their main source of revenue and rendered them 'empty shells' … This resulted in the shares in the JV Companies losing their value entirely. The loss of the value in the shares was a type of loss which would not have occurred but for the breaches of the Consent Order. It is also a type of loss which would have been entirely within the contemplation of the parties at the time they entered into the Consent Order. … [I]t can be said that the Repudiatory Breaches were committed precisely in order to denude the JV Companies of any value, and thereby render the Bidding Exercise nugatory. In such circumstances, there is no reason why this court, adopting the orthodox compensatory measure of expectation loss, cannot award substantial damages to the Respondents assessed by reference to the value of their shares in the JV Companies at the time the Repudiatory Breaches occurred. This loss, which is clearly pecuniary in nature, is far from impossible to quantify.

12.193 However, the court went on to conclude that an award of damages quantified merely by reference to the value of the respondents' shares alone (namely, the value of the shares in the JV Company, had the appellants not caused their value to plummet to zero by failing to grant subtenancies to it and by abstracting the benefit of the Head Lease for itself) would not fully reflect their expectation loss:[233]

> This is because the performance of the Consent Order would, in all likelihood, have given the Respondents *more* than the value in the shares, which they already held prior to the Repudiatory Breaches [by the appellants]. … This concern, however, can be addressed by awarding the Respondents *a premium* in excess of the value of their 37.5% share in the JV Companies as part of the compensatory award. In our judgment, a reasonable premium would be 15%, Such a premium would better reflect the true expectation loss of the Respondents, which was not merely the loss of the value in the shares, but also the loss of the opportunity to participate in the Bidding Exercise due to the Repudiatory Breaches. [emphasis in original]

12.194 At this point, it would seem that the court was concerned with two different and distinct types of loss. It seems clear that, the court was concerned with loss of the value of the shares by reference to the net asset value of the JV Companies, had the appellants not acted as they had done in connection with the non-grant of subtenancies and their hoarding of the benefit of the Head Lease for themselves, thereby reducing the value of the JV Companies to zero.[234] Second, these breaches by the appellants led to the non-occurrence of the Bidding

233 *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] 2 SLR 655 at [294].
234 *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] 2 SLR 655 at [293].

Exercise, which meant that the respondents were deprived of the opportunity to participate in that exercise.

12.195 It is tempting to characterise this "loss of opportunity" claim as a claim pertaining to the "loss of a chance". That is, even if the respondents had submitted the lower bid and lost in that exercise, they would have lost the chance to be paid what the appellants would have bid for their shares, whatever that might have been.

12.196 However, it is not clear that the court conceived there to have been a "loss of a chance" claim.[235] This is because, unless the Court of Appeal was purporting to extend that doctrine,[236] a "loss of a chance" claim only pertains to losses of benefits whose accrual depended on the actions of a contractual third party.[237]

12.197 For example, in *Chaplin v Hicks*,[238] the *locus classicus* of cases of this kind, the plaintiff successfully recovered damages for her loss of a chance to participate and to win a cash prize in a beauty pageant, the winner of which would have been decided by a public vote (that is, non-parties to the contract between the plaintiff and the defendant organisers of the pageant).

12.198 As was explained in *Allied Maples Group Ltd v Simmons & Simmons*,[239] where the claimed-for loss was contingent upon the (hypothetical) actions of a third party, it would be enough for the claimant to show that there was a substantial (as opposed to a speculative) chance that the third party would act in such manner so as to allow the claimed-for loss to manifest:[240] there is no need for the claimant to prove that the third party *would* have acted in that manner, on a balance of probabilities. This, however, was not the case in respect of the respondents in *Turf Club*.

12.199 In respect of the so-called "loss of the opportunity to bid in the Bidding Exercise"[241] so as to be paid such sum as the appellants would

235 *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] 2 SLR 655 at [294].

236 There is nothing in the judgment expressly indicating that the Court of Appeal intended to do so.

237 For general discussion, see *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) at paras 21.026–21.031.

238 [1911] 2 KB 786.

239 [1995] 1 WLR 1602.

240 *Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 WLR 1602 at 1614, *per* Stuart Smith LJ. This aspect of the reasoning of the Court of Appeal in England was unequivocally approved by the majority in *Asia Hotel Investments Ltd v Starwood Asia Pacific Management Pte Ltd* [2005] 1 SLR(R) 661.

241 *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] 2 SLR 655 at [294].

have bid in that exercise, had it been conducted, such loss presupposes that the appellants *and* the respondents would have submitted a higher and a lower bid respectively. This raises an interesting question as to the application of the principle set out in *Sykes v Midland Bank Executor and Trustee Co*,[242] being an aspect of the proposition that a plaintiff must prove all factual and evidential elements of its claim to the court's satisfaction on a balance of probabilities:[243]

> Where the claimant's claimed-for losses arise only on the basis that it *would* have taken certain hypothetical actions, it cannot be enough for the claimant to merely prove that it *might* have taken those actions. In other words, it is not enough in this context for the claimant to merely show that there was a *chance* it might have acted in that hypothetical manner. So in this connection, the claimant needs to show, on a balance of probabilities, that it *would* have acted in that manner … [emphasis in original]

12.200 The difficulty is that the respondents' claim in *Turf Club*[244] presupposes that the appellants *and* the respondents would each have put in a bid, and that the latter would have been lower than the former. But it is not clear from the report what evidence had been led by the respondents on which the court had relied to find that such would have been the case, on a balance of probabilities, given the court's ambivalence on the point:[245]

> Even if they had lost the Bidding Exercise, it is probable that [the appellants'] winning bid price would have been more than the market value of the shares. And, of course, if the Respondents had won the bid, then they would have had an opportunity to make substantial profits from the JV Companies.

12.201 Though the court opined that it was "probable" that the appellants' winning bid price would have been "more than the market value of the shares", had the Bidding Exercise been conducted, there is nothing to indicate how the court came to make such a finding. Indeed, it is questionable if any finding of the sort was made at all, given the

242 [1971] 1 QB 113. This principle was applied in connection with a claim in the tort of negligence in *JSI Shipping (S) Pte Ltd v Teofoongwonglcloong* [2007] 4 SLR(R) 460 at [148] and *Ikumene Singapore Pte Ltd v Leong Chee Leng* [1993] 2 SLR(R) 480 at [34]. There does not appear to be any clear reason, however, why the principle is to be limited to tort claims.

243 *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) at para 21.025.

244 As mentioned by the court in *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] 2 SLR 655 at [294].

245 *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] 2 SLR 655 at [294]. If the court below had made a finding on the point, the Court of Appeal does not appear to have referred to it.

court's appreciation that matters might have gone the other way.[246] With respect, the court's very ambivalence over the point may cast doubt on its otherwise confident assertion that this was a case where ascertainment of the loss was merely difficult, but not impossible.

12.202 Since it appears not to have been found that, had the Bidding Exercise been conducted, the bids would have come up one way (with the respondents "winning") or the other (with the respondents "losing"), to the extent that the court had to countenance the respondents' loss in these two alternative forms without committing to finding as to whether one or the other might have been the case, two possible rulings would seem to present themselves.

12.203 On the one hand, the respondents' claim on either of these heads would fail, on grounds that they had not sufficiently proved that they would have submitted a higher ("winning") bid than the appellants, *or* that they would have submitted a lower ("losing") bid.

12.204 On the other hand, perhaps matters were in such a state of flux that it was practically impossible for the plaintiff-promisee to submit proof of any or either such kind. And yet, the court was prepared to recognise that there was *some* inchoate type of loss which required a remedial response over and beyond the value of the respondents' shares in the JV Companies. But if so, would such response (namely the "15% premium" awarded by the court) not then be in the manner of an award of nominal damages? Might such obscurities not leave the court's assessment that the first prerequisite for awarding damages on the *Wrotham Park* measure open to question?[247]

12.205 Although some concerns have been expressed as to whether the first prerequisite for *Wrotham Park* damages to be available was quite as clearly left unsatisfied in *Turf Club* as the court appeared to suggest, that is not to say that the court's ultimate conclusion was unwarranted. As the court explained, the *Wrotham Park* measure is only available when all three of the prerequisites[248] are satisfied, and it is clear that the court concluded that the third had not.

246 See extract at para 12.200 above.

247 The actual quantification of the damages to be awarded on the basis set out by the Court of Appeal in *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] 2 SLR 655 was reported in [2019] 1 SLR 214. In that report, the Court of Appeal applied the 15% premium following a finding as to what the true value of the plaintiff-promisees' minority shareholding would have been, had the Consent Order not been breached, without elaborating further on how the premium had been derived.

248 Set out in *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] 2 SLR 655 at [217].

12.206 Applying the facts of the case to the third prerequisite, the court noted:[249]

> … [T]he third requirement for an award of *Wrotham Park* damages is also not made out because it is ***irrational and totally unrealistic to expect to enter into a bargain for the release of the relevant obligation*** (*ie*, the obligation on [the defendant-promisors] to refrain from upsetting the *status quo* so that the Bidding Exercise could proceed as contemplated), ***even on a hypothetical basis***.
>
> The main factors which lead us to this finding are: (a) ***the nature and purpose of the Consent Order***, which was a *negotiated settlement* between the parties following the previous litigation between them and the acrimony following the collapse of the joint venture; and (b) ***the mechanics of the Bidding Exercise***, which *already provided for the possibility of the* [defendant-promisors] *buying out the* [plaintiff-promisees'] *interests in the joint venture*.
>
> [emphasis in italics and bold italics in original]

12.207 It therefore seems that the conclusions that *Wrotham Park* damages may not be available because it would be "irrational" and/or "highly unrealistic" to expect objective reasonable men in the position of the relevant contracting parties to enter into a bargain allowing for releases of the obligations therein are highly fact-dependent. The circumstances of *Turf Club* afford us with an example or indication as to when such "irrationality" or a sufficient degree of unreality may be said to have arisen. Further illumination as to what factors may underpin such conclusions of "irrationality" or unreality will, however, have to await the handing down of further decisions. But as the sea-wall holding back the tide has been breached, notwithstanding the court's warning as to the limited availability of such damages, it seems likely that *Turf Club* may herald renewed enthusiasm for *Wrotham Park* damages to be claimed, even if such claims may, in the end, be dashed against the ramparts which the Court of Appeal has designed.

Third-party beneficiary contracts and broad ground damages

12.208 In *Motor Insurers' Bureau of Singapore v AM General Insurance Bhd*,[250] the High Court was presented with yet another opportunity to consider and apply the law on third-party beneficiary contracts.

12.209 Stripping the facts of the case to the barest essentials for the purposes of the present discussion, this case concerned the question whether AM General Insurance Bhd ("AM Gen") was liable to pay a sum

249 *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] 2 SLR 655 at [297]–[298].
250 [2018] 4 SLR 882.

of $788,057.73 to the second plaintiff ("Koo") pursuant to the terms of an agreement ("the Domestic Agreement") it had entered into with the first plaintiff, the Motor Insurers' Bureau of Singapore ("MIB").

12.210 Koo had been injured while riding pillion on a motorbike ridden by her husband, Liew Voon Fah (the third party to the present proceedings). In other proceedings, Liew was adjudged to be liable to Koo for her injuries, and was ordered to pay her the sum of $788.057.73 ("the Judgment Debt"). Unfortunately for Koo, she could not proceed directly against Liew's insurers in respect of the Judgment Debt as his policy did not cover Liew's liabilities to his passengers. Koo therefore brought proceedings to compel MIB to bring proceedings against AM Gen (who was the successor institution to Liew's insurers) to compel AM Gen to perform its obligations under an agreement between them to pay accident victims (like Koo) if they had been injured by persons who had taken insurance from AM Gen (or the insurance companies of which AM Gen stood in place) but whose judgment debts arising from such accidents had not been paid.

12.211 The case deals with many difficult issues relating to statutory and contractual interpretation in connection with motor vehicle insurance. It also deals with a number of points pertaining to procedure such as *locus standi* to bring proceedings, as well as the joinder of parties. Discussion of those points will have to be conducted elsewhere. But for present purposes, the following points are pertinent.

12.212 Having concluded that the facts of the case did not disclose that MIB had entered into its contract with AM Gen as trustee for the benefit of Koo,[251] the court concluded that the principle in *Lloyd's Bank v Harper*[252] which enables such a trustee to sue for damages on behalf of the third party was irrelevant.[253] But even so, AM Gen was liable to MIB on two alternative grounds.

12.213 First, the court held that since MIB was liable to pay Koo a sum equivalent to the Judgment Debt pursuant to its own obligations arising out of an agreement it had reached with the Minister for Finance of the Republic of Singapore ("the Principal Agreement"), under which it had become duty-bound to satisfy any judgment debts arising from motor

251 *Motor Insurers' Bureau of Singapore v AM General Insurance Bhd* [2018] 4 SLR 882 at [55]–[59], especially at [59]:

> I … do not think it can be said that cl 3(1) of the Domestic Agreement was a promise held on trust by the MIB for victims like Koo. Rather, it was a promise made by all insurers to the MIB for the MIB's benefit.

252 (1880) 16 Ch D 290.

253 *Motor Insurers' Bureau of Singapore v AM General Insurance Bhd* [2018] 4 SLR 882 at [116].

vehicle accidents arising in Singapore if the victim was otherwise left unpaid, AM Gen's failure to perform its obligations to MIB under the Domestic Agreement between them exposed MIB to substantial loss of its own;[254] and it was perfectly straightforward for MIB to sue AM Gen to recover substantial damages for its own pecuniary losses.[255]

12.214 The court noted that, had MIB already been sued for the Judgment Debt, and been ordered to satisfy it, there was no doubt that it would have been entitled to recover the same from AM Gen. But it did not matter that on the facts, MIB had yet to be sued, as "prospective and contingent losses are recoverable subject to the usual rules of proof or loss, causation and remoteness".[256]

12.215 Given the above, the court concluded that the question of recovery on the basis of the "broad ground" in respect of breaches of third-party beneficiary contracts did not arise because:[257]

> … [t]he broad ground enables the plaintiff to sue for damages where the loss of his performance interest cannot be framed in purely financial terms …

12.216 However, since the court was satisfied that MIB had been caused to suffer financial loss as a result of AM Gen's breach of its obligations under the Domestic Agreement to satisfy Koo's Judgment Debt, the above constraint to availability of the "broad ground" was not satisfied.[258]

254 Though the judgment does not explicitly discuss the point, it seems probable that had the issue been fully argued, the court would have taken the view that the Principal Agreement *was* a contract entered by the Minister for Finance for the benefit of third-party beneficiaries, and so, the Public Trustee (to whom the benefit and burden of the contract had been assigned by the Minister for Finance) would have been duty-bound to Koo to sue the MIB on the Principal Agreement had there been a need to do so. Hints that the court would have so concluded may be found in the court's comments in *Motor Insurers' Bureau of Singapore v AM General Insurance Bhd* [2018] 4 SLR 882 at [11], [51] and [60].

255 *Motor Insurers' Bureau of Singapore v AM General Insurance Bhd* [2018] 4 SLR 882 at [118]–[119].

256 *Motor Insurers' Bureau of Singapore v AM General Insurance Bhd* [2018] 4 SLR 882 at [121]. See also discussion at [122]–[127].

257 *Motor Insurers' Bureau of Singapore v AM General Insurance Bhd* [2018] 4 SLR 882 at [118].

258 *Motor Insurers' Bureau of Singapore v AM General Insurance Bhd* [2018] 4 SLR 882 at [119].

12.217 Second, recognising that, "not every liability to a third party [would] support a claim for substantial damages",[259] the court held in the alternative that, if it were the case that MIB had *not* sustained financial loss by reference to its liability to Koo under the Principal Agreement due to AM Gen's breach of its obligations under the Domestic Agreement, the "broad ground" would then be available, and AM Gen would be liable to MIB in the same quantum by reason of the "broad ground" by virtue of MIB's "loss of its performance interest in cl 3(1) of the Domestic Agreement".[260]

12.218 As to the MIB's "performance interest", the court explained:[261]

> … Besides its obvious financial interest in the discharge of its liability under the Principal Agreement, …, the MIB has an interest in keeping its operational costs (and by extension, the contributions of its members) low. …
>
> …
>
> The MIB also has a social interest in seeing that victims promptly receive the compensation to which they are entitled. As I stated in *Pacific & Orient*[262] at [16], the 'underlying rationale of a scheme like the [MIB] is to fulfil the social aim of providing compensation for all road accident victims where for some reason there was no effective insurance policy to cover the liability', as well as to 'help spread the risk among all insurers issuing motor insurance policies within the jurisdiction in case of untraced drivers and insolvent insurers.'. The MIB's memorandum and articles of association reflect these aims. … The MIB may be compared to the wealthy philanthropist in Lord Goff's example in that it is animated by a social purpose, *ie*, to see that victims of uninsured and untraced drivers are duly compensated for their injuries. In my view, these factors together give the MIB a real and substantial interest in the performance of [AM Gen's] obligation under cl 3(1) of the Domestic Agreement and would entitle it to substantial damages.

12.219 The court recognised that there were a number of as yet unresolved concerns in connection with an award of substantial damages on the "broad ground": (a) that the awardee of such damages

259 *Motor Insurers' Bureau of Singapore v AM General Insurance Bhd* [2018] 4 SLR 882 at [130]: "where it is clear and certain that liability will never be discharged by the claimant", following *Biffa Waste Services Ltd v Maschinenfabrik Ernst Hese Gmbh* [2009] PNLR 5.

260 *Motor Insurers' Bureau of Singapore v AM General Insurance Bhd* [2018] 4 SLR 882 at [133].

261 *Motor Insurers' Bureau of Singapore v AM General Insurance Bhd* [2018] 4 SLR 882 at [137] and [139].

262 *Pacific & Orient Insurance Co Bhd v Motor Insurers' Bureau of Singapore* [2013] 1 SLR 341.

might gain an "uncovenanted benefit or a windfall" by pocketing the damages "rather than spending them on rectifying the breach so that the third party may benefit";[263] (b) that such award on the broad ground "may lead to the defendant being doubly liable";[264] and (c) "whether the broad ground can support a claim by the plaintiff for consequential loss and damages for delay".[265] However, the court took the view that none of these complications were a concern in the case before it.[266]

12.220 Although the grounds of decision do not explicitly set it out, it appears that the court would have quantified MIB's loss on the "broad ground" arising from AM Gen's breach of its obligations under the Domestic Agreement in the sum of the Koo's unsatisfied Judgment Debt, since it only made a single award of damages, namely, damages in the sum of $788,057.73 plus interest at 5.33% per annum from 21 February 2011, which was the date of final judgment in the action brought by Koo against her husband: that is, the court was of the view that there would be no difference in the quantum, on either alternative ground.

12.221 The learned judge also declined to grant the order of specific performance sought by MIB to compel AM Gen to perform its obligations under the Domestic Agreement to pay Koo's Judgment Debt. No explicit reasons were provided for this, save the following:[267]

> Since I have found that the MIB is entitled to substantial damages, there is no need for me to consider the MIB's claim for specific performance.

This suggests that the court had declined to grant the order of specific performance as had been sought on grounds that, since substantial common law damages were available, there was no call to access the court's equitable jurisdiction on grounds of the inadequacy of its common law remedies.

263 *Motor Insurers' Bureau of Singapore v AM General Insurance Bhd* [2018] 4 SLR 882 at [144].

264 *Motor Insurers' Bureau of Singapore v AM General Insurance Bhd* [2018] 4 SLR 882 at [146].

265 *Motor Insurers' Bureau of Singapore v AM General Insurance Bhd* [2018] 4 SLR 882 at [138].

266 *Motor Insurers' Bureau of Singapore v AM General Insurance Bhd* [2018] 4 SLR 882 at [145] (in respect of the "windfall" issue), at [147] (in respect of the "double liability" issue), and at [148] (in respect of the "consequential loss and damages" issue).

267 *Motor Insurers' Bureau of Singapore v AM General Insurance Bhd* [2018] 4 SLR 882 at [150].

12.222 A number of interesting points may be made in light of the above decision. First, this case illustrates how, in principle, recovery for damages on the "broad ground" may be successfully invoked outside the context of building contracts.

12.223 Second, as noted above, the court in *Motor Insurers' Bureau* concluded that there were no issues of delay to concern it. It is, possibly, unfortunate that the question of "delay" was left unexplored by the court.

12.224 As mentioned above, in the end, the court ordered final judgment in favour of MIB for damages in the sum of $788,057.73 plus interest 5.33% per annum on that sum from 21 February 2011, which was the date of final judgment in Koo's action against her husband. These damages were plainly compensatory. If so, accepting that AM Gen's breach of the Domestic Agreement had caused MIB's loss, and that such loss was not too remote, what of MIB's obligation to mitigate such loss?

12.225 Part of Koo's difficulties had stemmed from MIB's initial resistance to Koo's originating summons of 26 April 2012 under which she had sought to compel the MIB to perform its obligations under its Principal Agreement with the Minister for Finance. This originating summons was ultimately stayed, by mutual consent, with the parties then commencing the present proceedings against AM Gen.[268]

12.226 It may well have been that it was reasonable for the MIB to resist Koo's initial originating summons, given the complex issues of motor vehicle insurance law in play.[269] But if, hypothetically, it were not (and the court made no express finding, either way – possibly because counsel did not appear to raise the issue), a thorny question as to whether MIB's refusal to compromise in respect of Koo's claim at an earlier point in time, thereby delaying satisfaction of Koo's Judgment Debt, might not be a matter as to which AM Gen might have suggested it ought not to be held responsible. It therefore remains an open question for future cases where "broad ground" damages in compensation for the promisor's own loss are claimed to surface these kinds of mitigation issues for consideration by the court.

268 The history of Koo's litigation against the Motor Insurers' Bureau of Singapore is briefly recounted at *Motor Insurers' Bureau of Singapore v AM General Insurance Bhd* [2018] 4 SLR 882 at [8]–[12].

269 Which were pending, and were dealt with in *Pacific & Orient Insurance Co Bhd v Motor Insurers' Bureau of Singapore* [2013] 1 SLR 341.

12.227 Third, *Motor Insurers' Bureau*, like the Court of Appeal in *Turf Club*,[270] recognises the centrality of the "performance interest" of a contractual promisee, and locates the "loss" for which broad ground damages may be awarded to be the "loss of the performance interest".[271] But if so, the concerns as to whether it is entirely accurate to conceive of a contractual promisee "losing" her "performance interest" (that is, her interest in the due performance of the contractual obligations in question)[272] would also apply. As with *Wrotham Park* damages, damages on the broad ground may possibly be better conceived as being awarded to compensate, not for the "loss of performance interest", but for the contractual promisee's loss of the promised performance.[273]

12.228 Though this may initially seem to be a mere matter of terminological pedantry, it is suggested that clarity in identifying the subject matter that has been lost is important, because this is central to the operation of the principles of remoteness, causation, and mitigation *of loss*. Mis-identification of "the loss" may result in misapplication of these principles; which brings us to a fourth and final point.

12.229 Fourth, if "broad ground" damages like *Wrotham Park* damages are targeted at compensating for the loss of a contractual promisee's performance interest (or, as has been suggested above, the promised-performance), an interesting question arises as to the extent to which the hypothetical bargain methodology for quantifying *Wrotham Park* damages, and the three constraints identified by the Court of Appeal in *Turf Club*[274] before *Wrotham Park* damages may be awarded, may or may not be relevant in "broad ground" damages claims: the relationship, if any, between these two kinds of compensatory damages remains to be fully teased out.

270 See para 12.146 above.

271 *Motor Insurers' Bureau of Singapore v AM General Insurance Bhd* [2018] 4 SLR 882 at [133]:

> I take the view that the MIB would be able to sue for substantial damages under the broad ground for loss of its performance interest in cl 3(1) of the Domestic Agreement.

272 See paras12.159–12.167 above.

273 See para 12.168 above.

274 See para 12.146 above.