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13. CONTRACT LAW[1]

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I. Formation of a contract

A. Offer and acceptance

(1) Different approaches in ascertaining existence of contract and interpreting a contract

13.1 The Court of Appeal in *The Luna*[2] held that there were significant differences in the approaches taken towards the interpretation of a contract and the ascertainment of the existence of a contract. In particular, the court pointed out that the parol evidence rule and principles governing the admission of extrinsic evidence applied to the former, whereas there was no restriction on the evidence which the court could consider in the case of the latter. The court made this distinction as it had to determine whether the parties had intended for certain bills of lading to have contractual effect. Accordingly, by this distinction, the court ruled that it

1 The views expressed in this chapter do not reflect the views of the Supreme Court of Singapore or the Singapore Management University.
2 [2021] 2 SLR 1054.

could have regard to the perspectives of not only the shipper and carrier in the present case but also other parties who were generally known to use these bills of lading.

13.2 The court explained that this distinction was sound as a matter of principle. While a court is considering the parties' objective intentions in both interpretation and formation cases, in the former case, a court is ascertaining "what the parties, from an objective viewpoint, ultimately *agreed* on" [emphasis added].[3] The foundational premise is that the parties had reached *an* agreement. As such, the parol evidence rule and the *Zurich Insurance* principles apply since the parties' mutual understanding of such an agreement and its terms can only be based on matters that are relevant, reasonably available to both parties and related to a clear or obvious context. In contrast, these principles do not apply to formation cases since the court there is considering the prior question of whether the parties had even reached an agreement in the first place.

13.3 The court also alluded to its own decision in *Simpson Marine (SEA) Pte Ltd v Jiacipto Jiaravanon*[4] ("*Simpson Marie*"), where it had considered it arguable that the distinction between the evidential rules applicable to the formation and interpretation of contracts is not correct. However, the court in *The Luna* opined that the court in *Simpson Marine* was considering the specific question of whether evidence of subsequent conduct could be considered in formation and interpretation cases. That specific question did not affect what the court was now considering to be a fundamental distinction between formation and interpretation, which was also supported by the English cases such as *The Starsin*.[5]

13.4 Accordingly, adopting the approach taken by the High Court in *Midlink Development Pte Ltd v The Stansfield Group Pte Ltd*,[6] the court considered that it could consider the established matrix of circumstances, including what the parties objectively understood from their respective perspectives. The court therefore ruled that it could have regard to the perspectives of not only the shipper and carrier in the present case but also other parties who were generally known to use these bills of lading.

3 *The Luna* [2021] 2 SLR 1054 at [31], citing *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at [132(d)].
4 [2019] 1 SLR 696.
5 [2004] 1 AC 715.
6 [2004] 4 SLR(R) 258.

13.5 The High Court in *Wong Kar King v Lim Pang Hern*[7] ("*Wong Kar King*") demonstrated the breadth of facts that could be considered in ascertaining the existence of an agreement between the parties. In that case, the court had to decide if there was an oral agreement concluded between the parties for the defendant to purchase 29% of the equity in Advanced Holdings Ltd from the plaintiff in exchange for the plaintiff procuring Advanced Holdings Ltd to acquire BD Crane and Engineering Pte Ltd for $9m. Ang Cheng Hock J was not convinced that there was such an oral agreement. First, the learned judge thought it was unrealistic that the parties did not reduce the alleged agreement to writing, especially given the high quantum involved. Second, the defendant could not identify the exact date on which the alleged oral agreement was made. This therefore offended the trite principle that there had to be a single point in time when the necessary consensus *ad idem* was reached.[8] Third, Ang J also found it commercially unrealistic that the parties would have agreed to a commitment of this magnitude without agreeing *when* the purchase would actually happen. Finally, Ang J found it helpful to consider whether the parties' subsequent conduct in that case supported the existence of the alleged oral agreement, which pointed against such an agreement. Ang J noted that the conduct had taken place *before* the emergence of the dispute at hand and therefore was unlikely to have been done with the aim of affecting the parties' respective positions in the present action.

13.6 More broadly, Ang J's approach in *Wong Kar King* is consistent with the Court of Appeal's pronouncement in *The Luna* that a court is able to consider a broad array of extrinsic evidence in ascertaining the existence of an agreement between the parties.

(2) Communication of acceptance

13.7 In *BGC Partners (Singapore) Ltd v Yap Yuk Hee*,[9] the High Court had to consider whether an acceptance was effectively communicated. See Kee Oon J held the general rule to be that communication of acceptance is necessary for a valid and binding contract to exist. Referring to *Chitty on Contracts*,[10] the learned judge explained that the rationale for this rule is to avoid unfairness to the offeror to bind him before he knows that his offer had been accepted.

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7 [2021] SGHC 225.

8 *Wong Kar King v Lim Pang Hern* [2021] SGHC 225 at [26], citing *Day, Ashley Francis v Teo Chin Huat Anthony* [2020] 5 SLR 514.

9 [2021] SGHC 279.

10 *Chitty on Contracts* (H G Beale gen ed) (Sweet and Maxwell, 33rd Ed, 2018) at para 2-044.

13.8 On the facts, See J held that there had not been effective communication of acceptance. There were no copies of the fully executed and dated agreements conveyed to the offeror. Indeed, cl 6(c) of the agreement required the offeree to return signed copies to the offeror.

B. Consideration

(1) Past consideration

13.9 The High Court applied the trite principle that past consideration is not good consideration in *Fu Hao v Evancarl Ltd*.[11] In that case, the defendants argued, among others, that the alleged written agreements between the parties were invalid as they were not supported by good consideration. The defendants argued that they had entered into the so-called first and second procurement agreements in consideration of the plaintiff entering into a sale and purchase agreement. However, that sale and purchase agreement was signed *before* the rest of the agreements were concluded. As such, the defendants contended that this was a situation of past consideration that invalidated the alleged written agreements between the parties.

13.10 The High Court rejected this argument. Lee Seiu Kin J referred to the Court of Appeal's holding in *Gay Choon Ing v Loh Sze Ti Terence Peter*,[12] where it held as follows:[13]

> It should also be noted that an absence of linkage between the parties can also occur if the consideration is *past* – hence, the oft-cited principle that 'past consideration is no consideration'. However, the courts *look to the substance rather than the form*. Hence, *what looks at first blush like past consideration will still pass legal muster if there is, in effect, a single (contemporaneous) transaction (the common understanding of the parties being that consideration would indeed be furnished at the time the promisor made his or her promise to the promisee)*. [emphasis in original]

13.11 Lee J held that no issue of past consideration would arise where the agreements concerned were entered into contemporaneously, that is, at or around the same time. On the present facts, the learned judge found that the parties had intended for the written agreements to constitute a contemporaneous agreement. As such, the fact that the constituent agreements were not signed precisely at the same time did not give rise to a problem in consideration.

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11 [2021] SGHC 137.
12 [2009] 2 SLR(R) 332.
13 *Gay Choon Ing v Loh Sze Ti Terence Peter* [2009] 2 SLR(R) 332 at [83].

(2) Forbearance from suing as consideration

13.12 In *Jasviderbir Sing Sethi v Sandeep Singh Bhatia*,[14] the High Court considered whether a bare forbearance from suing could amount to valid consideration. The plaintiffs argued that they provided consideration in relation to the so-called "Repayment Contract" by forbearing from suing the defendants for certain fraudulent representations the latter had made.

13.13 Vinodh Coomaraswamy J accepted as a starting point that a forbearance to sue could constitute valid consideration for a contract provided that, first, there were reasonable grounds for the underlying claim, and, second, the plaintiff honestly believed that the postponed claim had a fair chance of success.[15] However, the learned judge held that it was not sufficient for a promisee to simply forbear to sue a defaulting promisor so that the forbearance would constitute valid consideration. In addition, the element of *bargain* which is at the root of the doctrine of consideration requires the promisor to *request* the consideration as the price of the promise. Thus, in the present case, if the plaintiffs had decided unilaterally not to sue the defendants, then their forbearance to sue would not be the price of the defendants' promise and could not constitute valid consideration for the promise. On the facts, Coomaraswamy J found that the defendants had not asked the plaintiffs from suing.

C. Intention to create legal relations

13.14 In *Jasviderbir Sing Sethi v Sandeep Singh Bhatia*, Coomaraswamy J also had to consider if the parties concerned had intended to create legal relations. The learned judge held that the test of whether parties intended to create legal relations is objective. It is trite that parties are presumed to have intended to create legal relations if they enter into agreements in a business or commercial context. In contrast, parties are presumed *not* to have intended to create legal intentions if they enter into agreements in a social or domestic context. The problem in the present case was that the plaintiffs and the first defendant had both business and social relationships.

14 [2021] SGHC 14.
15 *Jasviderbir Sing Sethi v Sandeep Singh Bhatia* [2021] SGHC 14 at [172].

13.15 Coomaraswamy J considered the High Court case of *Oei Hong Leong v Chew Hua Seng*[16] ("*Oei Hong Leong*") to be instructive as it likewise concerned a situation where the parties had both business and social relationships. The learned judge considered the facts in both cases to be similar. Like in *Oei Hong Leong*, the parties concerned were friends but whose friendship had come under strain. The meeting, where they had entered into the alleged agreement, had been arranged for the parties to hear each other out. In particular, the meeting was not attended by legal representatives. It was also held in a domestic setting in the sense that there were friends and family members present who were not parties to the underlying business transaction. As such, Coomaraswamy J found that the parties did not objectively intend to create legal relations simply by attending the meeting concerned.

13.16 Moreover, the parties had not reduced their agreement to writing. This may be contrasted with the facts in *Oei Hong Leong*, where the parties had reduced their agreement to writing, albeit in the form of a handwritten note drafted on the spot by non-lawyers. In the present case, Coomaraswamy J noted that businessmen normally would instruct lawyers to document their obligations accurately. Accordingly, it was not likely that the parties had intended to create legal relations in the present case by way of an oral agreement only.

II. Terms of contract

A. Incorporation of terms

13.17 In *Nambu PVD Pte Ltd v UBTS Pte Ltd*,[17] the Court of Appeal made important clarifications on the principles relating to the incorporation of terms by a course of dealing. In the case, Nambu PVD Pte Ltd ("Nambu") and UBTS Pte Ltd ("UBTS") contracted for UBTS to transport a machine. Unfortunately, UBTS's vehicle, which carried the machine, caught fire. Nambu thus sued UBTS for fire damage to the machine. The trial judge found that the fire was due to UBTS's negligence. Furthermore, UBTS could not rely on its own standard terms and conditions or the Singapore Logistics Association's ("SLA's") standard terms and conditions to limit its liability, since neither set of terms was incorporated into the contract. UBTS appealed on the basis that the SLA terms and conditions were not incorporated into the contract (but did not dispute that its own standard terms and conditions were not incorporated).

16 [2020] SGHC 39.
17 [2022] 1 SLR 391.

13.18 UBTS argued that the SLA terms and conditions were incorporated into the contract due to a course of dealing. Specifically, UBTS argued that the terms and conditions were referenced in delivery orders and invoices issued by UBTS for work done prior and unrelated to the present contract. Andrew Phang Boon Leong JCA rejected this argument on behalf of the court. The learned judge accepted that, as a matter of first principles, a particular term can be incorporated in a particular contract if it can be shown that there was a previous course of dealing in which the term featured. However, that term must have featured as part of the *contracts* concerned. Therefore, that term can only be incorporated in the present contract only if it had been a *contractual* term in those previous occasions. Phang JCA explained that this was logical because it would be senseless and unprincipled to allow a term which had *no* contractual force in those previous occasions to be incorporated as a term *with* contractual force in the present contract. Such an approach would not align with the rationale behind the incorporation of terms by virtue of a previous course of dealing, which is premised on the parties having consistently *contracted* with reference to that term in the past but had omitted to do so in the present contract.

13.19 Furthermore, Phang JCA clarified that while the doctrine of reasonable notice may overlap with that of a course of dealing, the two doctrines of incorporation are conceptually different. And even if the two doctrines are regarded as coterminous with each other, the requirement of contractual effect would apply with stronger force to the doctrine of reasonable notice since it applied at or before the time the contract was entered into.

13.20 Finally, Phang JCA considered that the doctrine of previous course of dealing is closely related to the doctrine of trade practice. Whereas the doctrine of previous course of dealing is more personal to the contracting parties, the doctrine of trade practice relates to the industry at large. Thus, a party may succeed in establishing one but not the other.

13.21 On the present facts, it was fatal to UBTS's case that the delivery orders and invoices, where the SLA terms and conditions featured, were not meant to have contractual effect. Indeed, because non-contractual documents could not give rise to a course of dealing from which contractual terms could be incorporated, those documents could not lead to the incorporation of the SLA terms and conditions. Indeed, to incorporate terms which previously had no contractual effect into the present contract would drastically shift the parties' legal relationship. If at all, the fact that UBTS and Nambu had treated those documents as non-binding in nature would have given rise to an expectation that the terms contained within would remain non-binding in the present contract.

B. Parol evidence rule

13.22 The Court of Appeal in *Toh Eng Tiah v Jiang Angelina*[18] had to consider the application of the parol evidence rule as embodied in ss 93 and 94 of the Evidence Act[19] ("EA"). On the facts, the court had to decide if the trial judge had correctly applied the parol evidence rule to exclude evidence that would have affected his decision that the loan facilities agreement was not a sham. While the court's consideration of the parol evidence rule was primarily about s 94(*a*) and therefore not related to the interpretation of contracts, the decision is important for its broader analysis of the parol evidence rule as it is contained in ss 93 and 94.

13.23 Andrew Phang Boon Leong JCA began by explaining that s 93 of the EA operates as a rule concerning the proof of the terms of a contract. Pursuant to the terms of s 93, the section would not apply where the parties have not reduced the contract to the form of a document and where there is no need in law to do so. Section 94 operates in conjunction with s 93 and applies only where the terms of the contract have been proved according to s 93. If s 94 applies, then "no evidence of any oral agreement or statement shall be admitted … for the purpose of contradicting, varying, adding to, or subtracting from its terms".[20] Apart from s 94(*f*), which is concerned with the admissible evidence for the interpretation of contracts, the other provisions in ss 93 and 94 are concerned with the proof of the terms of the contract.

13.24 The learned judge held that because the application of s 94 depends on the application of s 93, the application of the parol evidence rule in ss 93 and 94 therefore turns entirely on whether s 93 applies. Implicit in the interaction of ss 93 and 94 is the requirement that there *is a contract in the first place* which has been reduced to a document.

13.25 Phang JCA reasoned that since the essential element of a sham is that the parties did not intend to create the legal relations in the first place, it must follow that the existence of a sham means that there was no agreement in the first place. By this analysis, the issue of whether there is a sham is prior to and will not engage the parol evidence rule in ss 93 and 94. In other words, the parol evidence rule does not apply to govern the evidence that can be considered in deciding whether there is a sham in the first place. In the present case, this meant that a wider range of evidence could be considered by the courts in determining the status of the loan facilities agreement between the parties.

18 [2021] 1 SLR 1176.
19 Cap 97, 1997 Rev Ed.
20 *Toh Eng Tiah v Jiang Angelina* [2021] 1 SLR 1176 at [70].

C. Common law rectification

13.26 In *Sun Electric Pte Ltd v Menrva Solutions Pte Ltd*,[21] the High Court provided helpful guidance on common law rectification, which is properly regarded as a facet of construction. Sun Electric Pte Ltd ("Sun Electric") was liable to Menrva Solutions Pte Ltd ("Menrva") for breach of contract. Menrva was obliged under the contract to provide consultancy services regarding activities carried out by Sun Electric's subsidiary, Sun Electric Power Pte Ltd ("SEP"). Clause 3(b) provided for the fees Sun Electric was to pay Menrva by reference to "net positive payment". Clause 3(a) referred to "SE" receiving a "net positive payment" from third parties, which the contract defined to mean Sun Electric. However, only SEP received the net positive payments. Thus, Sun Electric argued that Menrva was only entitled to nominal damages because it would have received no fees under the contract since Sun Electric was not the entity that received the net positive payments. Menrva argued that "SE" should be read to mean SEP or that it should be rectified.

13.27 Vinodh Coomaraswamy J held first that the contractual text provided no basis to read "SE" as meaning anything other than Sun Electric. This remained the case even if such a reading of the text led to the wholly absurd and uncommercial result that Menrva was obliged to provide services to Sun Electric with no possibility of receiving any fees.

13.28 As for common law rectification, the learned judge held that a court has the power when construing a contract to correct "obvious mistakes in the written expression of the intention of the parties".[22] The learned judge continued to explain that common law rectification is available on the satisfaction of the two elements in *East v Pantiles (Plant Hire) Ltd*[23] ("*East v Pantiles*"), namely (a) there is a clear mistake on the face of the instrument; and (b) it is clear what correction ought to be made to cure the mistake.

13.29 On the first element, Coomaraswamy J disagreed with the first defendant's argument that, following the House of Lords decision of *Chartbrook Ltd v Persimmon Homes Ltd*[24] ("*Chartbrook*"), common law rectification was no longer restricted to a clear mistake on the face of the instrument. The first defendant had argued for an extension of the first element based on Lord Hoffmann's statement in *Chartbrook* that a court

21 [2021] 5 SLR 648.

22 *Sun Electric Pte Ltd v Menrva Solutions Pte Ltd* [2021] 5 SLR 648 at [59], citing *Edwards Jason Glenn v Australia and New Zealand Banking Group Ltd* [2012] SGHC 61 at [60].

23 [1982] 2 EGLR 111.

24 [2009] 1 AC 1101.

could consider the instrument's background and context in deciding if there was a clear mistake. Coomaraswamy J pointed out that Lord Hoffmann's extension had not been considered in Singapore and preferred to decide the present case on the basis that the extension did not apply here. In particular, the learned judge held that s 95 of the Evidence Act imposes significant constraints on common law rectification in Singapore, prohibiting the court from receiving extrinsic evidence to determine what corrections should be made to the language of a document if the language is "on its fact ambiguous or defective". However, the learned judge acknowledged that certain provisions of the Evidence Act, such as ss 97 and 99, do allow the court to consider extrinsic evidence when the language in a document is plain on its face but is rendered meaningless when applied to existing facts. Be that as it may, the learned judge was of the view that the Evidence Act clearly does not allow a Singapore court to consider extrinsic evidence in every instance of common law rectification, and, in consequence, Lord Hoffmann's *wholesale* extension of the first element in *East v Pantiles* would likely not be allowed in Singapore law.

III. Vitiating factors

A. Mistake

13.30 If contracting parties enter into a written contract that does not reflect their true intention by reason of a common mistake, they may seek to rectify the contract. Rectification is an equitable relief that is available when the following conditions are met:[25]

> (a) the parties had a common continuing intention, whether or not amounting to an agreement, in respect of a particular matter in the instrument to be rectified;
>
> (b) there was an outward expression of accord;
>
> (c) the intention continued at the time of the execution of the instrument sought to be rectified; and
>
> (d) by mistake, the instrument did not reflect that common intention.

25 *Yap Son On v Ding Pei Zhen* [2017] 1 SLR 219 at [67].

13.31 In *Xanthopoulos, Elias v Rotating Offshore Solutions Pte Ltd*,[26] the High Court granted an application for equitable relief. In this case, the plaintiff had entered into an agreement with a company ("the Company") that was specifically identified in the agreement as ROS Engineering Pte Ltd ("ROSE"). On a close examination of the facts, however, the court found that the parties had, through the course of the negotiations up to the time of the execution of the agreement, intended the contracting party to be Rotating Offshore Solutions Pte Ltd ("RO Solutions"), the majority shareholder of ROSE. As this was a common mistake shared by all the parties involved in the negotiation of the contract, the court ordered rectification of those clauses of the contract that were affected by the error. This case usefully highlights a common pitfall that arises when agreements are drafted by untrained persons.

13.32 In *Sun Electric Pte Ltd v Menrva Solutions Pte Ltd*,[27] Coomaraswamy J considered whether the continuing common intention required for equitable rectification is subjectively or objectively ascertained. While there has been some controversy in English law over this issue, the learned judge adopted the objective approach in the present case since the parties agreed on that as being the correct position in law. In any case, the learned judge considered that since the only way to ascertain a person's subjective intention is by drawing inferences from his outward manifestations of intention, the issue of whether a subjective or objective approach applies is unlikely to make a practical difference in many cases. On the facts as recounted earlier,[28] the learned judge allowed equitable rectification of "SE" on the ground of common mistake. This was because the parties had negotiated the payment structure in cl 3(b) with a continuing common intention that Menrva would be paid a percentage of the net positive payments received by SEP.

B. Illegality

13.33 In *Ting Siew May v Boon Lay Choo*[29] ("*Ting Siew May*") the Court of Appeal adopted the proportionality principle to determine the enforceability of a contract entered into with the object of committing an illegal act. This approach requires the court to identify a proportionate response by considering the policy considerations underlying the illegality principle. Factors relevant to the assessment of proportionality include: (a) whether allowing the claim would undermine the purpose of the prohibiting rule; (b) the nature and gravity of the illegality; (c) the

26 [2021] SGHC 197.
27 See para 13.26 above.
28 See paras 13.26–13.29 above.
29 [2014] 3 SLR 609.

remoteness or centrality of the illegality to the contract; (d) the object, intent and conduct of the parties; and (e) the consequences of denying the claim.[30] The Court of Appeal has since reaffirmed this approach in *Ochroid Trading Ltd v Chua Siok Lui*[31] but also clarified that the proportionality principle is limited to the narrow context involving contracts that are not illegal *per se* but are tainted by illegality.

13.34 Where a contract involves *foreign* illegality, however, the position is more complex. Based on *Euro-Diam Ltd v Bathurst*[32] ("*Euro-Diam*"), the issue is resolved by first considering whether 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. This approach incorporates domestic contract law principles in so far as *Euro-Diam* suggests that the question of proximity (that is, the second step of the test) is determined by reference to the "reliance test" laid down in *Bowmakers Ltd v Barnet Instruments Ltd*[33] and the "conscience test" derived from *Beresford v Royal Insurance Co Ltd*.[34] In *Teng Wen-Chung v EFG Bank AG, Singapore Branch*,[35] the Court of Appeal noted that this aspect of *Euro-Diam* would have to be reconsidered since the reliance and conscience tests had been reformulated and superseded in *Ting Siew May* and *Ochroid Trading Ltd v Chua Siok Lui* respectively.

13.35 The opportunity to reconsider *Euro-Diam* arose in *EFG Bank AG, Singapore Branch v Surewin Worldwide Ltd*[36] ("*EFG Bank*"). In this case, the plaintiff sued to enforce a charge ("the SFIP-1 Pledge") granted by the second defendant over its assets ("the Pledged Assets") to secure the debts of its subsidiary, the first defendant. The Pledged Assets comprised, *inter alia*, units in the SFIP-1 Unit Trust that the second defendant had acquired by subscription. However, this acquisition (of the SFIP-1 Unit Trust) was illegal as it violated the Taiwan Insurance Act 1929. The question then arose as to whether the SFIP-1 Pledge was tainted, and rendered unenforceable, by the illegality acquisition.

30 *Ting Siew May v Boon Lay Choo* [2014] 3 SLR 609 at [70].
31 [2018] 1 SLR 363
32 [1990] 1 QB 1.
33 [1945] KB 65.
34 [1938] AC 586.
35 [2018] 2 SLR 1145.
36 [2021] SGHC 227.

13.36 Vinodh Coomaraswamy J concluded, applying the *Euro-Diam* rule, that the illegality in question did not have the effect of vitiating the SFIP-1 Pledge.[37] The first stage of the test required the court to consider whether, applying the relevant connecting factor, the tainted transaction would be enforceable under the law of the forum. Coomaraswamy J criticised this approach for failing to distinguish between acts and contracts.[38] In his view, the first stage of the test in *Euro-Diam* served no purpose where the illegal transaction was an act and not a contract. It was not meaningful to ask if an act, as opposed to a contract, was *enforceable* under the law of the forum. This was indeed the case before the court, as the second defendant's subscription of the unit trust was an act rather than a contract. In such cases, the better approach was simply to ask if the act in question constituted a foreign illegality. If it did, the court could proceed to stage two of the *Euro-Diam* test.

13.37 Turning to stage two, Coomaraswamy J noted the parties' agreement to substitute the reliance and conscience tests in *Euro-Diam* with the proportionality test laid down in *Ting Siew May*.[39] Applying this test to the facts, the learned judge concluded that a refusal to enforce the SFIP-1 Pledge would be a disproportionate response to the illegality under Taiwanese law. The relevant considerations were: the plaintiff neither knew of nor intended to facilitate the illegality; the second defendant was itself at fault in failing to maintain proper internal controls with the result that its senior executives could perpetuate the fraud that led to its insolvency; as it was unclear whether the contravened Taiwanese law had the effect of invalidating the illegal investments, it would be odd for the courts of Singapore to invalidate the tainted security; the illegal subscription was not central to the SFIP-1 Pledge since it was completed *before* the creation of the pledge with no intention (on the plaintiff's part) to facilitate the illegality; the consequences of not enforcing the pledge were severe as it meant that the plaintiff would lose its security in assets worth US$194.57m. For all these reasons, the court concluded that it was fair, and not disproportionate, for the second defendant (and its creditors) to bear the loss occasioned by the fraud of its senior executives.

37 The learned judge also held that the rule in *Foster v Driscoll* [1929] 1 KB 470 did not apply to the facts as the parties had not executed the SFIP-1 Pledge with a view to committing any act that would violate Taiwanese laws: *EFG Bank AG, Singapore Branch v Surewin Worldwide Ltd* [2021] SGHC 227 at [256]–[263]. The plaintiff also did not know that the second defendant's subscriptions were illegal under Taiwanese law.

38 *EFG Bank AG, Singapore Branch v Surewin Worldwide Ltd* [2021] SGHC 227 at [67]–[77].

39 See para 13.33 above.

13.38 Although *EFG Bank* was largely concerned with the application of conflict of law rules to foreign illegality, its application of *Ting Siew May* to the facts usefully illustrates how the proportionality principle is applied to weigh the competing interests and merits of the disputing parties. The juxtaposition of domestic and conflict rules in this context also raises difficult questions as to whether the two regimes should remain distinct or converge in the interests of coherence.[40]

13.39 A contract obtained by bribery may, in one sense, be "tainted" by illegality but that is not by itself a sufficient ground for vitiating the contract *vis-à-vis* the victim. In *Indian Bank v Green Mint Pte Ltd*,[41] the plaintiff bank sued to recover a loan from the first defendant and also the second and third defendants who had personally guaranteed the loan. The defendants resisted the action on the ground that the loan facility was "illegal" since it had obtained the business by bribing the relevant bank officer. Philip Jeyaretnam J categorically rejected this defence. The learned judge observed that while a contract to pay a bribe is unenforceable (since it is a contract to commit a crime), the contract procured by a bribe is valid unless the victim – the innocent party who entered into the contract under the influence of a disloyal employee or agent – chooses to rescind the contract. In an action between the victim and the briber, there is no question of attributing the mental state of the bribed employee to the employer (victim) to render the latter complicit in the illegal act. Consistently with the position in the UK, there exists no public policy in Singapore that requires courts to refuse to enforce a contract procured by bribery. If the bank were prevented by public policy from recovering a loan from a borrower who had obtained the loan by bribes, the result would be to "reward the wrongdoer and punish the victim".[42] To extend public policy in this way would be patently wrong.

13.40 At common law, contracts savouring of maintenance and champerty are void against public policy. "Maintenance" occurs when a disinterested party offers assistance to encourage the institution or defence of lawsuits, while "champerty" includes the additional element that the disinterested party would receive a share of any successful recovery. In *Re Vanguard Energy Pte Ltd*[43] ("*Re Vanguard*"), the High Court clarified that an assignment of a bare cause of action (or the fruits of such actions) will *not* be struck down for violating the rule against maintenance and champerty if:[44]

40 See discussion at paras 12.148–12.161.
41 [2021] SGHC 265.
42 *Indian Bank v Green Mint Pte Ltd* [2021] SGHC 265 at [21].
43 [2015] 4 SLR 597.
44 *Re Vanguard Energy Pte Ltd* [2015] 4 SLR 597 at [43].

(a) it is incidental to a transfer of property; or

(b) the assignee has a legitimate interest in the outcome of the litigation; or

(c) there is no realistic possibility that the administration of justice may suffer as a result of the assignment. In this regard, the following should be considered:

(i) whether the assignment conflicts with existing public policy that is directed to protecting the purity of justice or the due administration of justice, and the interests of vulnerable litigants; and

(ii) the policy in favour of ensuring access to justice.

13.41 In *POA Recovery Pte Ltd v Yau Kwok Seng*[45] ("*POA Recovery*"), our courts were asked to decide if the assignment of claims to a company with a $1 issued capital offended the rule against maintenance and champerty. In this case, some 4,000 investors who had made investments relating to crude oil in Canada suffered losses in their investments. They sought to recover these losses from the defendants on the ground that the investments were a fraudulent Ponzi scheme. However, the investors did not bring the action by way of a representative action but assigned all their claims to the plaintiff, POA Recovery Pte Ltd, a special purpose vehicle ("SPV") set up solely to prosecute the claims. At trial, the defendants successfully pleaded the defence of illegality. The trial judge, Choo Han Teck J, held that the plaintiff had no *locus standi* to bring the action because it was a "shell company" incorporated only for the purpose of bringing the action, and that was *prima facie* contrary to the doctrine of maintenance.[46] Further, Choo J held that the assignments did not fall within the exceptions identified in *Re Vanguard* because (a) the plaintiff did not have any legitimate interest in the rights of action assigned to it; and (b) structuring the claims in this manner was an attempt to "cost proof" the plaintiff and hence contrary to public policy.

13.42 The Appellate Division of the High Court reversed this aspect of the decision on appeal. Belinda Ang Saw Ean JAD, who delivered the court's judgment, highlighted the need to examine the issue against the doctrine's rationale. Citing *Giles v Thompson*,[47] the learned judge identified the rationale to "protect the purity of justice and the interest of vulnerable litigants".[48] The mere fact that the plaintiff was an SPV set up for the sole purpose of litigating the investors' claims did not violate

45 [2021] SGHC 41, subsequently considered by the Appellate Division of the High Court on appeal in *POA Recovery Pte Ltd v Yau Kwok Seng* [2022] SGHC(A) 2.
46 *POA Recovery Pte Ltd v Yau Kwok Seng* [2021] SGHC 41 at [42].
47 [1994] 1 AC 142.
48 *POA Recovery Pte Ltd v Yau Kwok Seng* [2022] SGHC(A) 2 at [88].

these fundamental considerations. Instead, the doctrine is relevant only if there is an "element of impropriety". Such impropriety might occur if a third-party funder surreptitiously controlled the proceedings or wagered on the litigation. On the facts, it was plain that the plaintiff's action did not fall into any such prohibited category. Despite the assignment of the claims, the investors remained in control of the litigation. They provided the funding and would be paid the entire proceeds of the litigation. Far from being a third-party funder, the plaintiff served only as a mechanism for consolidating the investors' claims with no entitlement to the proceeds of litigation. Indeed, the plaintiff had genuine commercial interests in prosecuting the claims precisely because it was set up solely for that purpose.[49] Thus, it followed that the claims could also be validated under the second exception identified in *Re Vanguard*.

13.43 As regards the issue of cost-proofing, Ang J acknowledged it as a legitimate concern but observed that it raised a question distinct from the doctrine of maintenance and champerty. This was because even if the structure did not violate that doctrine, courts had to still ensure, "as a matter of fairness in the administration of justice, that the structure adopted by the Investors is not abused in an attempt to insulate themselves from potential liability".[50] In this regard, Ang J clarified that the use of a lowly capitalised SPV is not, by itself, evidence of such abuse since defendants can always protect themselves by seeking security for costs.

13.44 *POA Recovery* is significant for clarifying that the genuine restructure of legal claims to reduce costs and administrative burden would not contravene the rule against maintenance and champerty. As Ang J explained, such arrangements are better seen as modern-day alternatives to representative actions that should be encouraged as they:[51]

> … may (where appropriately used) also promote efficiency in the administration of justice; it obviates the need for the cumbersome task of filing hundreds, if not thousands of *separate writs* pending consolidation, thereby easing the strain on both litigants and the courts. [emphasis in original]

49 *POA Recovery Pte Ltd v Yau Kwok Seng* [2022] SGHC(A) 2 at [88], citing *Giles v Thompson* [1994] 1 AC 142 at [99].

50 *POA Recovery Pte Ltd v Yau Kwok Seng* [2022] SGHC(A) 2 at [88], citing *Giles v Thompson* [1994] 1 AC 142 at [91].

51 *POA Recovery Pte Ltd v Yau Kwok Seng* [2022] SGHC(A) 2 at [88], citing *Giles v Thompson* [1994] 1 AC 142 at [90].

C. Restraint of trade

13.45 In *Prudential Assurance Co Singapore (Pte) Ltd v Tan Shou Yi Peter*[52] ("*PACS v Peter*"), the High Court considered (*obiter*) the enforceability of a non-solicitation clause. The dispute arose from the mass exodus of a group of agents from the plaintiff insurer to join a competitor ("Aviva"). The vast majority of the agents belonged to the Peter Tan Organisation ("PTO"), the largest and most successful group of agents selling the plaintiff's insurance products. PTO was led by the defendant, Tan Shou Yi Peter, who also resigned from the plaintiff to join the competitor. The plaintiff sued the defendant, alleging (*inter alia*) that the latter had, by enticing the PTO agents to leave the plaintiff to join Aviva, breached limb (b) of the following non-solicitation clause:

> 5.1 The Prudential Financial Consultant shall not at any time during the continuance of his/her Adviser/Financial Consultant Agreement and for a period of twenty-four (24) months after the termination of his/her Adviser/Financial Consultant Agreement for whatever reason directly or indirectly and whether in his/her own behalf or on behalf of or in association with others or otherwise in any capacity whatever:
>
> (a) … and
>
> (b) employ or endeavour to entice away from the Company any person who is an employee, officer, agent, Financial Consultant or manager of the Company as at the date his/her Adviser/Financial Consultant Agreement is terminated.

13.46 Chua Lee Ming J, who presided over the case, found that this clause was not incorporated into the defendant's contracts with the plaintiff. Nevertheless, the learned judge proceeded to consider if the clause would have been enforceable had it been incorporated. It is well established that enforceability depends on (a) the existence of a legitimate proprietary interest; and (b) reasonableness of the clause by reference to the interests of the parties and of the public. On the facts, Chua J found that the first criterion was satisfied. The maintenance of a stable, trained work force is a legitimate proprietary interest that employers may protect via a restraint of trade. In Chua J's view, such proprietary interest is not restricted to an employed workforce but extends also to a workforce that comprises independent contractors. What matters, as the learned judge explained, is "the [employer's] reliance on the workforce and the disruption that an unstable workforce would cause to the business".[53] On this view, it was clear that the plaintiff had legitimate proprietary interests

52 [2021] SGHC 109.

53 *Prudential Assurance Co Singapore (Pte) Ltd v Tan Shou Yi Peter* [2021] SGHC 109 at [135].

to protect. Even though the agents were not the plaintiff's employees, they nevertheless constituted its primary workforce. Allowing the defendant to solicit these agents to defect to Aviva would undoubtedly adversely affect the plaintiff's business. Turning to the question of reasonableness, Chua J held that the clause was reasonable even though it sought to prohibit solicitation of all agents regardless of ranks and seniority. Such restraint was justified having regard to the agent's role as the plaintiff's primary workforce. However, the restraint was far too wide and hence unreasonable in so far as it also applied to all employees and officers. Nevertheless, the clause could be saved by the application of the blue pencil to sever the words "employee" and "officer".

IV. Remedies

A. Causation of loss: "Legal causation"

13.47 It is often self-evident that a breach of contract by the contractual promisor will have caused loss to be suffered by the promisee where it is plain that "but for" the breach, the loss would not have arisen. However, this does not mean that the question of causation is always answered in a straightforward way.

13.48 The establishment of "factual" causation to the satisfaction of the court is a necessary, though not sufficient, requirement before the court finds in favour of the promisee. As the Court of Appeal in *JSI Shipping (S) Pte Ltd v Teofoongwonglcloong*[54] pointed out, "the 'but-for' test [of factual causation] is a necessary but sometimes insufficient litmus test. It is but an exclusionary test serving to filter out non-causal occasions for the loss".[55] To establish that the defendant's breach was the *effective* cause of the claimant's loss, it may also be necessary to establish what may be termed "legal" (as opposed to "factual") causation:[56]

> The first broad inquiry involves causation, which, as alluded to earlier, is in turn made up of causation in fact and causation in law. Causation in fact is concerned with the question of whether the relation between the defendant's breach of duty and the claimant's damage is one of cause and effect in accordance with scientific or objective notions of physical sequence. It is concerned with establishing the physical connection between the defendant's wrong and the claimant's damage. The universally accepted test in this regard is the 'but for' test, which we will elaborate on later.

54 [2007] 4 SLR(R) 460.
55 *JSI Shipping (S) Pte Ltd v Teofoongwonglcloong* [2007] 4 SLR(R) 460 at [141].
56 *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric* [2007] 3 SLR(R) 782 at [52]–[53]. See also *The Tian E Zuo* [2019] 4 SLR 475 at [47].

> However, satisfying the 'but for' test is by no means a sufficient condition because the all important 'causation in law' test must be satisfied as well. The reason for this is that to adopt the 'but for' test without limit would lead to absurd results. To illustrate the potential absurdity, we refer to the example provided in *McGregor on Damages*[57] at para 6-008. Consider that a mother gives birth to a son who, when he grows up, commits murder. Adopting the question of factual causation, it is clear that if the mother had not decided to have a child in the first place, the murder would never have happened; the 'but for' test is amply satisfied. She is thus a cause in fact of the murder by virtue of a physical sequence that is unbroken by scientific and objective notions of logic. Yet, it is equally true that the law regards the mother as bearing no responsibility for the murder on account of lack of negligence or other tortious activity on her part; it is the law which removes her from being a cause of the murder. This is causation in law. …

13.49 It is very difficult to set out a general account as to the requirements to establish "legal" causation (conceived as a supplementary exercise to "factual" causation as part of the exercise to establish "effective" causation of loss, as distinguished from the rules on remoteness of loss). Questions of "legal" causation often require examination of specific policy concerns as may arise in a particular factual context.

13.50 For example, where the defendant alleges that the claimant has failed to establish legal causation owing to the occurrence of a *novus actus interveniens* (that is, an "intervening cause") which "breaks" the "chain of causation", the court's decision on the point is, at base, a finding as to whether to attribute responsibility (and hence liability) for the loss to the acts of the defendant in breach, or to the acts of unconnected entities making up the alleged "intervening cause". In this context, the Court of Appeal in *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric*[58] quoted with approval the observations of Andrews J in *Palsgraf v The Long Island Railroad Co*[59] that:[60]

> [B]ecause of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics.

57 Harvey McGregor, *McGregor on Damages* (Sweet & Maxwell, 17th Ed, 2003).
58 [2007] 3 SLR(R) 782 at [54].
59 248 NY 339 (1928).
60 *Palsgraf v The Long Island Railroad Co* 248 NY 339 at 352 (1928).

13.51 Consequently, attempts to provide a general statement as to the nature of the inquiry can potentially mislead due to over-generalisation. The differences in the policy concerns arising within one context as compared with another may, accordingly, mean that different approaches are taken when ascertaining if "legal" causation had been sufficiently demonstrated in one, as opposed to any other, context.

13.52 The points set out above about the difficulties with "legal" causation should not, however, be taken to suggest that establishing "factual" causation is always straightforward. As the trilogy of cases below will show, establishing "factual" causation can itself be challenging.

B. Causation of loss: "Factual causation"

(1) Counterfactuals, and the doctrine of "minimum contractual promise"

13.53 If it can be established on a balance of probabilities that the loss claimed for by the plaintiff-promisee would not have arisen "but for" the defendant-promisor's breach of contract, then the plaintiff would have demonstrated that the defendant's breach had factually caused the plaintiff's claimed-for loss. However, this does not mean that no difficulties will ever arise in connection with questions of factual causation: only that the difficulties are of a different kind.

13.54 To establish "but for" causation, the plaintiff seeking relief must set out an appropriate counterfactual in which no breach had occurred, and then show how events would have turned out in that hypothetical scenario. But there may be many senses in which "no breach" may have occurred – and it appears that court retains considerable leeway to reject inappropriate counterfactuals. An example of this may be found in the decision of the High Court in *PACS v Peter*.[61]

13.55 The first defendant in this case, Peter, was contractually bound to the plaintiff, Prudential Assurance Co Singapore (Pte) Ltd ("PACS") under an "agency agreement" in which it was expressly provided that he was required to "conduct his insurance business [with the plaintiff] with integrity and honesty".[62]

61 See para 13.45 above.

62 This was expressly set out in cl 18(a)(i) of Peter's agency agreement with the plaintiff.

13.56 As the learned trial judge held:[63]

> … [t]his obligation required Peter to serve PACS with good faith and undivided interest … This included a duty not to solicit PACS' [other] agents (during the currency of Peter's Agency Agreement) to join a competitor. …

13.57 Prior to terminating his agency agreement with PACS, Peter commenced certain preparatory acts to join a rival insurance business; he also solicited other insurance agents to terminate their own agency agreements with PACS and to consider joining the rival business.[64] The trial judge held that these acts breached the term requiring Peter to act with integrity and honesty.[65]

13.58 In an attempt to avoid liability for such breach, defence counsel argued[66] that PACS had waived its rights to bring an action for these breaches, relying on a proposition set out in *Audi Construction Pte Ltd v Kian Hap Construction Pte Ltd*[67] ("*Audi Construction*") that a representation that one party would forbear from invoking its rights in light of the counterparty's breaches of duty could sometimes be made out from mere silence, particularly where there was a duty to speak out in respect of those breaches.

13.59 In *Audi Construction*, the Court of Appeal had explained that the "duty to speak" which it had raised referred to "circumstances in which a failure to speak would lead a reasonable party to think that the other party ha[d] elected between two inconsistent rights or [would] forbear to enforce a particular right in the future".[68] After pointing this out, the trial judge noted that Peter had actively concealed his breaches of contract from PACS. Consequently, it could not be said that PACS's silence in light of such active concealment would lead Peter to understand that it had elected to forbear enforcement of its rights in respect of Peter's breaches.[69]

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63 *Prudential Assurance Co Singapore (Pte) Ltd v Tan Shou Yi Peter* [2021] SGHC 109 at [315]. See also [157]–[158], in which the learned trial judge rejected counsel's contention that cl 18(a)(i) ought to be construed more narrowly such that it only regulated Peter's conduct with clients and potential clients, and did not encompass solicitation of other agents to terminate their agency agreements with the plaintiff.

64 These matters are summarised in *Prudential Assurance Co Singapore (Pte) Ltd v Tan Shou Yi Peter* [2021] SGHC 109 at [89] and [92].

65 *Prudential Assurance Co Singapore (Pte) Ltd v Tan Shou Yi Peter* [2021] SGHC 109 at [194].

66 *Prudential Assurance Co Singapore (Pte) Ltd v Tan Shou Yi Peter* [2021] SGHC 109 at [196]–[197].

67 [2018] 1 SLR 317 at [58].

68 *Audi Construction Pte Ltd v Kian Hap Construction Pte Ltd* [2018] 1 SLR 317 at [61].

69 *Prudential Assurance Co Singapore (Pte) Ltd v Tan Shou Yi Peter* [2021] SGHC 109 at [198].

13.60 Further, even if there were some form of representation of forbearance by silence, the trial judge noted[70] that Peter had not gone on to plead any facts pertaining to detrimental reliance on his part on such representation (if any) or "any other facts as would make it inequitable for him [*sic*][71] to rely on any alleged representation by PACS".[72] Consequently, the trial judge held that Peter's defence of waiver failed.[73]

13.61 Turning to the question of damages, the learned trial judge held that PACS had established that Peter's acts of solicitation had caused 227 of PACS's agents to terminate their own agency agreements and leave PACS.[74] However, in relation to PACS's claims for loss of profits as a result of the mass departure of these agents, and the loss of profits resulting from the "drop in productivity" occasioned by the uncertainty and controversy which began when Peter announced his intention to leave PACS, the learned trial judge held as follows.

13.62 In relation to the first claim for loss of profits owing to the mass departure of the 227 agents, PACS had posited three counterfactual scenarios,[75] all of which were predicated on the hypothesis that but for Peter's breaches, Peter would have remained with PACS instead of being terminated as of 8 July 2016, and that consequently, none of the agents who left PACS would have done so due to his actions.

70 *Prudential Assurance Co Singapore (Pte) Ltd v Tan Shou Yi Peter* [2021] SGHC 109 at [199].

71 Here, the learned trial judge probably intended to make the point that Peter had not pleaded any facts as would make it inequitable for *the plaintiff* to resile from its representation (if any) that it would forbear from enforcing its rights against Peter for his breaches.

72 *Prudential Assurance Co Singapore (Pte) Ltd v Tan Shou Yi Peter* [2021] SGHC 109 at [199].

73 *Prudential Assurance Co Singapore (Pte) Ltd v Tan Shou Yi Peter* [2021] SGHC 109 at [198]–[199].

74 The trial judge held in *Prudential Assurance Co Singapore (Pte) Ltd v Tan Shou Yi Peter* [2021] SGHC 109 at [232] that "but-for" causation was not made out by PACS in respect of 17 agents who either did not join Aviva Financial Advisors Pte Ltd (a wholly owned subsidiary of Aviva Ltd [the rival insurance business]) after leaving PACS, or only left PACS after Peter's agency agreement had come to an end (on 8 July 2016) when PACS terminated it in light of Peter's breaches (at which point Peter would no longer be bound by the cl 18(a)(i) duties).

75 *Prudential Assurance Co Singapore (Pte) Ltd v Tan Shou Yi Peter* [2021] SGHC 109 at [217]–[218].

13.63 Unfortunately for PACS, the learned judge accepted counsel's suggestion that the continuation of Peter's relationship with PACS beyond 8 July 2016 ought to have been, but was not, pleaded by PACS.[76] The trial judge therefore held that "it was necessary for PACS to plead this factual assertion [that Peter would have remained with PACS] so that Peter would know the case that he had to meet and not be taken by surprise".[77]

13.64 The result was that the trial judge rejected PACS's preferred counterfactuals and accepted, instead, the counterfactual proposed by counsel for Peter in which it was posited that Peter would still have left PACS, in accordance with the terms of his agency agreement with PACS, 14 days after giving notice of termination on 8 July 2016, and that Peter would otherwise have acted as he had done. Accordingly, based on *this* counterfactual, the 227 insurance agents contacted by Peter would still have left PACS because of Peter's acts of solicitation and given that Peter would still have left PACS after 8 July 2016 (on this counterfactual).

13.65 In consequence, PACS's losses by reason of the departure of these 227 agents was much less than would have been the case had any of PACS's preferred counterfactuals been applied. Also, since Peter and these agents would still have left on Peter's counterfactual, it followed that PACS could not prove any loss of profits by reference to the loss of productivity of these agents owing to the disruption and uncertainty following Peter's announcement that he would be leaving.[78]

13.66 That said, even if the court had not rejected PACS's counterfactuals for defects of pleading but had granted leave to amend, the result might not have been much different owing to the doctrine of "minimum contractual promise".

76 *Prudential Assurance Co Singapore (Pte) Ltd v Tan Shou Yi Peter* [2021] SGHC 109 at [239]. The learned trial judge also noted that a particular agreement (the Pegasus Agreement) which was central to the formulation of PACS's counterfactual had also not been pleaded.

77 *Prudential Assurance Co Singapore (Pte) Ltd v Tan Shou Yi Peter* [2021] SGHC 109 at [198].

78 *Prudential Assurance Co Singapore (Pte) Ltd v Tan Shou Yi Peter* [2021] SGHC 109 at [243], [263] and [265]–[266].

13.67 Where a claimant asserts that a defendant has breached its contractual obligations to the plaintiff, "it is axiomatic that no man can be held liable in contract for failing to do what he is not obliged to do under the contract";[79] that is, "the defaulting promisor is only liable for damages for losses quantified on the basis of the *minimum* obligations under the contract" [emphasis in original].[80]

13.68 Consequently, even if PACS's defective pleadings had been rectified, and PACS had not been barred for that reason from relying on its proposed counterfactuals which had assumed that Peter would not have left PACS, since Peter's agency agreement with PACS provided that Peter could lawfully terminate his relationship with PACS by giving 14 days' notice of termination, Peter's "minimum obligation" to PACS to carry out his insurance business with integrity and honesty would only persist until the relationship between them was lawfully terminated. This would occur 14 days after giving notice, as provided in the contract. Hence, the counterfactuals proposed by PACS would ultimately be dashed against the doctrine of minimum contractual promise even if PACS's pleadings had not been defective.

(2) Doctrine of minimum contractual promise, again

13.69 The importance of the doctrine of minimum contractual promise was also illustrated in the Court of Appeal's decision in *iVenture Card Ltd v Big Bus Singapore City Sightseeing Pte Ltd*[81] ("*iVenture*"). For present purposes, it is enough to concentrate on the contractual disputes between the first appellant and the first respondent.

13.70 The first appellant was part of the iVenture Group which developed and marketed packaged tours for tourists worldwide. In turn, the first two respondents, Big Bus Singapore City Sightseeing Pte Ltd ("Big Bus") and Singapore Ducktours Pte Ltd ("Ducktours"), were part of the Duck and HiPPO Group, a tourism business based in Singapore. The two groups entered into a business collaboration to develop the "Singapore iVenture Pass", a co-branded pass for tourists to more conveniently access Singapore tourist attractions.

79 *Beach v Reed Corrugated Cases Ltd* [1956] 1 WLR 807 at 817.

80 *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Singapore: Academy Publishing, 2nd Ed, 2022) at para 21.020.

81 [2022] 1 SLR 302.

13.71 To further their collaboration, the first appellant and first respondent entered into three contracts with each other: a "Licence Agreement", a "Reseller Arrangement"[82] and a "Service Level Agreement". These agreements were interdependent:[83]

> … the Reseller Arrangement was an accessory or incidental or offshoot agreement that was dependent on the existence of the Licence Agreement. … It is clear the Reseller Arrangement, as an agreement, could not have stood on its own without the Licence Agreement just as the Service Level Agreement made little commercial sense without the existence of the Licence Agreement.

13.72 Disputes over the sums payable under these agreements arose, and the relationship between the first appellant and the first respondent deteriorated. In the court below, the learned judge held that the first respondent had repudiatorily breached the Licence Agreement and the Reseller Arrangement,[84] but not the Service Level Agreement on grounds that the first appellant's own actions had led to *it* repudiating the Service Level Agreement.[85]

13.73 No appeal was lodged in relation to the decision below that there had been repudiatory breaches by the first respondent of the Licence Agreement and the Reseller Arrangement. But the appellants successfully appealed the point as to the Service Level Agreement. Consequently, the Court of Appeal held that the first respondent had repudiatorily breached all three contracts, and that these repudiatory breaches had been accepted[86] (explicitly in relation to the Licence Agreement and the Service Level Agreement, and implicitly, the Reseller Arrangement)[87] by the first appellant by a letter dated 6 December 2017. Hence, all three contracts were prematurely terminated by discharge for repudiatory breach.

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82 The "Reseller Arrangement" was formed informally and had at no point been reduced to writing: *iVenture Card Ltd v Big Bus Singapore City Sightseeing Pte Ltd* [2022] 1 SLR 302 at [6]. In the court below, it had been held that although the invoices issued pursuant to the Reseller Arrangement had been billed to iVenture Card Travel Ltd (the third appellant), and not iVenture Card Ltd (the first appellant), the evidence showed that the first appellant was party to the Reseller Arrangement, and not the third appellant: *iVenture Card Ltd v Big Bus Singapore City Sightseeing Pte Ltd* [2020] SGHC 109 at [7]. This was upheld on appeal: [2022] 1 SLR 302 at [30].

83 *iVenture Card Ltd v Big Bus Singapore City Sightseeing Pte Ltd* [2022] 1 SLR 302 at [80].

84 *iVenture Card Ltd v Big Bus Singapore City Sightseeing Pte Ltd* [2020] SGHC 109 at [15]–[16].

85 *iVenture Card Ltd v Big Bus Singapore City Sightseeing Pte Ltd* [2020] SGHC 109 at [20].

86 *iVenture Card Ltd v Big Bus Singapore City Sightseeing Pte Ltd* [2022] 1 SLR 302 at [80] and [101].

87 *iVenture Card Ltd v Big Bus Singapore City Sightseeing Pte Ltd* [2022] 1 SLR 302 at [80].

13.74 Having reversed the decision below on the question of repudiation of the Service Level Agreement, the Court of Appeal set aside the awards of nominal damages in favour of the first respondent which had been made by the trial judge.[88] Consequently, it fell to the Court of Appeal to address the question of damages for the first appellant in light of the discharge of the three contracts by reason of the first respondent's repudiation.[89]

13.75 Here, the first appellant sought to recover its loss of profits resulting from the termination of these contracts with the first respondent At trial, the first respondent's expert witness had calculated and estimated these losses in two blocks: loss of profits (a) from 6 December 2017 to 26 September 2020; and (b) beyond 26 September 2020.[90]

13.76 The date of 26 September 2020 was significant because this was the contractual end date of the Licence Agreement, the Reseller Arrangement and the Service Level Agreement.[91] However, the first respondent argued that these contracts would have been automatically renewed because of "automatic renewal clauses" set out in the Licence Agreement and the Service Level Agreement. Consequently, the first respondent relied on a counterfactual which assumed that all three contracts would have persisted beyond 26 September 2020: if so, the effect of the first respondent's repudiation which eventually resulted in the discharge of these contracts on 6 December 2017 would also extend to the profits that would have been gained by the first appellant beyond 26 September 2020 as well.

13.77 At first instance, it was held that these claims for loss of profits that would have been earned beyond 26 September 2020 were "incredibly speculative".[92] The Court of Appeal agreed that these claims could not be sustained for a variety of reasons.

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88 *iVenture Card Ltd v Big Bus Singapore City Sightseeing Pte Ltd* [2022] 1 SLR 302 at [101].

89 In the court below, it had been held that the second respondent (Ducktours) had tortiously induced the first respondent (Big Bus) to breach its contracts with the first appellant. Hence, the second respondent became jointly and severally liable for the first respondent's contractual liabilities to the first appellant: *iVenture Card Ltd v Big Bus Singapore City Sightseeing Pte Ltd* [2020] SGHC 109 at [23]–[25].

90 *iVenture Card Ltd v Big Bus Singapore City Sightseeing Pte Ltd* [2022] 1 SLR 302 at [118].

91 *iVenture Card Ltd v Big Bus Singapore City Sightseeing Pte Ltd* [2022] 1 SLR 302 at [118].

92 *iVenture Card Ltd v Big Bus Singapore City Sightseeing Pte Ltd* [2020] SGHC 109 at [35].

13.78 First, it pointed out that the supposed "automatic renewal clauses" were subject to the caveat that the respective contracts not be terminated by either of the contracting parties in accordance with other terms set out in each contract:[93]

> Thus it was always open to [the first respondent] to terminate both agreements by invoking the contractually-agreed procedure so that these agreements would end on 26 September 2020. The appellants' argument that the agreements would have been renewed as a matter of course owing to the operation of the automatic renewal clauses therefore lacked merit.

13.79 The Court of Appeal also observed that, given the first respondent's dissatisfaction with the first appellant's consistently late payments of sums due under the three contracts, it was more likely than not that the first respondent would have acted to terminate these contracts as of 26 September 2020 rather than permit them to be automatically renewed.[94] However, again, although the Court of Appeal did not expressly refer to it, the result would arguably have been the same even if the evidence had not been as clear owing to the doctrine of minimum contractual promise.

13.80 Just as with *PACS v Peter*,[95] it is not open to a claimant to seek damages for losses for non-performance of obligations which the defendant had not agreed to undertake. So, if the defendant had committed to perform certain obligations for a period of time but had also been given the power to terminate the contract at an earlier date before that period had fully expired, the claimant cannot recover damages in respect of losses arising beyond the point of termination.

13.81 Consequently, even if the evidence had *not* been such as to show that the first respondent would not have allowed the contracts to be renewed beyond 26 September 2020, it is to be taken (that is, *assumed*) that the first respondent as the party in breach would have acted in the counterfactual in the least favourable manner so far as the claimant's case was concerned (or, to put it another way, in the way most favourable to itself by taking advantage of any contractual provisions which would have the result of reducing its obligations and liabilities to the claimant as much as possible).

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93 *iVenture Card Ltd v Big Bus Singapore City Sightseeing Pte Ltd* [2022] 1 SLR 302 at [126].

94 *iVenture Card Ltd v Big Bus Singapore City Sightseeing Pte Ltd* [2022] 1 SLR 302 at [126].

95 See paras 13.53–13.68 above.

13.82 As Patten LJ explained in *Durham Tees Valley Airport v bmibaby Ltd*[96] (where the doctrine was referred to as the "minimum level of performance" doctrine):[97]

> … [t]he court … has to conduct a factual inquiry as to how the contract would have been performed had it not been repudiated. Its performance is the only counter-factual *assumption* in the exercised. On the basis of that premise, the court has to look at the relevant economic and other surrounding circumstances to decide on the level of performance which the defendant would have adopted. The judge conducting the assessment must *assume* that the defendant *would not have acted outside the terms of the contract and would have performed it in his own interests having regard to the relevant factors prevailing at the time.* But the court is not required to make assumptions that the defaulting party would have acted uncommercially merely in order to spite the claimant. To that extent, the parties are to be assumed to have acted in good faith although with their own commercial interests very much in mind. [emphasis added]

13.83 In applying this doctrine, the court must therefore *assume* that the defendant in breach would have utilised any discretionary entitlements which had been set out in the contract in such a way as would have made the most commercial sense in light of the factual circumstances at that point in time. In other words, there is no need to prove on a balance of probabilities that the defendant in breach would or would not have exercised that contractual discretion in a particular way as would make the most commercial sense for its own benefit, because the doctrine entails the *assumption* that the defendant in breach *would* so act.

(3) Taking into account events arising after the commencement of proceedings

13.84 Having dismissed the first appellant's claims for loss of profits beyond 26 September 2020, the Court of Appeal in *iVenture*[98] also considered the impact of the COVID-19 pandemic on tourist arrivals in Singapore. This was potentially relevant because the first appellant's expert witness had assumed that the earnings from the three contracts beyond 6 December 2017 would be in line with historical patterns of tourist arrivals in Singapore when he attempted to compute the first appellant's loss of profits.[99]

96 [2011] 1 Lloyd's Rep 68.
97 *Durham Tees Valley Airport v bmibaby Ltd* [2011] 1 Lloyd's Rep 68 at [79].
98 See para 13.69 above.
99 *iVenture Card Ltd v Big Bus Singapore City Sightseeing Pte Ltd* [2022] 1 SLR 302 at [118]–[120].

13.85 Although this expert witness' report had been accepted by the trial judge as setting out a reasonable way to assess the first appellant's losses and was used by the trial judge to formulate the damages to be awarded at first instance, no account had been taken as to the unprecedented impact of COVID-19 on tourism globally and in Singapore.

13.86 The Court of Appeal observed[100] that the first appellant's expert witness' report was dated 22 November 2019, and that the trial commenced on 14 January 2020 and ended on 16 March 2020, with the trial judge handing down his written judgment on 26 May 2020. In addition, the Court of Appeal held that it could take judicial notice of the announcement by the World Health Organization on 31 January 2020 of a global health emergency owing to COVID-19, its declaration of a COVID-19 pandemic on 11 March 2020, and of the imposition in Singapore of "circuit breaker" measures, that is, a "lockdown" which severely constrained the ordinary liberties of daily life in terms of freedom of movement within Singapore, on 7 April 2020.[101]

13.87 Given these circumstances, the Court of Appeal considered whether the first appellant's estimate of lost profits ought to be reconsidered in light of the impact of COVID-19 on tourist arrivals. In the Court of Appeal's own words, this turned on two issues:[102]

> (a) whether damages for breach of contract ought to take into account circumstances post-dating such breach; and
>
> (b) whether an appellate court may interfere with or otherwise revise a trial judge's assessment of damages or remit the case back to the trial judge to re-assess the damages on the basis of events that occurred after the evidential tranche of the trial but during the period of the written closing and reply submissions and before the handing down of the judgment.

13.88 As to the former, the Court of Appeal reiterated[103] the observations it had made in *The STX Mumbai*,[104] that "by the time the [trial] court hears the case, the *actual* nature and consequences of that breach might … be *known, given the passage of time between the date*

100 *iVenture Card Ltd v Big Bus Singapore City Sightseeing Pte Ltd* [2022] 1 SLR 302 at [128].
101 *iVenture Card Ltd v Big Bus Singapore City Sightseeing Pte Ltd* [2022] 1 SLR 302 at [128].
102 *iVenture Card Ltd v Big Bus Singapore City Sightseeing Pte Ltd* [2022] 1 SLR 302 at [131].
103 *iVenture Card Ltd v Big Bus Singapore City Sightseeing Pte Ltd* [2022] 1 SLR 302 at [142].
104 [2015] 5 SLR 1.

of the breach and the date(s) of the trial itself" [emphasis in original].[105] But a first instance hearing often proceeds in two stages: a first "fact-finding" or "evidential" stage, followed by a second stage when legal submissions are made and before judgment is handed down. What might the position be if a substantial change of circumstances had arisen *after* the "evidential" stage?

13.89 The Court of Appeal noted[106] that the COVID-19 pandemic could be taken to have started after the "evidential tranche" of the trial below, having only manifested "during the written closing submissions and before judgment was issued".[107] In these circumstances, the Court of Appeal recognised that, "[t]o be fair, the [trial] Judge would not have been able to foresee, in May 2020 when he handed down his judgment, how long this [COVID-19] pandemic would last".[108] But after examining the English cases on point,[109] the Court of Appeal concluded that:[110]

> … in assessing damages for repudiatory breach of executory contractual obligations …, an appellate court may have regard to evidence of events which reduce the value of the performance of such contractual obligations in assessing the quantum of damages to be awarded for such repudiatory breach, even though such events occurred only after the evidential tranche, during the written closing submissions and before the trial judge delivered judgment, if such events would have falsified some basic assumptions common to both sides or it would have affronted common sense or a sense of justice if the court had failed to take cognisance of them.

13.90 Consequently, the Court of Appeal concluded that the matter would have to be remitted to the trial judge to receive evidence to decide on the appropriate reduction to be made to the damages to be awarded as a result of the COVID-19 pandemic, unless the parties could come to an agreed reduction.[111]

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105 *The STX Mumbai* [2015] 5 SLR 1 at [69], citing English authorities such as *Golden Strait Corp v Nippon Yusen Kubishika Kaisha* [2007] 2 AC 353 and *Bunge SA v Nidera BV* [2015] 3 All ER 1082.

106 *iVenture Card Ltd v Big Bus Singapore City Sightseeing Pte Ltd* [2022] 1 SLR 302 at [144].

107 *iVenture Card Ltd v Big Bus Singapore City Sightseeing Pte Ltd* [2022] 1 SLR 302 at [144].

108 *iVenture Card Ltd v Big Bus Singapore City Sightseeing Pte Ltd* [2022] 1 SLR 302 at [144].

109 *iVenture Card Ltd v Big Bus Singapore City Sightseeing Pte Ltd* [2022] 1 SLR 302 at [146]–[151].

110 *iVenture Card Ltd v Big Bus Singapore City Sightseeing Pte Ltd* [2022] 1 SLR 302 at [152].

111 *iVenture Card Ltd v Big Bus Singapore City Sightseeing Pte Ltd* [2022] 1 SLR 302 at [157].

(4) Difficulties of proving that the defendant's breach had caused the plaintiff's loss on a balance of probabilities

13.91 The third in this trilogy of "factual causation" cases, *Judah Value Activist Fund v Open Faith Investment Ltd*,[112] provides a cautionary tale as to the severe difficulties which a plaintiff may face in establishing factual causation of loss for breach of a promise to convey title to publicly traded shares. In this case, the plaintiff ("Judah"), an exempted company incorporated in the Cayman Islands, and the defendant ("Open Faith"), a company incorporated in the British Virgin Islands, both held shares (directly or indirectly) in Agritrade Resources Ltd ("Agritrade"), a company listed on the Hong Kong Stock Exchange.

13.92 Judah had a secured margin loan facility ("MLF") with Maybank Kim Eng Securities Pte Ltd ("Maybank"), the security being Judah's holdings of Agritrade shares – which, as at end December 2019, stood at approximately 160 million shares. Under the terms of the MLF, Judah had to maintain a certain loan-to-value ratio ("LTV Ratio") of 70%: if the ratio fell below this value, Maybank would be entitled to sell Judah's Agritrade shares and apply the proceeds in reduction of Judah's outstanding indebtedness to Maybank to maintain the LTV Ratio as much as possible.

13.93 Judah agreed to issue "Class B" shares in Judah to Open Faith, in exchange for which Open Faith would transfer 60 million shares in Agritrade ("the Agritrade shares") to Judah by 31 December 2019 (being two days before the "Subscription Day" for the "Class B" Judah shares). Unfortunately, the 60 million Agritrade shares were not transferred by 31 December 2019. This had severe consequential effects because the market value of Agritrade shares fell substantially over the course of January 2020. In particular, on 20 January 2020, news that the controlling shareholder ("AIPL") of Agritrade had been granted a six-month moratorium by the Singapore High Court against, *inter alia*, commencement or continuation of legal proceedings against it, or any application for it to be wound up, became public.[113]

13.94 Had the 60 million Agritrade shares been transferred on time, this fall in value would have been offset by the increase in Judah's overall Agritrade shareholdings. However, given Open Faith's failure to

112 [2021] 5 SLR 114.

113 *Judah Value Activist Fund v Open Faith Investment Ltd* [2021] 5 SLR 114 at [67], where Sir Henry Bernard Eder IJ went on to observe that:

> … given that AIPL was … the majority shareholder in Agritrade, there can … be no doubt that … the making of such an application and *a fortiori* a moratorium order would (if and when made public) have created a significant downward pressure on the Agritrade share price.

transfer those shares, Judah's LTV ratio with Maybank fell below 70% on 20 January 2020. This led Maybank to sell the entirety of Judah's approximately 160 million Agritrade shares in three tranches, on 20, 21 and 23 January 2020.

13.95 Judah therefore sued Open Faith for losses arising from its breach of contract resulting in the forced sale of its shares by Maybank which it quantified on two alternative grounds. It appeared to have put its claims on the following alternative bases:[114]

> …
>
> (c) If the defendant had transferred the Agritrade Shares, the plaintiff would not have exceeded an LTV Ratio of 70% and received any margin calls on its portfolio.
>
> (d) The fall in the price of Agritrade shares from 20 to 23 January 2020 was a result of the force-selling of the Agritrade shares from the plaintiff's portfolio.
>
> (e) After the forced sale of the plaintiff's entire portfolio of Agritrade shares, the plaintiff's fund was worth S$0.
>
> (f) Had the forced sale not occurred, and had the defendant transferred the Agritrade Shares, the plaintiff's fund would have been worth S$5,389,734.91.
>
> (g) Accordingly, the plaintiff has lost that sum, *ie*, S$5,389,734.91.
>
> (h) Alternatively, the plaintiff claims damages on the basis that it suffered loss and damages of US$4,466,463.02, being the value of the defendant's Agritrade Shares as of 31 December 2019.

13.96 After what must have been an exceedingly challenging trial, Sir Henry Bernard Eder IJ held that:

> (a) Open Faith was obligated to transfer the Agritrade shares to Judah by 31 December 2019;[115]
>
> (b) even if there were an implied term that the transfer date be postponed if due diligence and subscription application process was not completed by that date, since both were completed by 18 December 2019, such implied term would not assist Open Faith;[116]
>
> (c) Judah had not exercised its power to change the Subscription Day to a date in February 2020 (which, if exercised,

114 *Judah Value Activist Fund v Open Faith Investment Ltd* [2021] 5 SLR 114 at [118].
115 *Judah Value Activist Fund v Open Faith Investment Ltd* [2021] 5 SLR 114 at [101]–[103].
116 *Judah Value Activist Fund v Open Faith Investment Ltd* [2021] 5 SLR 114 at [106]–[109].

would also have postponed the last day for transfer of the Agritrade shares);[117]

(d) Judah had not waived compliance with the 31 December 2019;[118]

(e) Judah had not made any unequivocal representation to Open Faith that it would not insist on its strict legal rights; even if there were, the evidence showed that Open Faith had not relied on them, and there was nothing inequitable in Judah insisting on its strict legal rights;[119]

(f) the type of loss claimed by Judah (being losses arising from the forced sale of its Agritrade shares by Maybank) were not too remote[120] because they amounted to "special loss" of a type of which Open Faith had actual knowledge within the second limb of *Hadley v Baxendale*[121] as endorsed by the Court of Appeal in *Out of the Box Pte Ltd v Wanin Industries Pte Ltd*;[122] and

(g) Open Faith's breach had caused Maybank to force sell Judah's Agritrade shares.[123]

Fatally, however, for Judah, Eder IJ was not satisfied that it had made out its claims for damages on either its primary or alternative heads of claim.

13.97 On Judah's alternative head of claim, Eder IJ decided as follows:[124]

> [I]t seems to me important to bear in mind that the transaction entered into by the parties was, in effect, a 'swap' of a very particular kind, *ie*, … the defendant [that is, Open Faith] agreed to transfer the Agritrade Shares to the plaintiff [that is, Judah] in return for shares in the plaintiff's fund [*sic*].[125] If the transfer had taken place, the value of the plaintiff's fund would have increased by the value of the Agritrade Shares transferred into the plaintiff's fund. In that scenario, the value of the shares in the plaintiff's fund that the defendant would have received would have reflected the value of the plaintiff's fund as a whole, including the Agritrade Shares newly transferred into the fund by the defendant.

117 *Judah Value Activist Fund v Open Faith Investment Ltd* [2021] 5 SLR 114 at [117].
118 *Judah Value Activist Fund v Open Faith Investment Ltd* [2021] 5 SLR 114 at [111]–[115].
119 *Judah Value Activist Fund v Open Faith Investment Ltd* [2021] 5 SLR 114 at [116].
120 *Judah Value Activist Fund v Open Faith Investment Ltd* [2021] 5 SLR 114 at [143].
121 (1854) 9 Exch 341.
122 [2013] 2 SLR 363.
123 *Judah Value Activist Fund v Open Faith Investment Ltd* [2021] 5 SLR 114 at [164].
124 *Judah Value Activist Fund v Open Faith Investment Ltd* [2021] 5 SLR 114 at [137]–[138].
125 To be more precise, the agreement was for Open Faith to be issued shares in Judah: *Judah Value Activist Fund v Open Faith Investment Ltd* [2021] 5 SLR 114 at [13].

> Thus, this is not a case where it might be said that the parties contemplated that if the defendant did not comply with its contractual obligations and transfer the Agritrade Shares to the plaintiff, the plaintiff might be able simply to go out into the market and buy the same number of shares to fill the gap. It follows that the *prima facie* measure of damages which applies, for example, in sale of goods cases for non-delivery, cannot sensibly be applied in the present circumstances …

Given the reference to how the parties could not be taken to have "contemplated that if the defendant did not comply with its contractual obligations … the plaintiff might be able simply to go out into the market and buy the same number of shares to fill the gap", Eder IJ may have reasoned that this alternative head of claim was not recoverable because this type of loss was too remote, given the matters set out in the judgment.[126]

13.98 Eder IJ did not elaborate why he concluded in this way. It is arguable that Eder IJ might have concluded as he did because the point of the transaction between Open Faith and Judah was for Open Faith to become a shareholder of Judah through "payment" in Agritrade shares. If there was no reason for Judah to acquire further Agritrade shares apart from attaining this goal, it would seem to follow that it would not have been the parties' contemplation that Judah might nevertheless go into the market to acquire an equivalent number of such shares as Open Faith had promised if Judah were to discharge the contract.

13.99 It may be noted that, even if Eder IJ had concluded otherwise on the remoteness point, Judah's success on this alternative head of claim would still face significant challenges. First, as this *type* of loss would only arise if Judah *would* have gone into the market following discharge of its contract with Open Faith to purchase replacement Agritrade shares, Judah bears the burden of proving, on a balance of probabilities, that it *would* have done so.[127]

13.100 Next, even if Judah successfully demonstrated this, nice questions would also have to be addressed as to whether this might have been an appropriate case to depart from the "breach date" rule so as to quantify

126 *Judah Value Activist Fund v Open Faith Investment Ltd* [2021] 5 SLR 114 at [137].

127 See *Sykes v Midland Bank Executor and Trustee Co* [1971] 1 QB 113. For a Singapore example of the proposition that where the claimed-for loss would arise only if the plaintiff would have taken certain hypothetical actions (albeit in the context of a claim in the tort of negligence), see *JSI Shipping (S) Pte Ltd v Teofoongwongcloong* [2007] 4 SLR(R) 460 at [148] and *Ikumene Singapore Pte Ltd v Leong Chee Leng* [1993] 2 SLR(R) 480 at [34]. This rule is discussed in *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Singapore: Academy Publishing, 2nd Ed, 2022) at paras 21.024–21.027.

Judah's loss in light of post-breach events (such as the decline in the market price of Agritrade shares through January 2020), and/or whether it would have been a reasonable mitigatory step for Judah to have gone into the market at some later point in January 2020 to purchase shares to make up for the shortfall caused by Open Faith's breach.[128] So quite apart from the question of remoteness of loss, the path to recovering substantial damages based on this head would seem to be far from straightforward.

13.101 Turning to Judah's principal head of claim, Eder IJ accepted that Judah had proved that Open Faith's breach had caused Maybank to force sell Judah's Agritrade shares.[129] However, Eder IJ dismissed Judah's claim for these forced-sale losses. In his judgment:[130]

> … the present case is not one which involves consideration of whether the loss caused to the plaintiff was the result of some other co-operating cause or intervening act. In my view, the plaintiff has simply failed on the evidence to establish that its loss was caused by the defendant's breach.

Questions pertaining to "other co-operating cause[s] or intervening act[s]" would seem to pertain to issues of *legal* as opposed to factual causation. Unfortunately, Eder IJ did not explain why he thought these issues of legal causation were not relevant to the dispute before him. It might be that Eder IJ took the view that these questions "did not arise" because the *prior* question of *factual* causation had not been established by Judah. If so, this aspect of the court's judgment may be taken to be a warning to prospective plaintiffs as to the onerousness of the burden which is placed on plaintiffs to prove that the defendant's breach had caused the claimed-for loss.

13.102 Given that the contract between Open Faith and Judah required Open Faith to "pay" for the Judah shares, not in money, but *in specie* by transferring Agritrade shares, complex problems of valuation of Judah's "loss" of those shares would arise. Part of this complexity would involve the truism that the market price of these shares on the Hong Kong Stock Exchange post-breach would not necessarily be a good indicator of Judah's loss because Maybank's forced sales would tend to depress the market price.

128 On the "breach-date" rule and mitigation, see *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Singapore: Academy Publishing, 2nd Ed, 2022) at paras 22.002–22.009 and 22.109 *ff*, respectively.

129 See para 13.96(g) above.

130 *Judah Value Activist Fund v Open Faith Investment Ltd* [2021] 5 SLR 114 at [176].

13.103 While the court will still strive to "do the best it can"[131] and not shirk its responsibility to assess and quantify losses even though the task be difficult, as the Court of Appeal observed in *Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd*[132] ("*Robertson Quay*"):[133]

> … a plaintiff cannot simply make a claim for damages without placing before the court ***sufficient evidence of the loss*** it has suffered even if it is other wise entitled in principle to recover damages. On the other hand, where the plaintiff has attempted its level best to prove its loss *and* the evidence is ***cogent***, the court should allow it to recover the damages claimed. [emphasis in original in italics; emphasis added in bold italics]

13.104 Judah's counsel had not produced any witnesses from Maybank and provided no good reason for not doing so.[134] This caused great difficulties so far as proving that the forced sales had caused the losses claimed by Judah. As Eder IJ pointed out:[135]

> One of the uncertainties (which, no doubt, a witness from Maybank might have clarified) is that it is unknown exactly *when* during the 45-minute period between 3.15 pm and 4.00 pm [on 20 January 2020] Maybank force sold the 30 million Agritrade shares, This would seem to be a potentially important part of the jigsaw since it appears from the records that the large drop in share price from HK$0.280 to HK$0.255 occurred between 3.15pm and 3.30pm when some 20,615,000 shares were sold. [emphasis in original]

13.105 Consequently:[136]

> In the present context, the difficulty is that it is unknown which of these shares (*ie*, the plaintiff's shares or the shares belonging to third parties) were sold when – and, in particular, what shares were sold during that crucial 15-minute period in the first 15 minutes of trading on 21 January 2020. The records show that some 53,740,000 Agritrade shares were sold during those 15 minutes of trading. … However, on the evidence, it is impossible to conclude on a balance of probabilities that it was the forced sale of the plaintiff's shares that caused the drop of the share price on 21 January 2020. Again, it is perhaps unfortunate that there was no evidence from a witness from Maybank, which might have been able to clarify the position. However, on this issue the burden of proof falls squarely on the plaintiff.

131 *Biggin & Co v Permantle, Ltd* [1951] 1 KB 422 at 438, cited with approval in *Robertson Quay International Pte Ltd v Steen Consultants Pte Ltd* [2008] 2 SLR(R) 623 at [28].
132 [2008] 2 SLR(R) 623.
133 *Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd* [2008] 2 SLR(R) 623 at [31].
134 *Judah Value Activist Fund v Open Faith Investment Ltd* [2021] 5 SLR 114 at [146].
135 *Judah Value Activist Fund v Open Faith Investment Ltd* [2021] 5 SLR 114 at [174].
136 *Judah Value Activist Fund v Open Faith Investment Ltd* [2021] 5 SLR 114 at [175(a)].

13.106 Given the exhortations in *Robertson Quay*[137] that a plaintiff must provide "sufficient evidence of the loss it has suffered", and for the plaintiff to attempt "its level best to prove its loss" by tendering cogent evidence of causation,[138] as well as Eder IJ's observations on the importance of direct evidence from Maybank's employees, perhaps Judah had not done "its level best", when, without any explanation, it had failed to adduce direct evidence from Maybank (which it could have done). It is thus arguable that the unexplained lack of such evidence may have contributed to Eder IJ's decision (as finder of fact) that Judah had failed to prove factual causation of this head of loss.

137 See para 13.103 above.
138 Reproduced at para 13.103 above.