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# 13. CONTRACT LAW[1]

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13.1 The volume of Singapore case law grows ever more. This year was no exception. With a new "Contract Law" team in place, a slightly different approach has been taken this year to focus on fewer cases, but in greater depth.

## I. Privity and assignment as an 'exception' to privity

### *A. The "procedural" requirement to join the equitable assignor*

13.2 Where *A* and *B* have contracted with each other, only those parties may sue for breach of that contract, and only those parties may be sued for breach of that same contract. If *A* equitably assigns the benefit of that *A*–*B* contract to a third party, *C*, certain consequences follow. First, if the *A*–*B* contract required *B* to pay *A* a fixed sum of money, although *C* as a mere equitable assignee would not be permitted to bring a common law action in debt against B to recover the outstanding sum solely and in his own name, the debt action can proceed if *A* is joined as a party.[2]

1 The views adopted in this chapter are expressed by the authors in their personal academic capacities and do not necessarily reflect the views of the Singapore Management University, or the National University of Singapore.

2 See, *eg*, *Parkway Hospitals Singapore Pte Ltd v Sandar Aung* [2007] 1 SLR(R) 227, at [12]–[13], reversed on appeal to the Court of Appeal on different grounds without addressing this point: *Sandar Aung v Parkway Hospitals Singapore Pte Ltd* [2007] 2 SLR(R) 891.

13.3 This follows the so-called "*Vandepitte* procedure".[3] As was explained in *The State-Owned Company Yugoimport SDPR v Westacre Investments Inc*[4] ("*Yugoimport*"):[5]

> … [T]he *Vandepitte* procedure is a rule of procedure, and not a rule of substance. Its purpose is to serve as a procedural 'short-cut' to avoid the multiplicity of actions. In a normal case where the trustee refuses to sue a third party, a beneficiary under a trust would have to bring an action against the trustee to compel him to begin an action against the third party, or to replace the trustee. The *Vandepitte* procedure allows instead for the conflation of the two actions, such that the beneficiary can bring an action against the third party in his own name, while also joining the trustee as a defendant.

13.4 Though initially developed in trusts cases, the *Vandepitte* procedure also applies to cases of equitable assignment,[6] a point reiterated in *Alternative Advisors Investments Pte Ltd v Asidokona Mining Resources Pte Ltd*[7] ("*Alternative Advisors*"). But what if, following joinder, the assignor is "struck out" for non-compliance with an "unless order"?

13.5 In *Alternative Advisors*, the first claimant, Alternative Advisors Investments Pte Ltd ("AAI"), brought an action in debt as equitable assignees of the benefit of a S$2m loan from the second claimant, Supreme Star Investments Ltd ("SSI"), to the first defendant, Asidokona Mining Resources Pte Ltd ("Asidokona").

13.6 SSI made the assignment to AAI in 2018. The assignment was equitable because no written notice was given to Asidokona before commencement of the action.[8] Although AAI initially commenced

3 Named after *Vandepitte v Preferred Accident Insurance Corp of New York* [1933] AC 70.

4 [2016] 5 SLR 372.

5 *The State-Owned Company Yugoimport SDPR v Westacre Investments Inc* [2016] 5 SLR 372 at [117]. Although typically joined as a co-defendant, it appears that where the assignor does not object to be joined as a party, it may be joined as a co-claimant: *Three Rivers District Council v Bank of England* [1996] 1 QB 292 at 308, *per* Peter Gibson LJ.

6 For English authority, see, *eg*, *Barbados Trust Co Ltd v Bank of Zambia* [2007] EWCA Civ 148; [2007] 1 Lloyd's Rep 495 at [99]. In Singapore, see *Parkway Hospitals Singapore Pte Ltd v Sandar Aung* [2007] 1 SLR(R) 227 and *Motor Insurers' Bureau of Singapore v AM General Insurance Bhd* [2018] 4 SLR 882.

7 [2022] SGHC 41.

8 *Alternative Advisors Investments Pte Ltd v Asidokona Mining Resources Pte Ltd* [2022] SGHC 41 at [66].

proceedings in its sole name against Asidokona, in November 2018, AAI joined SSI as a co-claimant[9] to avoid the "procedural bar".[10]

13.7 On 17 March 2020, the defendants obtained an "unless order": that the claim be struck out unless a discovery order issued on 7 March 2020 was complied with by 7 April 2020. When that order was not complied with, the action of AAI and SSI as co-claimants was struck out.[11]

13.8 On appeal, Choo Han Teck J set aside the "unless order" as against AAI (the first claimant and equitable assignee) but not SSI (the second claimant and equitable assignor).[12] Consequently, "AAI's claim survived".[13]

13.9 This created a conundrum: since AAI was a mere *equitable* assignee of the benefit of the loan which had been made by SSI to Asidokona, did the "unless order", which was only partially set aside, mean that SSI was no longer party to the action? If so, could it continue?

13.10 In *Alternative Advisors*, Hoo Sheau Peng J took the view that although the "unless order" had been set aside as against the first claimant, AAI, that did not mean that the second claimant was no longer party to the action.[14] However, even if the unless order, despite its partial setting aside, rendered SSI no longer party to the action, the learned judge was of the view that such joinder was a mere "procedural" requirement which the court had power to waive in appropriate circumstances.[15]

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9 *Alternative Advisors Investments Pte Ltd v Asidokona Mining Resources Pte Ltd* [2022] SGHC 41 at [66]. Had written notice been given, SSI's equitable assignment to AAI would have "become" a "statutory" or "legal" assignment under s 4(8) of the Civil Law Act 1909 (2020 Rev Ed), as it appears that the assignment had been executed in writing "under the hand" of the assignor, and was "absolute and not by way of charge". In that event, joinder would not have been necessary for the action at law, and AAI as "statutory" or "legal" assignee would have been entitled to proceed as sole claimant.

10 Previously adverted to in *Cooperatieve Centrale Raiffeisen-Boerenleenbank BA, Singapore Branch v Motorola Electronics Pte Ltd* [2010] 3 SLR 48 at [49].

11 *Alternative Advisors Investments Pte Ltd v Asidokona Mining Resources Pte Ltd* [2020] SGHC 125 at [7].

12 *Alternative Advisors Investments Pte Ltd v Asidokona Mining Resources Pte Ltd* [2020] SGHC 125 at [10].

13 *Alternative Advisors Investments Pte Ltd v Asidokona Mining Resources Pte Ltd* [2022] SGHC 41 at [47].

14 *Alternative Advisors Investments Pte Ltd v Asidokona Mining Resources Pte Ltd* [2022] SGHC 41 at [78].

15 *Alternative Advisors Investments Pte Ltd v Asidokona Mining Resources Pte Ltd* [2022] SGHC 41 at [72]–[75].

13.11 Although the requirement for joinder of an equitable assignor to a *common law* action in relation to the chose as had been assigned is *substantive* (since privity of contract is a substantive rule of contract), so far as the requirement for its joinder *in equity* is concerned, *that* is indeed procedural. Consequently, so far as the proceedings before the court in *Alternative Advisors* were viewed as requiring joinder of the assignor (SSI) as a procedural matter, that must have been because the matter was being proceeded with within the court's *equitable* jurisdiction.

13.12 First, as the Court of Appeal explained in *Yugoimport*,[16] although the *Vandepitte* procedure appears to join *parties*, it actually joins *proceedings* – namely, the proceedings *in equity* as between the equitable assignee and the equitable assignor (by which the assignee is seeking specific relief in equity to compel the assignor to carry out its duties to the assignee arising from the assignment), with the proceedings *at common law* as between the equitable assignor (as creditor/obligee) and the debtor/obligor as arises from the common law debt or other legal chose in action.

13.13 Second, cases such as *Performing Right Society Ltd v London Theatre of Varieties Ltd*[17] ("*Performing Right Society*") recognise that an equitable assignee of the benefit of a common law chose in action *has* an *equitable* cause of action in its own right as against the obligor to that common law chose – for example, where equitable specific relief is sought to remedy a threatened or continuing infringement of a common law entitlement – which it may, in principle, pursue in its own name. As Lord Cave explained in that case:[18]

> … [t]hat an equitable owner may commence proceedings alone, and may obtain interim protection in the form of an interlocutory injunction, is not in doubt; but it was always the rule of the Court of Chancery … that, in general, when a [claimant] only has an equitable right in the thing demanded, the person having the legal right to demand it must in due course [before granting any final order] be made a party to the action … If this were not so, a defendant after defeating the claim of an equitable claimant might have to resist like proceedings by the legal owner, or by persons claiming under him as assignees for value without notice of any prior equity, and proceedings might be indefinitely and oppressively multiplied.

13.14 Hence, in *Performing Right Society*, where equitable assignments were effected to the claimant society of copyrights to any musical works to be composed by two of the society's members in the future, the House

16 See para 13.3 above.
17 [1924] AC 1.
18 *Performing Right Society Ltd v London Theatre of Varieties Ltd* [1924] AC 1 at 14.

of Lords accepted that so far as the society was seeking specific relief in equity to permanently enjoin the defendant from breaching its copyright in those musical works, although it would be helpful to join the assignors to bind them to the decision of the court in those equitable proceedings, it was not *necessary* to join them as co-claimants, and such joinder could indeed be waived in appropriate circumstances (though not on the facts of that case).

13.15 Similar points have been made in respect of equitable assignments of a contract debt. As Chitty LJ pointed out:[19]

> [A]n ordinary debt or [legal] chose in action before the [Supreme Court of] Judicature Act [1873] was not assignable so as to pass the right of action at law, but it was assignable so as to pass the right to sue *in equity*. *In his suit in equity* the assignee of a debt, even where the assignment was absolute on the face of it, had to make his assignor, the original creditor, party in order primarily to bind him *and prevent his suing at law*, and also to allow him to dispute the assignment if he thought fit. [emphasis added]

13.16 Third, although the order made by the High Court in *Alternative Advisors* for the defendant to pay the sum of money as had been lent (plus contractually stipulated interest) might seem to be an order of the court acting in its common law jurisdiction by way of the common law action in debt, as Chitty LJ accepted in the extract above, it is possible for a court while acting in its equitable jurisdiction to grant *equitable* specific relief by way of an order compelling performance of such obligations. And one situation where such equitable relief would be granted would be a case where the common law remedy was, for some reason, not available.

13.17 Arguably, this was precisely the case in *Alternative Advisors*, if the effect of the "unless order" against SSI (which was not set aside on appeal) was to bar the *common law* action in debt of the assignor SSI as against the debtor Asidokona.

13.18 Finally, Hoo J accepted that the risk of relitigation of the matter was negligible and concluded that, as a result, this *was* an appropriate case to disregard the non-joinder of SSI.[20]

13.19 *Alternative Advisors* may thus illustrate yet another circumstance when a court might view joinder of an equitable assignor of the benefit of

19 *Durham Brothers v Robertson* [1898] 1 QB 765 at 769–770.

20 *Alternative Advisors Investments Pte Ltd v Asidokona Mining Resources Pte Ltd* [2022] SGHC 41 at [76].

a common law chose in action to be a merely "procedural" requirement *in proceedings within its equitable jurisdiction* which might be waived.[21]

13.20 As the decision of the court in this case shows, where the common law remedy is barred, equitable specific relief may be granted – and, in that context, if the court can also be satisfied that the risk of relitigation owing to the assignor not being bound *at common law* because of its non-joinder to the proceedings *in equity* is negligible, it will permit the proceedings in equity to carry on to judgment, and will grant final and dispositive remedies in equity without such joinder.

### *B. The effect of anti-assignment clauses*

13.21 In *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd*,[22] Lord Browne-Wilkinson had pointed out that anti-assignment clauses can be construed as precluding and invalidating a purported assignment, though other constructions are possible.

13.22 That analysis has been accepted and applied by the High Court in *Total English Learning Global Pte Ltd v Kids Counsel Pte Ltd*[23] and in *Arris Solutions, Inc v Asian Broadcasting Network (M) Sdn Bhd*.[24] Hence, although there has yet to be Court of Appeal authority on this point, it appears that an assignment can be invalidated by non-compliance with an anti-assignment clause (if that be its true construction).

13.23 In *Gravitas International Associates Pte Ltd v Invictus Group Pte Ltd*,[25] a dispute had arisen from consultancy services which a firm, Gravitas Holdings Pte Ltd ("GH"), had contracted to provide to the defendant ("Invictus") pursuant to a consultancy contract ("the Contract") between them, as well as another contract between GH and one of its employees, Virgilli ("the Employment Contract").

13.24 The Contract contained an anti-assignment clause ("Clause 8.3") as follows:[26]

21 If so, it arguably follows the footsteps of *William Brandt's Sons & Co v Dunlop Rubber Co, Ltd* [1905] AC 454, as explained in Chee Ho Tham, "Joinder of Equitable Assignors of Equitable and Legal Choses in Action" [2017] LMCLQ 538.

22 [1994] 1 AC 85.

23 [2014] SGHC 258.

24 [2017] 4 SLR 1.

25 [2022] 4 SLR 1193.

26 *Gravitas International Associates Pte Ltd v Invictus Group Pte Ltd* [2022] 4 SLR 1193 at [11].

> Neither Party may assign any of its rights under this Agreement without the prior consent of the other Party, which shall not be unreasonably withheld; provided. This Agreement shall apply to, be binding in all respects upon, and inure to the benefit of the successors and permitted assigns of the Parties.

13.25 Despite Clause 8.3, on 24 April 2020, GH unilaterally executed a deed which purportedly assigned all its "rights, benefits, interests, claims and titles" under the Contract, and the Employment Contract, to the claimant, Gravitas International Associates Pte Ltd ("Gravitas").[27] No notice of the assignment was given until the defendant received a letter notifying it of the same on 13 August 2020.[28]

13.26 Subsequently, the claimant commenced a contractual claim[29] against the defendant for sums which it claimed were due under the Contract, as well as for damages which GH would have earned but for the defendant's repudiatory breach of the Contract in its own name.[30] The claimant also commenced a tort action against the defendant for damages under the tort of inducement of breach of contract on grounds that the defendant had induced Virgilli to repudiatorily breach his employment contract with GH.[31]

13.27 Both actions were dismissed by the learned judge, Lee Seiu Kin J. Since this chapter is concerned with contract issues and not tort,[32]

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27 The text of relevant portions of this deed are reproduced at *Gravitas International Associates Pte Ltd v Invictus Group Pte Ltd* [2022] 4 SLR 1193 at [9]. Clearly, the assignment was absolute and not by way of charge. Further, being by way of deed, it was an assignment in writing.

28 *Gravitas International Associates Pte Ltd v Invictus Group Pte Ltd* [2022] 4 SLR 1193 at [33].

29 *Gravitas International Associates Pte Ltd v Invictus Group Pte Ltd* [2022] 4 SLR 1193 at [3].

30 Since there had been a valid equitable assignment of entitlements arising from the Contract as at 24 April 2020, absolutely and in writing (see n 27 above), it would have become a *statutory* assignment in accordance with s 4(8) of the Civil Law Act 1909 (2020 Rev Ed) by 13 August 2020 when written notice was received by the defendant via a letter from counsel for the claimant: *Gravitas International Associates Pte Ltd v Invictus Group Pte Ltd* [2022] 4 SLR 1193 at [33]. Consequently, as statutory assignee, unlike *Alternative Advisors Investments Pte Ltd v Asidokona Mining Resources Pte Ltd* [2022] SGHC 41, joinder of the assignor (GH) would not be required.

31 *Gravitas International Associates Pte Ltd v Invictus Group Pte Ltd* [2022] 4 SLR 1193 at [4].

32 In brief, the claimant's tort claim failed because the assignment of this aspect of GH's entitlements was held to be invalid as savouring of champerty. Having observed (*Gravitas International Associates Pte Ltd v Invictus Group Pte Ltd* [2022] 4 SLR 1193 at [50]) that "the right to receive services of an employee under a contract of [employment] is a personal right which cannot validly be assigned without the employee's consent", the learned judge seems to have reasoned that the claimant,

*(cont'd on the next page)*

the following will concentrate on the learned judge's dismissal of the claimant's contract claim.

13.28 In this connection, *inter alia*, the defendant had argued that the claimant had no *locus standi* to bring the action since non-compliance with Clause 8.3 meant that no valid assignment had been effected.

13.29 Lee J accepted this submission. He pointed out that the text of the anti-assignment clause had to be construed to ascertain what the parties might objectively have intended by it,[33] a process which involved two questions:[34]

> First, whether the terms of the [anti]-assignment[35] clause suggest that parties intended for the very alienability of the right to be restricted. Second, still referring to the terms of the clause, what type of rights does it appear to capture (*ie*, rights to performance, rights to present or future fruits, or combinations thereof).

13.30 Given this, the learned judge focused on the phrase "Neither Party may assign" in Clause 8.3, which he took to mean "The Parties nay not assign".[36] That being so, the learned judge construed "may not" to indicate that the parties had intended "to affect the very alienability of the chose in action in question. The requirement of consent thus takes effect as a condition-precedent to a valid assignment".[37]

13.31 The learned judge also opined that, had the clause used "shall" instead of "may", its construction might well be different:[38]

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notwithstanding its status as assignee of GH's tortious claim against the defendant for inducement of breach of the Employment Contract, did not have any performance interest in the due performance of that contract by the said employee without more. If so, it would have no "genuine commercial interest" in suing the defendant for having induced a breach of that contract. Consequently, the assignment of the bare right of action to sue in this tort for unliquidated damages unaccompanied by any genuine commercial interest was ineffective: *Gravitas International Associates Pte Ltd v Invictus Group Pte Ltd* [2022] 4 SLR 1193 at [51]–[54] and [97].

33 *Gravitas International Associates Pte Ltd v Invictus Group Pte Ltd* [2022] 4 SLR 1193 at [22].

34 *Gravitas International Associates Pte Ltd v Invictus Group Pte Ltd* [2022] 4 SLR 1193 at [23].

35 Throughout his judgment, Lee Seiu Kin J referred to Clause 8.3 as a "non-assignment" clause, but nothing turns on the difference in terminology.

36 *Gravitas International Associates Pte Ltd v Invictus Group Pte Ltd* [2022] 4 SLR 1193 at [26].

37 *Gravitas International Associates Pte Ltd v Invictus Group Pte Ltd* [2022] 4 SLR 1193 at [27].

38 *Gravitas International Associates Pte Ltd v Invictus Group Pte Ltd* [2022] 4 SLR 1193 at [28].

> When we say one 'shall' do something, that is an obligation to act …; conversely, when one 'shall *not*' do something, that is an obligation to abstain. Hence, if a person acts in contravention of a clause expressed in those terms, it would connote a breach of contract. However, when we say one 'may' do something, that permits or empowers that individual to perform the act but does not oblige him to do so. By the phrase 'may not', we forbid the doing of the act, or deprive him of any power to perform that act. This has connotations of invalidity of the act rather than the breach of an obligation. [emphasis in original]

13.32 Turning to the scope of the assignment, the learned judge accepted that Clause 8.3 constrained the assignment of "*all* choses in action arising from the Contract" [emphasis in original];[39] and nothing in the text of the contract suggested that the parties intended to distinguish between the rights to performance of the Contract and the rights to *fruits* of the Contract (such as the contractual *causes of action* arising from breach of the Contract). Hence, the assignment effected by the deed of GH's entitlements under the Contract was caught by Clause 8.3 such that failure to obtain the defendant's prior consent rendered the assignment ineffective.[40]

13.33 Lee J then found that prior consent had not been obtained since no request for consent had even been made prior to the deed of 24 April 2020. And although requests for consent were made after that date, no subsequent deeds of assignment were executed.[41] But what of the qualification in Clause 8.3 that consent not be unreasonably withheld?

13.34 In *Hendry v Chartsearch*,[42] the English Court of Appeal considered a similar anti-assignment clause. In *dicta*, it touched on the moot question: Would the failure to request for consent be fatal if, had it been sought, there would have been no reasonable basis to withhold it?

13.35 Lee J observed that Millett and Hendry LJJ thought that the failure to request for consent would still be fatal, although Evans LJ's judgment was more equivocal.[43] However, Lee J ultimately preferred the approach of Millett and Hendry LJJ.[44] Consequently, he concluded that

39 *Gravitas International Associates Pte Ltd v Invictus Group Pte Ltd* [2022] 4 SLR 1193 at [31].

40 *Gravitas International Associates Pte Ltd v Invictus Group Pte Ltd* [2022] 4 SLR 1193 at [32].

41 *Gravitas International Associates Pte Ltd v Invictus Group Pte Ltd* [2022] 4 SLR 1193 at [35].

42 [1998] CLC 1382.

43 *Gravitas International Associates Pte Ltd v Invictus Group Pte Ltd* [2022] 4 SLR 1193 at [38]–[41].

44 For reasons set out at *Gravitas International Associates Pte Ltd v Invictus Group Pte Ltd* [2022] 4 SLR 1193 at [42]–[45].

the failure to request the defendant's consent was fatal, notwithstanding that Clause 8.3 had provided that such consent was not to be unreasonably withheld, even absent any reasonable grounds to withhold consent had it been sought.[45]

13.36 Finally, Lee J also addressed the proposition that Clause 8.3 "survived" the termination of the Contract, that Contract having come to an end following acceptance of the defendant's repudiatory breach. The point arose because, whereas the Contract made express provisions for the "survival" of certain clauses, no mention was made of Clause 8.3.[46] However, this submission was rejected by the learned judge, reasoning that, "as it is the inherent proprietary characteristics of the chose in action which restricts transferability, it is not relevant that the Contract has ended or that the non-assignment clause 'has not survived'".[47]

## II. Implication of terms in law

13.37 Contract terms may be implied in fact or in law, with each mode of implication having different requirements before a term may be successfully implied.

13.38 Recognition of a new category of implied term in law is generally slow. Caution is understandable because once a new class is recognised, unless and until reversed (whether judicially or by statute), all contracts within that class will become subject to such implied term in law. By contrast, where a term has been successfully implied in fact in one case, because such implication is dependent on the facts of the case, its broader impact is more limited.

13.39 In 2022, a few cases were decided which illustrate the cautious approach to implication of terms in law. However, such diffidence should not be overstated as there *are* certain contexts in which such implication is more readily countenanced.

45 *Gravitas International Associates Pte Ltd v Invictus Group Pte Ltd* [2022] 4 SLR 1193 at [46].

46 *Gravitas International Associates Pte Ltd v Invictus Group Pte Ltd* [2022] 4 SLR 1193 at [47].

47 *Gravitas International Associates Pte Ltd v Invictus Group Pte Ltd* [2022] 4 SLR 1193 at [48].

### *A. Implied term to perform one's duties with reasonable care*

13.40 For example, in *Razer (Asia-Pacific) v Capgemini Singapore Pte Ltd*,[48] the General Division of the High Court ("High Court (General Division)") accepted that, in a contract for services involving skill or expertise, the service provider is indeed subject to a duty to provide those services with reasonable care by reason of an implied term in law "unless such implication runs contrary to express words of the agreement".[49]

13.41 In this case, the learned judge cited[50] with approval Viscount Simonds LJ's opinion in *Lister v Romford Ice and Cold Storage Co Ltd*[51] that:[52]

> … [t]he proposition of law stated by Willes J in *Harmer v Cornelius*[53] has never been questioned: 'When a skilled labourer,' he said, 'artizan [*sic*], or artist is employed, there is on his part an implied warranty that he is of skill reasonably competent to the task he undertakes …. Thus, if an apothecary, a watch-maker, or an attorney be employed for reward, they each impliedly undertake to possess and exercise reasonable skill in their several arts. … An express promise or express representation in the particular case is not necessary.' …

13.42 In the learned judge's opinion, since this reasoning applied equally to the case at hand as the contract before the court involved the enlistment of the services of a party with a specific skill set, and whose technical expertise had been relied upon, the service provider was indeed "under an implied contractual duty to exercise reasonable care and skill" in providing those services, such implication arising in law.[54]

### *B. Implied term imposing a duty of loyalty in a contract of service*

13.43 That said, a few other cases handed down in 2022 illustrate the difficulties with implication of terms in law. One of these is *Commodities Intelligence Centre Pte Ltd v Mako International Trd Pte Ltd*[55] ("*Mako International*").

13.44 In *Ng Giap Hon v Westcomb Securities Pte Ltd*[56] ("*Ng Giap Hon*"), the Court of Appeal rejected the proposition that a term imposing a duty

48 [2022] SGHC 310.
49 *Razer (Asia-Pacific) v Capgemini Singapore Pte Ltd* [2022] SGHC 310 at [90].
50 *Razer (Asia-Pacific) v Capgemini Singapore Pte Ltd* [2022] SGHC 310 at [92].
51 [1957] 1 AC 555.
52 *Lister v Romford Ice and Cold Storage Co Ltd* [1957] 1 AC 555 at 572–573.
53 (1858) 5 CBNS 236 at 246.
54 *Razer (Asia-Pacific) v Capgemini Singapore Pte Ltd* [2022] SGHC 310 at [93].
55 [2022] 5 SLR 837.
56 [2009] 3 SLR(R) 518.

of good faith might be implied in law into agency agreements (that is, a contract whereby a principal appoints another party to be his agent with authority to bind the principal in certain contractual undertakings).[57]

13.45 In *Mako International*, while recognising that the duty of loyalty and the duty of good faith are distinct, the High Court (General Division) accepted that the reasoning in *Ng Giap Hon* pertaining to the duty of good faith was applicable to both types of duty. Consequently, the High Court (General Division) rejected the proposition that a duty of loyalty might arise via an implied term in law – if it was to be implied at all, it would have to be implied in fact.[58]

### *C. Implied term of mutual trust and confidence in an employment contract*

13.46 A second example of the cautious approach to implication of terms in law can be found in *Dong Wei v Shell Eastern Trading (Pte) Ltd*.[59] This case concerned a dispute over the manner whereby the first respondent ("Shell Eastern") terminated the employment of the appellant, Dong Wei.

13.47 The appellant was a Shell Eastern freight trader who was suspected of attempting to market a ship to Vitol Asia Pte Ltd ("Vitol") directly, in breach of the usual market practice. Dong Wei's actions were reported to Dong Wei's line manager, Lim (the second respondent), who initiated steps by senior management to investigate the matter.

13.48 The appellant was interviewed as part of the investigation on 23 October 2017 and suspended with pay. Although the appellant's letter of suspension stated that he would be informed of the investigation outcome, he was not. Indeed, after the investigation ended on 21 November 2017, the appellant's suspension continued while Shell Eastern considered whether to terminate his employment despite the inconclusive results of the investigation which ended on 21 November 2017 without positive evidence of wrongdoing or any reasonable explanation for the calls to Vitol.

13.49 Meanwhile, on 29 November 2017, an industry journal, S&P Global Platts ("Platts"), asked Shell Eastern to comment on rumours that the appellant was being investigated for corruption. Shell Eastern did not

57 *Ng Giap Hon v Westcomb Securities Pte Ltd* [2009] 3 SLR(R) 518 at [60].
58 *Commodities Intelligence Centre Pte Ltd v Mako International Trd Pte Ltd* [2022] 5 SLR 837 at [76].
59 [2022] 1 SLR 1318.

respond to Platts's specific query. This led to a Platts article ("the Platts article") which stated that "unethical dealings" and "corruption" in Shell Eastern's tanker chartering teams were under investigation, and that at least one employee had been placed on mandatory leave. Although the appellant was not named in the Platts article, as a matter of fact, he was the only such employee at the time.

13.50 On 18 January 2018, Shell Eastern terminated the appellant's employment and paid him three months' salary in lieu of notice as provided in his employment contract. The appellant alleged that as prospective employers within the shipping industry took the Platts Article to relate to him, it was difficult for him to be re-employed within the industry unless the allegations in the article were cleared. Consequently, the appellant sued Shell Eastern, *inter alia*, contending that the term to maintain mutual trust and confidence had been implied in law into his employment contract with Shell Eastern, and it had been breached owing to Shell Eastern's (a) misuse of its power to suspend him and keep him on suspension; (b) mismanagement of the investigation; (c) failure to formally disclose the outcome of the investigation in writing; and (d) arbitrary, capricious and/or bad faith termination of his employment.[60]

13.51 For various reasons which need not detain us, the Appellate Division of the High Court ("High Court (Appellate Division)") agreed with the decision below to dismiss the appellant's claims for breach of contract.[61] But what is of interest, for present purposes, are the court's observations as to the implied term in law of trust and confidence which the appellant purported to rely on as the foundation of his claim for breach of contract.

13.52 In a postscript, the High Court (Appellate Division) noted[62] that, although the court below had asserted[63] that the implied term of mutual trust and confidence had been "accepted" into Singapore law,[64] the only

60 As summarised in *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 at [15].

61 The High Court (Appellate Division)'s reasons for dismissing the appellant's action on the basis that the acts which were in purported breach of the implied duty are set out in *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 at [36]–[38] and [42]–[43].

62 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 at [70]–[71].

63 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2021] SGHC 123 at [40]–[43].

64 Relying on cases such as *Wee Kim San Lawrence Bernard v Robinson & Co (Singapore) Pte Ltd* [2014] 4 SLR 357; *Cheah Peng Hock v Luzhou Bio-Chem Technology Ltd* [2013] 2 SLR 577; *Wong Leong Wei Edward v Acclaim Insurance Brokers Pte Ltd* [2010] SGHC 352; *Brader Daniel John v Commerzbank AG* [2014] 2 SLR 81; *Tullett Prebon (Singapore) Ltd v Chua Leong Chuan Simon* [2005] 4 SLR(R) 344; *Leong*

*(cont'd on the next page)*

Court of Appeal authority among these cases, *Wee Kim San Lawrence Bernard v Robinson & Co (Singapore) Pte Ltd*,[65] did not go so far quite as far as the court below had assumed.[66]

13.53 Further, the High Court (Appellate Division) noted that certain observations of the Court of Appeal in *The One Suites Pte Ltd v Pacific Motor Credit (Pte) Ltd*[67] ("*The One Suites*") also tended to show that the status of the implied term in law of trust and confidence as a matter of Singapore law remains open for decision in a future case.[68]

13.54 Finally, the High Court (Appellate Division) pointed out that the implied term of mutual trust and confidence, as Lord Nicholls explained in *Malik v Bank of Credit and Commerce International SA*[69] ("*Malik*"), obliged the parties to an employment contract "not to engage in conduct likely to undermine the trust and confidence required if the employment relationship [was] to continue in the manner the employment contract implicitly envisage[d]".[70] Hence:[71]

> … [o]n this view, the implied term [of trust and confidence] operates to secure the *continued functioning* of the employment relationship, and though the term entails the potential imposition of a wide range of specific obligations, and cannot extend past the subsistence of the employment relationship. [emphasis in original]

13.55 Given the above, the question whether the term of trust and confidence which had been adverted to by Lord Nicholls in *Malik* would also be implied in law to employment contracts governed by Singapore law may well still await a definitive statement from the Court of Appeal.[72] Further, it may be that, even if such term were implied in law, its operation

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*Hin Chuee v Citra Group Pte Ltd* [2015] 2 SLR 603; and *Arul Chandran v Gartshore* [2000] 1 SLR(R) 436.

65 [2014] 4 SLR 357.

66 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 at [73]–[74].

67 [2015] 3 SLR 695 at [44].

68 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 at [81], where the High Court (Appellate Division) also noted that scepticism as to whether *Wee Kim San Lawrence Bernard v Robinson & Co (Singapore) Pte Ltd* [2014] 4 SLR 357 had unequivocally held that, as a matter of Singapore law, such a term would indeed be implied in law could also be found in the academic literature: for instance, the views set out in Ravi Chandran, "Fate of Trust and Confidence in Employment Contracts" (2015) 27 SAcLJ 31.

69 [1980] AC 20.

70 *Malik v Bank of Credit and Commerce International SA* [1980] AC 20 at 35.

71 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 at [77].

72 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 at [82].

might be limited to actions related to the continued operation of the employment contract of which it is part.[73]

### *D. Implied term of co-operation*

13.56 A third illustration of the conservative approach to implication of terms in law – this time, the implied term of co-operation – may be found in *Ng Koon Yee Mickey v Mah Sau Cheong*[74] ("*Mickey Ng*").

13.57 The dispute in this case involved a written sale and purchase agreement ("SPA") between the appellant, Ng, and the respondent, Mah, by which Mah agreed to purchase Ng's shareholding in Enersave International (HK) Ltd ("Enersave International") for RMB13m, payable in three tranches.

13.58 Two of the tranches were paid, but the final one of RMB8m was payable on the condition that Xianda Holdings (HK) Ltd (a subsidiary of Enersave International), and Xianda (Tianjin Seawater Resources Development Co) Ltd (a subsidiary of Xianda Holdings (HK) Ltd), on the one hand, and the Committee of the Tianjin Economic-Technological Development Area (Nangang Industrial Zone), on the other, execute a so-called "operational agreement" ("the Operational Agreement") in writing on or before 24 October 2014. If it was not, Mah would have the power to terminate the SPA, whereupon the first two payments would be converted to loans to be repaid by Ng – by mutual agreement, the deadline of 24 October 2014 was subsequently postponed to 24 October 2016 ("the Deadline").

13.59 Subsequently, Mah informed Ng by a letter sent on 21 October 2016 ("the 21 October Letter") that if the Operational Agreement was not executed by the Deadline, the SPA would be terminated. As events turned out, the Operational Agreement was only executed on 3 November 2016.

13.60 At first instance, Mah convinced the court that he had effectively exercised his right to terminate the SPA via the 21 October letter, even though it was sent before the Deadline, because Art 4.5 of the SPA stipulated that any notice "[if] mailed shall be deemed to have been given or made on the third business day following the day on which it was mailed". Applying this, the court below deemed the 21 October Letter to have reached Ng on 26 October 2016, two days after the Deadline.

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73 Given the High Court (Appellate Division)'s musings summarised at para 13.54 above.

74 [2022] 2 SLR 1296.

13.61 On appeal, the High Court (Appellate Division) in *Mickey Ng* held that it had not been established that the 21 October Letter had been mailed, and so the court below had wrongly relied on Art 4.5 in coming to its conclusion.[75] But even if it had been proved that the 21 October Letter had been mailed, Art 4.5 would still not assist Mah's case.

13.62 First, the High Court (Appellate Division) pointed out that:[76]

> … [w]hether a contract would be automatically terminated upon the occurrence or non-occurrence of a specified event is dependent on the construction of the contract.

13.63 However:[77]

> … [n]othing in the wording of the SPA suggested that the agreement would be terminated automatically should the Deadline not be met.

13.64 Next,[78] drawing on *Afovos Shipping Co SA v Pagnan*,[79] *Wardley Ltd v Datin Chong Moo Lan*[80] and *Maredelanto Compania Naviera SA v Bergbau-Handel GmbH, The Mihalis Angelos*,[81] the High Court (Appellate Division) identified two key points:[82]

> First, in determining when a right to exercise an option arises, the court's primary concern is with the construction of the contractual clauses in question. Based on the wording of the clauses in each of the above cases, such a right could only be exercised after the occurrence or non-occurrence of certain specific events. Any notice that was given prior to when such a right had accrued was deemed to be premature and invalid. … Second, in construing the relevant clauses, the courts took into account the context of each contract.

13.65 Applying these points, the High Court (Appellate Division) held that Mah's termination of the SPA by means of the 21 October letter was ineffective because it had been issued prematurely, before the Deadline: at best, it was notice of an invalid termination.[83]

13.66 The above would have disposed of the appeal. But the High Court (Appellate Division) also responded to two further lines of argument, namely the so-called "prevention principle" (or the principle

75 *Ng Koon Yee Mickey v Mah Sau Cheong* [2022] 2 SLR 1296 at [49]–[50].
76 *Ng Koon Yee Mickey v Mah Sau Cheong* [2022] 2 SLR 1296 at [34].
77 *Ng Koon Yee Mickey v Mah Sau Cheong* [2022] 2 SLR 1296 at [35].
78 *Ng Koon Yee Mickey v Mah Sau Cheong* [2022] 2 SLR 1296 at [36]–[43].
79 [1983] 1 WLR 195 at 199.
80 [1993] 1 SLR(R) 469 at [14].
81 [1971] 1 QB 164 at 208.
82 *Ng Koon Yee Mickey v Mah Sau Cheong* [2022] 2 SLR 1296 at [44].
83 *Ng Koon Yee Mickey v Mah Sau Cheong* [2022] 2 SLR 1296 at [45].

that a contract party may not take advantage of its own breach) and the implication of a duty to co-operate.

13.67 While recognising that there was some uncertainty over the latter point,[84] the High Court (Appellate Division) took the position that this term is to be implied in fact, and not at law. First, the court took the position that "implication of a term in law 'would entail implying the same term in the future for all contracts of the same type'".[85] Second, it was of the view that "terms implied in law are implied as a 'necessary incident of a definable category of contractual relationship'".[86] Third, it recognised the note of caution by the Court of Appeal in *Ng Giap Hon* to imply terms in law circumspectly.[87] Fourth, it also recognised that the Court of Appeal had already rejected the notion that the duty of good faith might be implied in law in *The One Suites*.[88]

13.68 Given all this, the High Court (Appellate Division) set out the following propositions:[89]

> (a) **Proposition 1**: "Given the myriad factual situations in which a contract could be said to have a provision requiring both parties to 'concur in doing' something to render the contractual effectual, we do not think there is 'definable category of contractual relationship' in which such a term can be implied as a 'necessary incident'."
>
> (b) **Proposition 2**: "Further, whether a duty to co-operate should be implied is dependent on the obligations imposed on each party in each particular contract, the intentions of the parties at the point of entering into the contract, and whether such a duty had to be implied to give the contract efficacy."

13.69 Thus, the High Court (Appellate Division) concluded that if a term setting out a duty to co-operate was to be implied, it would have to be implied in fact.[90] If so, the steps set out in *Sembcorp Marine Ltd v PPL*

84 *Ng Koon Yee Mickey v Mah Sau Cheong* [2022] 2 SLR 1296 at [87].
85 *Ng Koon Yee Mickey v Mah Sau Cheong* [2022] 2 SLR 1296 at [88], adopting the Court of Appeal's observations in *Ng Giap Hon v Westcomb Securities Pte Ltd* [2009] 3 SLR(R) 518 at [46].
86 *Ng Koon Yee Mickey v Mah Sau Cheong* [2022] 2 SLR 1296 at [89], adopting Lord Bridge's analysis in *Scally v Southern Health and Social Services Board* [1992] 1 AC 294 at 307.
87 *Ng Giap Hon v Westcomb Securities Pte Ltd* [2009] 3 SLR(R) 518 at [88].
88 See para 13.53 above.
89 *Ng Koon Yee Mickey v Mah Sau Cheong* [2022] 2 SLR 1296 at [91].
90 *Ng Koon Yee Mickey v Mah Sau Cheong* [2022] 2 SLR 1296 at [91].

*Holdings Pte Ltd*[91] ("*Sembcorp Marine*") for such implication would have to followed.[92]

13.70 With respect, although the High Court (Appellate Division)'s judgment could be read as suggesting that a term imposing a duty to co-operate may never be implied at law, that may go too far. To begin with, Proposition 2 (as reproduced above) is difficult. It is not completely clear how the three requirements set out in Proposition 2 are distinguishable from the steps set out in *Sembcorp Marine* before a term may be implied in fact. If they amount to the same thing, then asserting that such a term may *only* be implied if such requirements are satisfied would be tantamount to asserting that no implication in law can arise because the requirements for implication *in fact* are not met. But that seems odd since it is accepted that the requirements for implication in law and in fact are distinct.

13.71 Next, although the Court of Appeal authorities state that, if a term is successfully implied in law in relation to a class of contract, it will thereafter be implied into all contracts falling within that class, those authorities do not stipulate how broadly (or narrowly) such a class might be defined. Thus, the question whether the class of *contracts* is a possible class into which certain terms might be implied in law would seem to still be an open one, at least in principle.

13.72 Finally, the *ratio* of the Court of Appeal's judgment in *The One Suites* lay in its reversal of the decision below that a duty to make reasonable endeavours to obtain the consent of a third party to the sale in question *had* arisen due to an implied term *in fact*.[93] Although the Court of Appeal observed that "there is no implied duty of good faith based on a 'term implied in *law*'" [emphasis in original],[94] citing *Ng Giap Hon*,[95] these observations were *dicta*.[96] Consequently, the High Court (Appellate Division) in *Mickey Ng* was relying on *obiter dicta* statements of the Court of Appeal in *The One Suites*. Moreover, it was *dicta* relating to the *distinct* duty of good faith and not the duty of co-operation.

91 [2013] 4 SLR 193 at [101].
92 *Ng Koon Yee Mickey v Mah Sau Cheong* [2022] 2 SLR 1296 at [105].
93 *The One Suites Pte Ltd v Pacific Motor Credit (Pte) Ltd* [2015] 3 SLR 695 at [23]–[31].
94 *The One Suites Pte Ltd v Pacific Motor Credit (Pte) Ltd* [2015] 3 SLR 695 at [44].
95 Presumably, the Court of Appeal was referring to *Ng Giap Hon v Westcomb Securities Pte Ltd* [2009] 3 SLR(R) 518 at [60].
96 Indeed, the Court of Appeal's words in *The One Suites Pte Ltd v Pacific Motor Credit (Pte) Ltd* [2015] 3 SLR 695 at the beginning of [44] tell us as much.

## III. Implication of the duty to co-operate *in fact*

13.73 Be that as it may, the High Court (Appellate Division) in *Mickey Ng*[97] ultimately held that, because of an implied term *in fact*, the appellant Mah *was* subject to a duty to co-operate with Ng, to wit, by not delaying the execution of the Operational Agreement beyond the Deadline. However, the way in which the court came to this conclusion is interesting.

13.74 No term may be implied in fact into a contract in contradiction to its express terms: that is, there must be a "gap" in the express terms for the implied term in fact to fill.[98] However, following *Sembcorp Marine*,[99] before a term may be implied in fact, the court must first "ascertain *how* the gap in the contract arises. Implication will be considered only if the court discerns that the gap arose *because* the parties did not contemplate the gap" [emphasis added].[100]

13.75 Significantly, as the Court of Appeal emphasised that the "true gap" would only arise if "the *parties* did not contemplate the issue at all" [emphasis added],[101] it would follow that no "true gap" will arise if the court is unable to hold that *none* of the parties contemplated the issue to which the proposed implied term pertained as at the time of contract formation.[102]

13.76 Given the above, in *Sembcorp Marine* itself, the Court of Appeal ruled, in relation to the first stage of determining if there was indeed a "true gap" (which would open the door to implying a term in fact whereby certain express terms were to cease to apply once either of the contracting parties ceased to hold 50% of the share capital of a particular company), that although there was a term in the contract in question ("cl 26.1") which provided that the parties might amend the terms of that contract:[103]

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

98 See, *eg*, *Socimer International Bank Ltd v Standard Bank London Ltd* [2008] EWCA Civ 116; [2008] 1 Lloyd's Rep 558 at [105], adopting the opinion of the *Privy Council in BP Refinery (Westernport) Pty Ltd v The President, Councillors and Ratepayers of Shire of Hastings* (1978) 52 ALJR 20 at 26.

99 See para 13.69 above.

100 *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [101(a)]. See also [94].

101 *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [94].

102 See also *CAA Technologies Pte Ltd v Newcon Builders Pte Ltd* [2017] 2 SLR 940 at [75]–[77], addressing the question whether a "true gap" might arise in a contract where only one contract party had contemplated the issue to be addressed by the proposed implied term.

103 *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [118].

> … [that did] not mean that the parties had considered particular contingencies [such as changes in shareholding] and then agreed that if those contingencies materialised, their only recourse would be to amend the [contract] under cl 26.1. *In fact, there was nothing to suggest that the parties had even addressed their mind to this issue*. [emphasis added]

13.77 Thus,[104] there are two steps to establishing the "true gap": first, establishing that the express terms in the contract in question do not address the issue to be addressed by the proposed implied term; and second, considering whether the evidence before the court[105] indicates that the contracting parties had not considered the issue in question.[106]

13.78 Turning back to *Mickey Ng*,[107] the High Court (Appellate Division) took the view that it was permissible for a term to be implied in fact whereby Ng and Mah were subject to a duty to co-operate with each other by ensuring that the Operational Agreement was to be duly executed before the Deadline. But before it could go on to determine if such an implied term was necessary for the due functioning of the contract between them such that had they been asked by an officious bystander that if such a term ought also be a part of their contract they would both have replied, "but of course", the court had to conclude that a "true gap" was present, that is, the absence of any express term relating to such duty to co-operate had arisen *because* neither party had contemplated the "issue". And yet, the court reached this conclusion whilst acknowledging that both Ng and Mah had *assumed* that the Operational Agreement would be executed.

13.79 Crucially, the High Court (Appellate Division) concluded that the parties had, prior to contract formation, assumed that they had in common the goal of getting the Operational Agreement executed in good time,[108] and that, as a consequence, there was no need to make express provision to ensure that this be done.[109]

13.80 This aspect of the reasoning of the High Court (Appellate Division) is potentially confusing *if* the proposed implied term of a duty

104 See also *ACTAtek, Inc v Tembusu Growth Fund Ltd* [2016] 5 SLR 335 at [88]; *Global Switch (Property) Singapore Pte Ltd v Arup Singapore Pte Ltd* [2019] SGHC 122 at [130]; and *Cheong Chee Hwa v China Star Food Group Ltd* [2019] SGHC 86 at [90].

105 Which would include the express provisions in the contract in question: see, *eg*, *R Manokaran v Chuah Ah Leng* [2022] SGHC 39 at [222].

106 For other examples illustrating the two-step approach, see *Global Switch (Property) Singapore Pte Ltd v Arup Singapore Pte Ltd* [2019] SGHC 122 at [130] and *Cheong Chee Hwa v China Star Food Group Ltd* [2019] SGHC 86 at [90].

107 See para 13.86 above.

108 *Ng Koon Yee Mickey v Mah Sau Cheong* [2022] 2 SLR 1296 at [106].

109 *Ng Koon Yee Mickey v Mah Sau Cheong* [2022] 2 SLR 1296 at [66].

of co-operation addressed the "issue" of co-operation. Were this the case, the court's conclusion that both Mah and Ng had, prior to contract formation, contemplated that co-operation as to the due execution of the Operational Agreement before the Deadline would be in their own self-interest would seem to contradict its conclusion that there was a "true gap" *because* the parties had not conceived of *that* issue.

13.81 This suggests that the "issue" which the High Court (Appellate Division) had in mind was more subtle: perhaps the "issue" addressed by the implied term to co-operate was not whether there would be co-operation, but that each party (and, in particular, Mah) ought to be under a legally binding *duty* to co-operate. Since both parties had assumed that co-operation was a given, and having assumed that co-operation would be forthcoming *without* the need for legal compulsion, Mah and Ng might well have failed to conceive that legal compulsion might be necessary if the circumstances were to change, post-contract formation. So framed, there *would* be a "true gap".

13.82 This case shows that careful characterisation of the "issue" to be addressed by the proposed implied term is needed. With care, it then becomes easier for the party seeking to imply the term in question to identify the relevant *evidence* to satisfy the court that none of the parties had conceived of the issue in question in the lead-up to contract formation.

13.83 On the supposition that there was indeed a "true gap", the High Court (Appellate Division) went on to conclude that it was "necessary in the business or commercial sense to imply a term to co-operate to give the SPA efficacy".[110] Further, it took the position that the scope of this duty entailed "a duty [on Mah] to make reasonable efforts to achieve signing by the Deadline, and certainly not to hinder or prevent the signing of the Operational Agreement".[111] Hence, it reasoned that Mah had breached this duty given as it was proved that he had influenced the timing of the execution of the Operational Agreement.[112]

## IV. Breach of the implied duty to co-operate and the "prevention principle"

13.84 Given the above, the High Court (Appellate Division) proceeded in *Mickey Ng* to deal with Ng's contention that Mah be barred from "taking advantage of his own wrong" by terminating the SPA

110 *Ng Koon Yee Mickey v Mah Sau Cheong* [2022] 2 SLR 1296 at [107].
111 *Ng Koon Yee Mickey v Mah Sau Cheong* [2022] 2 SLR 1296 at [111].
112 *Ng Koon Yee Mickey v Mah Sau Cheong* [2022] 2 SLR 1296 at [119]–[133].

despite having breached the contract by delaying the execution of the Operational Agreement.

13.85 The High Court (Appellate Division) recognised that the "prevention principle" (as it is often termed) operates as a matter of common law and is not limited to building and construction contracts where it arguably first gained prominence.[113]

13.86 Agreeing with the English Court of Appeal in *BDW Trading Ltd v JM Rowe (Investments Ltd)*,[114] the High Court (Appellate Division) also concluded that this common law principle can be excluded by express contract terms indicating that the parties intended the same.[115] However, the High Court (Appellate Division) concluded that there were no express provisions in the SPA which precluded application of this principle.[116]

13.87 As a result, having found that he had breached his (implied) duty to co-operate in that "Mah's conduct had made it impossible for the Operational Agreement to have been signed by the Deadline",[117] the High Court (Appellate Division) concluded that, "[b]y the operation of the prevention principle, Mah was thus precluded from relying on the non-fulfilment of that condition under Art 4.7 of the SPA to terminate the agreement".[118] That disposed of the point. But the court went further.

13.88 Having taken that counsel had only argued on the basis of the prevention principle which had been set out in *Evergreat Construction Co Pte Ltd v Presscrete Engineering Pte Ltd*[119] ("*Evergreat*") (notwithstanding counsel's citation of *Chua Tian Chu v Chin Bay Ching*[120] ("*Chua Tian*

113 *Ng Koon Yee Mickey v Mah Sau Cheong* [2022] 2 SLR 1296 at [80].
114 [2011] EWCA Civ 548 at [31].
115 *Ng Koon Yee Mickey v Mah Sau Cheong* [2022] 2 SLR 1296 at [81]–[82].
116 *Ng Koon Yee Mickey v Mah Sau Cheong* [2022] 2 SLR 1296 at [84].
117 *Ng Koon Yee Mickey v Mah Sau Cheong* [2022] 2 SLR 1296 at [132].
118 *Ng Koon Yee Mickey v Mah Sau Cheong* [2022] 2 SLR 1296 at [136]. The High Court (Appellate Division) had acknowledged (at [86]) that, "[i]n order for the prevention principle to operate, it would have to be shown … that the contractual right or benefit that Mah was asserting or claiming was a direct result of his prior breach of contract". Though the judgment does not make it explicit, since Mah's power to terminate the sale and purchase agreement was preconditioned on execution of the Operational Agreement before the Deadline, it seems tolerably obvious that the High Court (Appellate Division) must have also concluded that Mah's power to invoke this power of termination was a direct result of his breach of the implied duty to co-operate in preventing the Operational Agreement from being executed before the Deadline.
119 [2006] 1 SLR(R) 634.
120 [2011] SGHC 126.

*Chu*") in support of his submissions), the High Court (Appellate Division) observed that:[121]

> … the nuanced distinctions (if any) of the 'equitable' or 'common law' versions [of the prevention principle] were not argued before [it]. As such, it [was] inadvisable and unnecessary for [the High Court (Appellate Division)] to delve into further discussion of the juridical basis of the prevention principle for present purposes [and t]he question as to whether the 'equitable' conception of the prevention principle was correctly recognised in *Chua Tian Chu* is perhaps best left for consideration and clarification (if appropriate) in a suitable case in future, where the court might have the benefit of hearing full arguments before arriving at a considered decision.

13.89 It has been suggested previously[122] that Singapore law may countenance two versions of the "prevention principle", with *Evergreat* illustrating its operation at common law, and *Yap Boon Keng Sonny v Pacific Prince International Pte Ltd*[123] ("*Sonny Yap*") illustrating its operation in equity.

13.90 Although neither decision explicitly qualified its application of the prevention principle expressly with the labels "common law" or "equitable", in the later decision of *Chua Tian Chu*, Andrew Ang J explicitly accepted that the prevention principle can operate by way of an "equitable remedy" which is "derived from the well established legal maxim that no man shall take advantage of his own wrong".[124]

13.91 Tellingly, as to what might count as an act of prevention to trigger this "equitable remedy", Ang J relied on the authority of *Sonny Yap*, where Judith Prakash J had held that:[125]

> … [a]n act of prevention operates to prevent, impede or otherwise make it more difficult for a contractor to complete the works by the date stipulated in the contract.

13.92 This definition does not require that the party whose act of prevention is complained of be shown to have committed any form of contract breach. Hence, the prevention principle as applied in both *Chua Tian Chu* and *Sonny Yap* precluded the parties in question from insisting on strict compliance with contractual times for completion of performance by their respective counterparties where the delays arose

121 *Ng Koon Yee Mickey v Mah Sau Cheong* [2022] 2 SLR 1296 at [79].
122 See (2020) 21 SAL Ann Rev 403 at 432–436, paras 13.85–13.101 where the potential distinction and some key cases are discussed.
123 [2009] 1 SLR(R) 385.
124 *Chua Tian Chu v Chin Bay Ching* [2011] SGHC 126 at [60].
125 *Yap Boon Keng Sonny v Pacific Prince International Pte Ltd* [2009] 1 SLR(R) 385 at [34].

from acts of prevention, even though those acts did not give rise to contract breaches themselves.

13.93 By contrast, for the *Evergreat* version of the prevention principle, V K Rajah J held that "[t]he court accepts that in general, a party *in default under a contract* cannot take advantage of *his own wrong*" [emphasis added].[126] In so doing, he adopted the summary in *Chitty on Contracts*[127] of the position in English law that "other principles governing the relationship of the [contracting] parties also find their formal source in the construction of the contract: so, for example, the courts accept that, in general, a party in default under a contract cannot take advantage of his own wrong",[128] which relied on the authority of *Alghussein Establishment v Eton College*.[129]

13.94 Given the above, the *Evergreat* version of the prevention principle seems to be distinct from that which had been applied in *Sonny Yap* and *Chua Tian Chu* since the prevention principle applied in *Evergreat* is apparently concerned with acts of prevention which amount to breaches of contractual duties by that party. This distinguishes and makes its operation narrower than the *Sonny Yap* and *Chua Tian Chu* variant.[130]

13.95 Ang J observed in *Chua Tian Chu* that "[a]cts of prevention can *include* failures or omissions on the part of the purchaser to fulfil certain express or implied obligations" [emphasis added].[131] Ang J also concluded that orders for variations outside the scope of the contract were acts of prevention which triggered the version of the "prevention principle" Ang J observed in *Chua Tian Chu* that "[a]cts of prevention can *include* failures or omissions on the part of the purchaser to fulfil certain express or implied obligations" [emphasis added].[132] Ang J also concluded that orders for variations outside the scope of the contract were acts of prevention which triggered the "prevention principle". But Ang J did not make any rulings that any relevant express or implied term in the contract

126 *Evergreat Construction Co Pte Ltd v Presscrete Engineering Pte Ltd* [2006] 1 SLR(R) 634 at [51].
127 Vol 1 (Sweet & Maxwell, 29th Ed, 2004).
128 *Chitty on Contracts* vol 1 (Sweet & Maxwell, 29th Ed, 2004) at para 1-1025. The equivalent passage in *Chitty on Contracts* vol 1 (Sweet & Maxwell, 34th Ed, 2021) may be found at para 2-051.
129 [1988] 1 WLR 587. See also *Evergreat Construction Co Pte Ltd v Presscrete Engineering Pte Ltd* [2006] 1 SLR(R) 634 at [51]–[52].
130 It is accepted in *Fundamental Investors Pte Ltd v Palm Tree Investment Group Pte Ltd* [2020] 4 SLR 1328 at [136]–[137] that the *Evergreat* formulation of "acts of prevention" is narrower than that used in *Yap Boon Keng Sonny v Pacific Prince International Pte Ltd* [2009] 1 SLR(R) 385.
131 *Chua Tian Chu v Chin Bay Ching* [2011] SGHC 126 at [62].
132 *Chua Tian Chu v Chin Bay Ching* [2011] SGHC 126 at [62].

had been breached owing to such improper orders – so it seems he did not apply the narrower *Evergreat* version of the prevention principle.

13.96 The same may be observed in *Sonny Yap*. While accepting that acts of prevention had arisen owing to certain actions taken by one of the parties, Prakash J did not make any findings that these actions amounted to breaches of any express and/or implied terms of that contract.[133] This suggests that Prakash J did not apply the narrower *Evergreat* version of the prevention principle, either.

13.97 Second, the "common law" version is said to operate through the mechanism of *construction* of the terms of the contract. However, in neither *Chua Tian Chu* nor *Sonny Yap* did the court employ construction as part of the court's reasoning: it was sufficient for the version of the prevention principle before both Ang and Prakash JJ to apply so long as it was shown that the party in question had acted in a way which prevented the counterparty from completing its part of the bargain by the contractual deadline.

13.98 Consequently, and for reasons which have been set out previously,[134] it may not be entirely inappropriate to take Rajah J in *Evergreat*[135] to have set out a "common law" version of the principle, distinct from the *Sonny Yap* or *Chua Tian Chu* version, and which might be termed the "equitable" version (following the usage adopted in *Chua Tian Chu*). For now, notwithstanding the High Court (Appellate Division)'s doubts, it is suggested that the differences highlighted above suggest that the *Evergreat* version of the prevention principle which operates through construction of the contract's terms might not be the only one: a broader principle may well have been applied in *Sonny Yap* and *Chua Tian Chu*.

## V. Remedies

13.99 In 2022–2023, there were several interesting and important decisions on remedies for breach of contract. The discussion below touches on: (a) the relationship between expectation and reliance measures; (b) the availability of an account of profits as a remedy for breach of contract; and (c) cost of cure damages and the relevance of intention to cure.

133 *Yap Boon Keng Sonny v Pacific Prince International Pte Ltd* [2009] 1 SLR(R) 385 at [41].

134 (2020) 21 SAL Ann Rev 403 at 434–436, paras 13.94–13.99.

135 See para 13.93 above.

### *A. Expectation and reliance measures of damages*

13.100 The relationship between measures of damages was addressed in some detail in *Koh Chew Chee v Liu Shu Ming*[136] ("*Koh Chew Chee*"), and the subsequent appeal to the High Court (Appellate Division) in *Liu Shu Ming v Koh Chew Chee*[137] ("*Koh Chew Chee (HC(A))*") (which reversed the High Court (General Division) on certain key points).

13.101 The claimant had made claims arising out of multiple sales and leaseback agreements with the defendants in respect of five condominium units in the Philippines. The claimant invested about S$1.5m in these units, which were based on the defendants' "condotel" business model of providing condominium units to travellers for short-term accommodation, and promising investors an attractive rate of return through rental revenue.

13.102 When the defendants failed to transfer title to these units although the claimant had completed payment, the claimant sought to recover various heads of damages for breach of contract, as well as fraudulent misrepresentation.[138] The focus of the claimant's contractual claim was for damages comprising the price at which the defendants were supposedly obliged to buy back the units (as part of an alleged "buyback term" providing the claimant capital protection), as well as arrears of rent earned had the defendants not been in breach.

13.103 Lee Seiu Kin J found that the defendants had failed to transfer title to the units, a repudiatory breach entitling the claimant to terminate the agreements and sue for damages.[139] However, the court held that there was no "buyback term".[140] As Lee J explained:[141]

> … without the buyback agreement, we are simply dealing with the Defendants' failure to deliver title to real property. The normal measure of damages in respect of such a breach is to take the market value of the property at the time for completion …, less the contract price if it has not already been paid ….
>
> … It is difficult, however, to apply to the present case. It could technically be applied; but it requires the [claimant] to prove the market value of the Units. However, as stated, her case hinges entirely on the existence of the Alleged

136 [2022] SGHC 25.
137 [2023] SGHC(A) 15.
138 The latter misrepresentation claim was dismissed given that Lee Seiu Kin J found that the defendants were not shown to have made various false statements or done so fraudulently; nor had claimant had not acted upon each and every alleged representation.
139 *Koh Chew Chee v Liu Shu Ming* [2022] SGHC 25 at [95]–[98].
140 *Koh Chew Chee v Liu Shu Ming* [2022] SGHC 25 at [35], [88] and [101].
141 *Koh Chew Chee v Liu Shu Ming* [2022] SGHC 25 at [101]–[103].

> Buyback Term, and so no valuation of the Units was prepared or tendered as evidence.
>
> This puts the court in a difficult position. … without evidence of the Units' value, I cannot state with any certainty the position the [claimant] would be in had the Contracts been performed. Therefore, an award of expectation damages cannot be properly quantified.

13.104 As such, Lee J favoured the time-honoured technique of invoking reliance damages (that is, damages awarded by reference to the reliance measure) as a *proxy* for the expectation interest (that is, the claimant's interest in the due *performance* of the contract).[142] He highlighted as settled law the existence of the reliance measure, which was said to be available at the election of a claimant.[143]

13.105 Lee J emphasised that the juridical basis of reliance *damages* is to protect *not* the claimant's reliance *interest* but the claimant's *expectation* interest: reasonable reliance is "simply the filter through which the court determines which of the [claimant]'s pleaded expenses were *properly* incurred in connection with the contract" [emphasis in original].[144]

13.106 The High Court (General Division) in *Koh Chew Chee* emphasised that while not all contracts entered into to make profits will be profitable,[145] in attempting to generate those profits, costs would almost certainly have been incurred (for example, sums paid to the counter-party to secure counter-performance, or for works in preparation for applying the expected counter-performance to a profitable use).[146] Damages might then be awarded for the losses caused by the counter-party's breaches, quantified on the "reliance measure" by reference to such costs expended in reliance, unless the counter-party proves that a "bad bargain" has been struck. That is:[147]

> … [t]he burden is … shifted to the defendant to prove … that the [claimant] would not even have been able to recover what he put down in expectation of performance.

142 *Koh Chew Chee v Liu Shu Ming* [2022] SGHC 25 at [109]–[148].
143 *Koh Chew Chee v Liu Shu Ming* [2022] SGHC 25 at [110], citing *Anglia Television Ltd v Reed* [1972] 1 QB 60; see also the local decisions of *TCL Industries (Malaysia) Sdn Bhd v ICC Chemical Corp* [2007] SGHC 211 at [11] and *PT Panosonic Gobel Indonesia v Stratech Systems Ltd* [2010] 3 SLR 1017 at [6].
144 *Koh Chew Chee v Liu Shu Ming* [2022] SGHC 25 at [126].
145 *Koh Chew Chee v Liu Shu Ming* [2022] SGHC 25 at [115].
146 *Koh Chew Chee v Liu Shu Ming* [2022] SGHC 25 at [116].
147 *Koh Chew Chee v Liu Shu Ming* [2022] SGHC 25 at [118].

13.107 As for the burden of proof where reliance damages are claimed, Lee J noted that:[148]

> … we can take it that a [claimant] would not enter a loss-making contract, and should at least recover expenses reasonably incurred in order to put himself in a nett zero position. Moreover, it is said that it is just 'to put the peril of the answer upon that party who by his wrong has made the issue relevant to the rights of the other'.

13.108 On the facts, Lee J found that the defendants would most likely not have been able to discharge the burden of showing that the claimant would not have been able to recoup expenses reasonably incurred. These amounted to S$1,468,895.69 as payment of the purchase price and ₱340,504.50 as costs of incorporating a Philippine company, LK Strategic Hub (Philippines) Inc, to be the claimant's nominee to which title was to be transferred. The court took the view that if the contracts had been properly performed, the claimant would only have needed to sell the units at 81.5% of the total expenditure sum, given that she had guaranteed rental revenue representing around 18.5% of total expenditure, so it would be unlikely that the contract was loss-making. Moreover, even if the market was weak, the claimant could have waited for an upswing and continued leasing out the units to generate revenue.[149]

13.109 On appeal,[150] the High Court (Appellate Division) reached a rather different set of conclusions. The High Court (Appellate Division) began by making a critically different finding: the claimant did not validly terminate the contracts either on the basis of the defendant's renunciation or breach of condition (the claimant had not purported to do so in her relevant correspondence with the defendant).[151] As such, the High Court (Appellate Division) ruled that the claimant was *not* entitled to claim damages on the basis of termination, whether on the expectation or reliance measures. However, given that the breach persisted, the High Court (Appellate Division) ordered the defendants to transfer, free of encumbrance, title of the units and also to give possession thereof to the claimant's nominee, in line with her fallback plea seeking an order for possession if the contracts were adjudged not to be validly terminated.[152]

13.110 The question of reliance damages was thus rendered "academic", but the High Court (Appellate Division) addressed its appropriateness

148 *Koh Chew Chee v Liu Shu Ming* [2022] SGHC 25 at [119]–[120], citing *Albert & Son v Armstrong Rubber Co* 178 F (2d) 182 at 189 (1949), *per* Learned Hand CJ.
149 *Koh Chew Chee v Liu Shu Ming* [2022] SGHC 25 at [141]–[142].
150 *Liu Shu Ming v Koh Chew Chee* [2023] SGHC(A) 15.
151 *Liu Shu Ming v Koh Chew Chee* [2023] SGHC(A) 15 at [108]–[113].
152 *Liu Shu Ming v Koh Chew Chee* [2023] SGHC(A) 15 at [113].

in a wide-ranging *obiter dictum*.[153] To anticipate its conclusion, the High Court (Appellate Division) disagreed with the High Court (General Division) that damages should have been assessed on a reliance basis:[154]

> 118 It … appeared to us that in cases where [claimants] have been awarded reliance damages, this was because it was impossible or, at least, extremely difficult, to prove that they would have turned a profit had the contract not been breached. In the case before us, Ms Koh did not suggest that it was impossible or difficult to adduce evidence of the value of the Units. Indeed, logic suggests that it should have been a simple matter for her to adduce such evidence had she applied her mind to do so.
>
> …
>
> 124 We are also of the view that it is not open to a [claimant] to claim reliance damages simply because he chooses not to adduce evidence of expectation damages. Such a [claimant] does not have an unfettered option to switch to a claim for reliance damages and the court does not have a wide discretion to grant such damages in every case even when such damages are not pleaded.
>
> …
>
> 217 To summarise, a [claimant] does not have an unfettered option to claim reliance damages and neither is there a wide discretion for a court to grant reliance damages. Such relief is usually available if it is impossible, or at least extremely difficult, for a [claimant] to prove his expectation damages in the usual way or if his contract was not for profit. Ms Koh's case does not fall into any of these categories.

13.111 Hence, the High Court (Appellate Division) appeared to adopt a more stringent threshold requirement before reliance damages may serve as a proxy for expectation loss and disagreed with the High Court (General Division)'s reasoning.[155]

13.112 For one, the High Court (Appellate Division) disagreed explicitly with Hutchinson J's views in *CCC Films (London) Ltd v Impact Quadrant Films Ltd*[156] ("*CCC Films*"), a leading decision to the effect that a claimant has an unfettered option to claim reliance damages.[157]

13.113 The High Court (Appellate Division) held that Hutchinson J in *CCC Films* had read the authorities that extended the availability of reliance damages beyond situations where it was impossible or at least extremely difficult to prove expectation damages. For example, in the

153 *Liu Shu Ming v Koh Chew Chee* [2023] SGHC(A) 15 at [114].
154 *Liu Shu Ming v Koh Chew Chee* [2023] SGHC(A) 15 at [118], [124] and [217].
155 *Liu Shu Ming v Koh Chew Chee* [2023] SGHC(A) 15 at [143]–[218].
156 [1985] QB 16.
157 *CCC Films (London) Ltd v Impact Quadrant Films Ltd* [1985] QB 16 at 32.

well-known decision of *Anglia Television Ltd v Reed*,[158] the claimant successfully claimed wasted expenses against the defendant where the latter had wrongfully repudiated a contract to play a part in a television play the claimant was producing, and Lord Denning had in his judgment taken the claimant to have an option to elect between loss or profits or wasted expenditure. However, the High Court (Appellate Division) understood this as a case where the claimant had taken the position that it could *not* prove its loss of profit.[159]

13.114 The High Court (Appellate Division) also considered the decision in *Commonwealth of Australia v Amann Aviation Pty*[160] ("*Amann*"), where the majority of the High Court of Australia had awarded substantial reliance damages for the claimant's wasted expenditure in respect of a contract for aerial coastal surveillance for the Commonwealth, which had prematurely terminated the contract by serving an invalid termination notice. While it was clear that the burden of proof was shifted to the Commonwealth in a way that was advantageous to the claimant, since it could not show that the claimant had entered into a loss-making contract, the High Court (Appellate Division) read the judgments in *Amann* to be premised upon situations where it was impossible or at least extremely difficult to prove expectation damages, or the contract in question was not entered into for the purpose of making a profit.[161]

13.115 Lastly, the High Court (Appellate Division) also disagreed with the recently released decision of *123 259 932 Pty Ltd v Cessnock City Council*[162] ("*Cutty Sark*"), where the New South Wales Court of Appeal reversed the trial judge's decision and allowed the appellant's claim for substantial reliance damages against the respondent city council.

13.116 That claim arose out of the respondent's agreement to grant the appellant a lease of part of Cessnock Airport, on which the appellant was constructing an aircraft hangar from where it intended to operate a business offering joy flights. The respondent was found to have repudiated its obligation to take all reasonable action by a certain "sunset date" to apply for and register a subdivision plan necessary for the grant of the lease, which thus did not take effect.

13.117 In allowing the appellant's claim for reliance damages representing the amount expended in constructing the hangar, the New

158 [1972] 1 QB 60.
159 *Liu Shu Ming v Koh Chew Chee* [2023] SGHC(A) 15 at [173]–[177].
160 (1991) 104 ALR 1.
161 *Liu Shu Ming v Koh Chew Chee* [2023] SGHC(A) 15 at [179].
162 [2023] NSWCA 21.

South Wales Court of Appeal in *Cutty Sark* made clear that establishing the impossibility of proving expectation loss was not a precondition for the recovery of reliance damages.[163] It also stated that such losses are available where "the [claimant] does not undertake to prove, or the evidence does not establish, any loss of profits".[164]

13.118 While the High Court (Appellate Division) in *Koh Chew Chee (HC(A))* agreed that a requirement of "impossibility" is unnecessarily strict, it held that there is a "quantum leap" to extend reliance damages simply to situations where a claimant does not prove an expectation of profit, notwithstanding that it may not be impossible or even extremely difficult for a claimant to do so.[165]

13.119 As noted, the High Court (Appellate Division) did not find that the threshold had been crossed to consider reliance damages appropriate.[166] Moreover, it added that the High Court (General Division) was incorrect to assume without further evidence that no prejudice to the defendant would result from invoking a presumption of reliance loss, and, further, that the defendant would not have been able to discharge the burden of proving that the claimant had made a bad bargain.

13.120 While diametrically opposed, the divergence between the High Court (General Division) and High Court (Appellate Division) judgments should not obscure their agreement on the juridical basis for reliance damages. Clearly agreeing with the High Court (General Division), the High Court (Appellate Division) stated that: "Reliance damages are not awarded on a different basis from expectation damages".[167] It also agreed that reliance damages are awarded on the same basis as ordinary expectation damages, *viz*, to put a claimant in the position he would have been had the contract been performed.[168]

13.121 This clarification of the basis of reliance damages is not inconsequential. Readers will recall that Fuller's and Purdue's classic article (which coined the very term "reliance interest")[169] identified reliance losses, *viz*, damages, for the purpose of undoing the harm which the claimant's reliance on the defendant's promise has caused her, to be

163 *123 259 932 Pty Ltd v Cessnock City Council* [2023] NSWCA 21 at [90].
164 *123 259 932 Pty Ltd v Cessnock City Council* [2023] NSWCA 21 at [87]–[90] and [93].
165 *Liu Shu Ming v Koh Chew Chee* [2023] SGHC(A) 15 at [193]–[196].
166 *Liu Shu Ming v Koh Chew Chee* [2023] SGHC(A) 15 at [167].
167 *Liu Shu Ming v Koh Chew Chee* [2023] SGHC(A) 15 at [134].
168 *Liu Shu Ming v Koh Chew Chee* [2023] SGHC(A) 15 at [142].
169 L L Fuller & William R Perdue, "The Reliance Interest in Contract Damages" (1936) 46 Yale LJ 52.

*the* key contractual interest.[170] But the judgments in the General and Appellate Divisions of the High Court clearly state that this is incorrect, at least so far as Singapore law is concerned. It is the expectation interest that is central, on the basis that contracting parties acquire not simply an expectancy but also a right to performance.[171] Consequently, claims for reliance damages are made sense of within a framework giving primacy to expectation loss.

13.122 Next, in relation to the key holding of the High Court (Appellate Division): to recover damages on the reliance *measure*, a claimant not only has to plead that which is sought but has also to show that it is impossible, or at least extremely difficult, for the claimant to prove his expectation damages in the usual way, or if his contract was not for profit. Without this trigger, apart from the not-for-profit scenarios, a claimant cannot invoke the presumption that the revenue to be earned would have at least equalled his reliance expenditure; neither is a court permitted to consider this remedy on its own accord, particularly in circumstances where the claimant fails to plead or adduce evidence of expectation losses.

### *B. Account of profits for breach*

13.123 The High Court (General Division) of the High Court in *Koh Chew Chee* also rejected the claimant's claim for an account of profits made by the defendants as a consequence of their alleged misuse of the purchase price paid.[172] As no appeal to the High Court (Appellate Division) was lodged in relation to this issue, the High Court (Appellate Division)'s judgment in *Koh Chew Chee (HC(A))* leaves this part of the decision below untouched.

13.124 Lee J reiterated that, given the Court of Appeal's tentative pronouncements in *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua*[173] ("*Turf Club Auto*"), it has not been conclusively determined if the decision of the House of Lords in *Attorney General v Blake*[174] ("*Blake*") forms part of the Singapore law of contract.[175]

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170 L L Fuller & William R Perdue, "The Reliance Interest in Contract Damages" (1936) 46 Yale LJ 52 at 56–57.

171 See Daniel Friedmann, "The Performance Interest in Contract Damages" (1995) 111 LQR 628.

172 *Liu Shu Ming v Koh Chew Chee* [2023] SGHC(A) 15 at [150]–[172]. No appeal was brought on this point: see *Liu Shu Ming v Koh Chew Chee* [2023] SGHC(A) 15 at [22].

173 [2018] 2 SLR 655 at [250], [269] and [302].

174 [2001] 1 AC 268.

175 *Koh Chew Chee v Liu Shu Ming* [2022] SGHC 25 at [151].

13.125 The High Court (General Division) in *Koh Chew Chee* further stressed that the award in *Blake*, which was made in circumstances where the defendant had published certain details in breach of an undertaking to the secret services, was well recognised to be rare, and supportable only on the exceptional factual character of that case.[176] Indeed, the Court of Appeal in *Turf Club Auto* had remarked that "it suffices for us to tentatively suggest that if *AG v Blake* damages are to be recognised, their availability should be confined to truly exceptional cases".[177] Hence, for the remedy to be accepted in Singapore, it must be "the *right and necessary* case" [emphasis in original], which the present one in *Koh Chew Chee* was not.[178]

13.126 Lee J also took the opportunity to discuss the suggestion that contract-breakers "akin to fiduciaries" are liable to account for profits, drawn from Lord Nicholls's characterisation of the defendant's undertaking in *Blake* as closely akin to a fiduciary obligation.[179] Lee J explained that this suggestion in *Blake* should not be read as purporting to create a head of persons liable to account, whether in equity or law. Rather, Lord Nicholls could be understood to be saying that:[180]

> … the exceptional facts of the case justified the award of an account of profits, and in any event, such an award is not entirely out of left field because Blake stood in a position quite close to that of an actual fiduciary, against whom the court would suffer no discomfort from ordering an account of profits for breach of his fiduciary duties.

Lee J did acknowledge that "the remedy is *most typically* seen in cases where a fiduciary relationship exists, and fiduciary duties are breached" [emphasis in original], in so far as equity leaves little room for such individuals who are reposed with trust, confidence and loyalty to benefit from their appointments.[181] But he held the view that a quasi-fiduciary status is not strictly at the foundation of an account of profits remedy.[182]

13.127 Lee J further observed that different rationalisations of *Blake* damages would lead to different outcomes. A narrower "fiduciary" rationale means that the exceptional circumstances identified would "naturally be filtered through the notions of trust, loyalty, honesty, good faith, and regard for the interests of the 'principal'".[183] While there may

176 *Koh Chew Chee v Liu Shu Ming* [2022] SGHC 25 at [157].
177 *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] 2 SLR 655 at [255].
178 *Koh Chew Chee v Liu Shu Ming* [2022] SGHC 25 at [172].
179 *Attorney General v Blake* [2001] 1 AC 268 at 287.
180 *Koh Chew Chee v Liu Shu Ming* [2022] SGHC 25 at [157].
181 *Koh Chew Chee v Liu Shu Ming* [2022] SGHC 25 at [162].
182 *Koh Chew Chee v Liu Shu Ming* [2022] SGHC 25 at [159].
183 *Koh Chew Chee v Liu Shu Ming* [2022] SGHC 25 at [165].

be an element of deterrence, the award would "predominantly [be] directed at preserving the values of the fiduciary relationship rather than punishment".[184]

13.128 On the other hand, a more open-textured rationalisation might be "policy-focused", suggesting that the remedy is appropriate where the law has a legitimate basis for punishing the defendant and/or deterring non-performance.[185] In the latter respect, the court referred to *Esso Petroleum Co Ltd v Niad Ltd*[186] ("*Esso*"), a rare commercial case where an account of profits was awarded.

13.129 The award in *Esso*, where the defendant had breached a "Pricewatch" agreement with the claimant by which the claimant provided financial support in consideration for the defendant keeping its petrol prices at a certain level, was said to be justified because of the impossibility of the claimant proving damages, the fundamental nature of the defendant's obligation to the functioning of the Pricewatch scheme, and the defendant's conduct, which was seen as cynical and deliberate.[187] This was thus an example where the more open-textured rationale of an account of profits was said to be applied, since the defendant was not understood to be in a quasi-fiduciary position.[188]

13.130 In any event, however, neither the narrow fiduciary rationale nor the broader policy justification for an account of profits was said to be applicable on the facts of *Koh Chew Chee*.

13.131 The High Court (General Division)'s reflections on the justificatory basis for *Blake* damages warrants some comment. First, a deterrence "policy" rationale for the disgorgement remedy has been recognised in the academic literature.[189] Indeed, in *Blake*, it was said that the remedy is "tailored to deter those who would place sensitive information at risk"[190] – that is, it is aimed at promoting a policy of discouraging such behaviour.

13.132 Secondly, it is worth noting that deterrence is not a monolithic concept, and if interrogated more closely, questions may arise over its

184 *Koh Chew Chee v Liu Shu Ming* [2022] SGHC 25 at [165].
185 *Koh Chew Chee v Liu Shu Ming* [2022] SGHC 25 at [166].
186 [2001] EWHC 6 (Ch).
187 *Esso Petroleum Co Ltd v Niad Ltd* [2001] EWHC 6 (Ch) at [63]; see also *Koh Chew Chee v Liu Shu Ming* [2022] SGHC 25 at [167]–[170].
188 *Koh Chew Chee v Liu Shu Ming* [2022] SGHC 25 at [169].
189 See, *eg*, James Edelman, "Restitutionary Damages and Disgorgement Damages for Breach of Contract" (2000) 8 RLR 129 at 137.
190 *Attorney General v Blake* [2001] 1 AC 268 at 287.

operationalisation. For example, while Rotherham accepts that the principal justification for disgorgement is deterrence, he also conceives that many factors determine that whether deterrence might be effectively achieved, including the gravity of the breach, the probability of its detection and enforcement, the responsiveness of parties to financial sanctions, and the existence of alternative criminal or non-legal sanctions, among others.[191] If correct, even if a broader deterrence rationale is available, this alone may not entail wider access to the remedy: the nature of the interests at stake, the type of wrongdoing involved and the role played by other available remedies in encouraging defendants to carry out their existing obligations may also be significant.

13.133 Thirdly, it is certainly possible for a deterrence rationale to be consistent with a focus on fiduciary status. As Samet argues, even without bad faith, fiduciaries can be gripped by self-deception, thus justifying a stringent profit-stripping rule in order to deter fiduciaries from succumbing to considerations of self-interest that could lead them to exploit their position, and of which they may be not fully conscious.[192] A focus on fiduciary status and deterrence need not be mutually exclusive, though under this analysis the former might still be a very important, though not exclusive, gateway to the availability of the remedy.

13.134 Fourthly, the difficulty in identifying *the* rationale for an account of profits in breach of contract cases might suggest a more *pluralistic* approach. Barnett, for example, identifies multiple possible rationales for disgorgement damages.[193] These include vindication of the performance interest, deterrence, and punishment or retribution, with deterrence nonetheless being the "central justification".[194] Profit-stripping removes any inducement for defendants to breach contracts in the first place, and is clearly more punitive as compared with normal compensatory damages, though potentially less retributive compared with an award of punitive damages. Nonetheless, it may be that different rationales remain operative and collectively reinforce the need for a disgorgement remedy in the appropriate case. Barnett argues that the defendant in *Blake* deserved to be stripped of his profit because of the advertent nature of his breach, yet disgorgement was also meant to deter the defendant and others from

191 Craig Rotherham, "Deterrence as a Justification for Awarding Accounts of Profits" (2012) 32 OxJLS 537. See in particular 561–562.

192 Irit Samet, "Guarding the Fiduciary's Conscience – A Justification of a Stringent Profit-stripping Rule" (2008) 28 OxJLS 763.

193 Katy Barnett, *Accounting for Profit for Breach of Contract* (Hart Publishing, 2012) ch 2.

194 Katy Barnett, *Accounting for Profit for Breach of Contract* (Hart Publishing, 2012) at p 12.

committing similar breaches in the future.[195] The award might also serve to publicly vindicate the claimant's right to performance.[196]

13.135 It should be reiterated, however, that nothing that has been said so far should be taken to suggest that the disgorgement remedy is likely to become more readily available in Singapore law. It has been recently commented that, "it nevertheless remains the case that it would be foolhardy to speculate *when* such a case [for the remedy] might arise in Singapore given the present state of local precedents".[197] The decision in *Koh Chew Chee* reinforces the authors' view that courts continue to take a highly limited view of the remedy.

### *C. Cost of cure damages*

13.136 *JSD Corp Pte Ltd v Tri-Line Express Pte Ltd*[198] ("*JSD Corp*") was an appeal against a District Judge's refusal to award damages for certain outstanding repair costs and diminution in value of vehicles damaged while being transported by the respondent logistics company.[199] Allowing the appeal in part, Goh Yihan JC discussed the principles and policies governing the availability of cost of cure damages, an issue which has attracted much academic commentary in the common law world,[200] but which had yet to receive much judicial attention in Singapore law hitherto.

13.137 The appellant's claim consisted of (a) incurred repair costs; (b) outstanding repair costs; and (c) diminution in value. At first instance, the appellant's incurred repair costs claim was allowed. But its claims for outstanding repair costs and diminution in value were dismissed, leading to the present appeal.

13.138 In the appeal, Goh JC upheld the decision below dismissing the claim for damages for diminution in value since the appellant did not put forward appropriate evidence to discharge its burden of proving any such

195 Katy Barnett, *Accounting for Profit for Breach of Contract* (Hart Publishing, 2012) at p 13.

196 Katy Barnett, *Accounting for Profit for Breach of Contract* (Hart Publishing, 2012) at p 35.

197 *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2nd Ed, 2022) at para 23.063.

198 [2022] SGHC 227.

199 *Tri-Line Express Pte Ltd v JSD Corp Pte Ltd* [2022] SGMC 16.

200 See, *eg*, Brian Coote, "Contract Damages, *Ruxley* and the Performance Interest" (1997) 56(3) Camb LJ 537; Alexander Loke, "Cost of Cure or Difference in Market Value? Toward a Sound Choice in the Basis for Quantifying Expectation Damages" (1996) 10 JCL 189; Solène Rowan, "Cost of Cure Damages and the Relevance of the Injured Promisee's Intention to Cure" (2017) 76(3) Camb LJ 616.

diminution even after the vehicles would have been repaired (though the learned Judicial Commissioner accepted that such a claim would in principle be possible and not amount to double recovery if the claimant were not fully compensated by cost of cure damages).[201]

13.139 As for the appeal, *viz* the outstanding repair costs (governed by the leading House of Lords decision in *Ruxley Electronics and Construction Ltd v Forsyth*[202] ("*Ruxley*")), Goh JC reversed the decision below and allowed the appellant's claim on this head in part. Goh JC's restatement of the law is useful to highlight at the outset:[203]

> In sum, the principles from the above discussion are:
>
> (a) The reasonableness test only applies if the cost of cure greatly exceeds the diminution in value (if any), such as in *Ruxley*. Otherwise, a [claimant] has the right to freely elect between obtaining damages based on cost of cure or diminution in value.
>
> (b) The reasonableness test applies whether the claim is in contract or tort, or whether one is dealing with personal or real property. It applies beyond the construction context in *Ruxley*.
>
> (c) When the authorities speak of the intention to cure as being relevant, they speak of it under the rubric of the *Ruxley* reasonableness test. The intention to cure is a factor in the overall inquiry, rather than being a prerequisite. But it is a weighty factor; absent very special countervailing factors, the failure to prove an intention to cure is likely to limit a [claimant] to a claim for diminution in value.

13.140 As Goh JC explained, in cases where the claimant's existing property is damaged during transport by a carrier, one common measure of damages is the cost of cure, as an alternative to losses measured by the difference in value between undamaged and damaged property.[204] In respect of the cost-of-cure measure, one line of authorities suggests that intention to cure is a *prerequisite* for claiming such damages: it had been said in *Tito v Waddell (No 2)*[205] that a claimant who "has no intention of applying any damages towards carrying out the work contract for" has no reason to recover the cost of work which would never be done.[206] On the other hand, another line of authorities holds intention to be a *factor* in

201 *JSD Corp Pte Ltd v Tri-Line Express Pte Ltd* [2022] SGHC 227 at [118]–[130].
202 [1996] AC 344.
203 *JSD Corp Pte Ltd v Tri-Line Express Pte Ltd* [2022] SGHC 227 at [86]–[88].
204 *JSD Corp Pte Ltd v Tri-Line Express Pte Ltd* [2022] SGHC 227 at [26]–[27].
205 [1977] Ch 106.
206 *Tito v Waddell (No 2)* [1977] Ch 106 at 332–333. See also *Radford v De Froberville* [1977] 1 WLR 1262 and the discussion in *JSD Corp Pte Ltd v Tri-Line Express Pte Ltd* [2022] SGHC 227 at [30]–[33].

considering the reasonableness of the cure measure.[207] The leading case in this regard is the *Ruxley* decision, which awarded the claimant a smaller loss of amenity award (£2,500) for a swimming pool not constructed to the required depth. It found that the proposed cost of cure (£21,560) was unreasonable in being disproportionate to the claimant's loss, with intention being a factor relevant "to the reasonableness and hence to the extent of the loss which has been sustained".[208]

13.141 In examining precedent, principle and policy, Goh JC ultimately found that intention to effect a cure is a *relevant factor* in the objective reasonableness test for *Ruxley*-type damages.

13.142 He first noted that the Singapore courts have not laid down any definitive ruling on the relevance of a party's intention to effect cure.[209] Cases such as *Chia Kok Leong v Prosperland Pte Ltd*[210] and *Family Food Court v Seah Boon Lock*,[211] which had suggested that intention to cure was not a prerequisite for promisee claims on the "broad ground" for substantial damages in the context of contracts for the benefit of third parties,[212] were taken by Goh JC to be fundamentally different from the two-party situation in the present case.[213]

13.143 Yet the two-party cases did not speak with one voice either. The High Court decision of *Management Corporation Strata Title Plan No 1166 v Chubb Singapore Pte Ltd*[214] appeared to emphasise the importance of intention to cure in holding that it was not reasonable to award the estimated cost of repairing a condominium's security and communication system: "it was not clear that the claimants would spend that amount and embark on such a replacement project".[215]

13.144 On the other hand, in *Sonny Yap*[216] the High Court did not explicitly consider intention to cure. There, it held that cost of cure damages would not be appropriate in respect of certain undersized rooms, since the objective of constructing a suitable house had been substantially achieved, and reconstruction would incur substantial and excessive costs

207 *JSD Corp Pte Ltd v Tri-Line Express Pte Ltd* [2022] SGHC 227 at [34]–[36].
208 *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344 at 359.
209 *JSD Corp Pte Ltd v Tri-Line Express Pte Ltd* [2022] SGHC 227 at [38]–[49].
210 [2005] 2 SLR(R) 484.
211 [2008] 4 SLR(R) 272.
212 See *Chia Kok Leong v Prosperland Pte Ltd* [2005] 2 SLR(R) 484 at [57] and *Family Food Court v Seah Boon Lock* [2008] 4 SLR(R) 272 at [53].
213 *JSD Corp Pte Ltd v Tri-Line Express Pte Ltd* [2022] SGHC 227 at [42].
214 [1999] 2 SLR(R) 1035.
215 *Management Corporation Strata Title Plan No 1166 v Chubb Singapore Pte Ltd* [1999] 2 SLR(R) 1035 at [107].
216 See para 13.89 above.

of demolition and rebuilding. Local authority being inconclusive, Goh JC looked to case law from other jurisdictions as well as first principles.[217]

13.145 In holding intention to cure to be *one* factor within the reasonableness test, Goh JC added that cases following *Ruxley*,[218] such as the English Court of Appeal's decision in *The Maersk Colombo*,[219] understood the role of intention to cure as "not conclusive" but still took it to be "relevant to the question whether it would be reasonable to reinstate the property".[220]

13.146 As for principle, it seems intention to cure should be relevant where cost of cure is not yet incurred – if the cost is never incurred where the claimant does not and has no intention to effect a cure by repairing the property, the claimant cannot be said to have suffered any such loss by way of repair costs. In contrast, where a party has *already* spent money on repairs, and cost of cure damages compensate him for the money *already* spent, courts are less concerned with whether the claimant will use the damages to pay such incurred expenses.[221]

13.147 Finally, as a matter of policy, an inquiry into intention to cure better protects an injured promisee's consumer surplus and avoids the conferral of windfalls on claimants exceeding any true loss. Such considerations outweigh countervailing arguments founded on reasons of convenience, to the effect that an examination into intention may be complicated or difficult to prove.[222]

13.148 Relatedly, another issue Goh JC identified was whether the rule in *Ruxley*[223] was directly applicable in tort-like scenarios concerning negligent damage caused to chattels (including the present case premised on breach of an implied contractual term to take reasonable care), as opposed to incomplete or defective performance in building or construction services contracts.

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217 *JSD Corp Pte Ltd v Tri-Line Express Pte Ltd* [2022] SGHC 227 at [47]–[49].

218 See para 13.139 above.

219 [2001] 2 Lloyd's Rep 275.

220 *The Maersk Colombo* [2001] 2 Lloyd's Rep 275 at [56]; see also *JSD Corp Pte Ltd v Tri-Line Express Pte Ltd* [2022] SGHC 227 at [70]–[71].

221 *JSD Corp Pte Ltd v Tri-Line Express Pte Ltd* [2022] SGHC 227 at [72]–[77]. *Quaere* whether such cases of actual expenditure might be instances where a different principle is in play, namely, the "third basic rule" of mitigation (see *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2nd Ed, 2022) at paras 22.130–22.138) that expenses actually incurred by a claimant as part of its reasonable mitigatory steps may be recovered as part of its damages?

222 *JSD Corp Pte Ltd v Tri-Line Express Pte Ltd* [2022] SGHC 227 at [78]–[81].

223 See para 13.139 above.

13.149 There have been suggestions that in the former scenarios, "the true measure of the [claimant]'s loss is the diminution in the value of the property", with the repair cost "no more than evidence of the diminution in value",[224] and intention to repair irrelevant for such purposes.[225] However, Goh JC was ultimately not persuaded that a separate rule existed for these situations: "it would be unprincipled to maintain such a distinction where the compensatory aims of contract and tort converge", with the "lodestar" always being the "*objective reasonableness* of the award of damages, in which intention to cure is one relevant factor" [emphasis in original].[226]

13.150 Applying these guidelines to the claims for outstanding repair costs, Goh JC allowed the claim for outstanding repair costs in respect of two vehicles, a 1976 BMW and a 1977 BMW, as the total repair costs were said to be less than the diminution in value of these vehicles. Hence, there was no need to police this amount on a reasonableness test.[227]

13.151 On the other hand, in respect of a 1973 BMW, the outstanding repair costs of S$9,059 greatly exceeded the diminution in value of the car after repairs (S$4,000). Given that the total market value of the car was S$8,000, even assuming a maximum diminution in value of S$8,000 before any repairs, the outstanding repair costs would still exceed this amount. Applying the reasonableness test, Goh JC held that the appellant had not shown any intention to carry out the repairs since it had not done anything in relation to such repairs for more than three years since the vehicle had been damaged; nor had the appellant provided any good reason for its inaction. Moreover, given that the repair costs far exceeded the diminution in market value, it would not be proportionate or economical to incur repair costs, as opposed to replacing the vehicle altogether.[228] It was thus not reasonable to apply the cost of cure measure in these circumstances.

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224 *JSD Corp Pte Ltd v Tri-Line Express Pte Ltd* [2022] SGHC 227 at [52], citing *Chitty on Contracts* vol 1 (Hugh Beale gen ed) (London: Sweet & Maxwell, 34th Ed, 2021) at para 26-04, fn 236.

225 *JSD Corp Pte Ltd v Tri-Line Express Pte Ltd* [2022] SGHC 227 at [54], citing James Edelman, *McGregor on Damages* (London: Sweet & Maxwell, 21st Ed, 2021) at para 37-007.

226 *JSD Corp Pte Ltd v Tri-Line Express Pte Ltd* [2022] SGHC 227 at [58]. In reaching this conclusion, the court was aided by the discussion of *Ruxley* damages in Adam Kramer KC, *The Law of Contract Damages* (Hart Publishing, 3rd Ed, 2022) at para 4-161, and Andrew S Burrows, *Remedies for Torts, Breach of Contract, and Equitable Wrongs* (Oxford University Press, 4th Ed, 2019) at p 213.

227 *JSD Corp Pte Ltd v Tri-Line Express Pte Ltd* [2022] SGHC 227 at [97].

228 *JSD Corp Pte Ltd v Tri-Line Express Pte Ltd* [2022] SGHC 227 at [90]–[96]. See also [99]–[104], which discusses the decisions of *Masterfox Connections Pte Ltd v N & I Transportation* [2008] SGMC 5 and *Darbishire v Warran* [1963] 1 WLR 1067.

13.152 A few remarks might be added to the above analysis. Rowan,[229] whose recent work was cited by Goh JC's opinion,[230] has put forward three options for the role of intention in the analysis of cost of cure damages:

> (a) Option A: a court could award cost of cure damages regardless of whether the breach has been remedied or is intended to be remedied, focusing simply on the objective reasonableness of the award.
>
> (b) Option B: a court could award cost of cure damages if the breach has been remedied, or where the breach has not been remedied, considering intention to remedy as a factor going towards the reasonableness of the award; but once such an award is made, refusing to monitor how damages are actually used. As Lord Jauncey has said in *Ruxley*:[231] "Intention, or lack of it, to reinstate can have relevance only to the reasonableness and hence to the extent of the loss which has been sustained. Once that loss has been established intention as to the subsequent use of the damages ceases to be relevant."
>
> (c) Option C: a court could award cost of cure damages only if the breach has been remedied and, if breach has not been remedied, only if the promisee intends to remedy the breach. To ensure that the intention is carried out, the court could make the award conditional upon the cure being effected and subject to clawback if not; alternatively, requiring the promise to undertake that he will spend the damages on cure, enforceable by an order for contempt of court.

13.153 Option A is inconsistent with the recognition in the case law of intention as having at least *some* relevance in analysis. Option C, on the other hand, may over-emphasise manifestation of the intention to cure. This might introduce further problems and costs associated with enforcing undertakings, and is inconsistent with the "true rule" that "once awarded, the courts are not concerned with how the damages are used … the damages are not clawed back if the claimant chooses to spend them inappropriately".[232] Option B, which was the *modus operandi* taken

229 Solène Rowan, "Cost of Cure Damages and the Relevance of the Injured Promisee's Intention to Cure" (2017) 76(3) Camb LJ 616. See in particular 634–641.

230 *JSD Corp Pte Ltd v Tri-Line Express Pte Ltd* [2022] SGHC 227 at [28]–[29].

231 *Ruxley Electronics and Construction Ltd v Forsyth* [1996] 1 AC 344 at 359.

232 Andrew S Burrows, *Remedies for Torts, Breach of Contract, and Equitable Wrongs* (Oxford University Press, 4th Ed, 2019) at p 199.

by Goh JC in *JSD Corp*, arguably occupies the *via media* between two alternative approaches.