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13. CONTRACT LAW[1]

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I. Introduction

13.1 In keeping with the approach taken in last year's Annual Review of Singapore Cases on Contract Law, this year's Annual Review will look at a smaller number of cases, but in greater detail. That said, before proceeding further, it may be helpful to briefly note some other interesting developments in 2023 by way of preface.

13.2 First, in *Asidokona Mining Resources Pte Ltd v Alternative Advisors Investments Pte Ltd*,[2] the Appellate Division of the High Court ("Appellate Division") reversed the decision of the General Division of the High Court ("General Division"), below.[3] However, the Appellate Division accepted that the General Division had rightly dispensed with the need to join the assignor to the proceedings.[4]

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 [2023] 1 SLR 954; upheld on appeal to the Court of Appeal: *Alternative Advisors Investments Pte Ltd v Asidokona Mining Resources Pte Ltd* [2024] 1 SLR 188.

3 *Alternative Advisors Investments Pte Ltd v Asidokona Mining Resources Pte Ltd* [2023] 4 SLR 284.

4 *Asidokona Mining Resources Pte Ltd v Alternative Advisors Investments Pte Ltd* [2023] 1 SLR 954 at [97]. The point on joinder was not discussed in the further appeal to the Court of Appeal: *Alternative Advisors Investments Pte Ltd v Asidokona Mining Resources Pte Ltd* [2024] 1 SLR 188. For discussion of the General Division's decision on joinder, see Tham Chee Ho & Tan Zhong Xing, "Contract Law" (2022) 23 SAL Ann Rev 359 at paras 13.2–13.20.

13.3 Second, in *Lim Siau Hing @ Lim Kim Hoe v Compass Consulting Pte Ltd*,[5] the Court of Appeal reiterated the proposition that conduct subsequent to the time of contract formation *is* relevant and admissible for the purpose of proving whether a contract had formed. However, although it also clarified that there was, as yet, no Singapore authority stating that evidence of subsequent conduct would *never* be relevant or admissible for the purposes of aiding in the process of interpretation of the terms of a written contract, it declined to go any further. Accordingly, the relevance and admissibility of subsequent conduct for purposes of aiding in the process of interpretation in these cases remains open.[6]

13.4 Third, in *PT OKI Pulp & Paper Mills v Sunrise Industries (India) Ltd*,[7] the Appellate Division clarified that, in a contract of sale involving payment via letters of credit, there is *no* rule of law that dictates that the dates for performance under the contract of sale shall be varied, in tandem, if the shipment dates set out in the letters of credit are varied, since: "it is trite that a letter of credit, which governs the obligations owed by the issuing bank to the beneficiary, is autonomous and operates independently of the underlying contract between the buyer and seller".[8] But, even so, the Appellate Division accepted that:[9]

> … an amendment to a letter of credit may be evidentially relevant and indeed significant to the question of whether the parties intended to also amend the underlying contract correspondingly. That said, any such amendment must be weighed against the entire factual matrix to ascertain whether it is evidentially significant. An indication that the parties did not intend to amend the underlying contract is where there is a reservation of rights under the underlying contract notwithstanding the amendment to the letter of credit.

13.5 Fourth, in *Rio Christofle v Tan Chun Chuen Malcolm*,[10] in the midst of clarifying that contracts for the sale of cryptocurrency such as Bitcoin were *not* illegal and void merely because the vendors had failed to comply with the vendor licensing requirements imposed under the Payment Services Act 2019,[11] the General Division also reiterated that "[t]he approach taken to identifying the proper parties to a contract is

5 [2023] SGCA 39 at [96].
6 *Lim Siau Hing @ Lim Kim Hoe v Compass Consulting Pte Ltd* [2023] SGCA 39 at [96]–[97].
7 [2023] SGHC(A) 38.
8 *PT OKI Pulp & Paper Mills v Sunrise Industries (India) Ltd* [2023] SGHC(A) 38 at [57], following *Crédit Agricole Corporate & Investment Bank, Singapore Branch v PPT Energy Trading Co Ltd* [2023] SGCA(I) 7 at [18], referring to *Kuvera Resources Pte Ltd v JPMorgan Chase Bank, NA* [2023] 2 SLR 389 at [29] and [35].
9 *PT OKI Pulp & Paper Mills v Sunrise Industries (India) Ltd* [2023] SGHC(A) 38 at [58].
10 [2023] 5 SLR 684.
11 *Rio Christofle v Tan Chun Chuen Malcolm* [2023] 5 SLR 684 at [51]–[67].

an objective one".[12] However, this approach would have to be modified where, although the contract had been reduced to a documentary form, that document did *not* enable the parties thereof to be ascertained. In such cases, adopting the position set out in *Americas Bulk Transport Limited (Liberia) v Cosco Bulk Carrier Limited (China)*,[13] the learned High Court judge took the position in Singapore to be as follows:[14]

> … In such cases, recourse is 'permitted of what the parties said to each other and what they did down to the point at which a contract was concluded for the purpose of determining who the parties to the agreement were intended to be': *Americas Bulk Transport* at [19(ii)] citing *Estor Limited v Multifit (UK) Limited* [2009] EWHC 2565 (TCC) at [26]. In such cases, the objective approach still applies, and the pertinent question is what 'a reasonable person furnished with the relevant information… would conclude': *Americas Bulk Transport* at [19(iii)] citing *Hamid v Francis Bradshaw Partnership* [2013] EWCA Civ 470 at [57(ii)].

13.6 Finally, in *Tan Tien Sek v Tan Tien Sai*,[15] where a contract for the sale of an interest in land had failed to comply with the written formality requirements in s 6(*d*) of the Civil Law Act 1909,[16] Teh Hwee Hwee JC held that the doctrine of part performance could not be invoked successfully by the purchaser. In doing so, Teh JC accepted the position that had been previously set out by the High Court in *Hu Lee Impex Pte Ltd v Lim Aik Seng*,[17] and in *Pang Moh Yin Patricia v Sim Kwai Meng*,[18] preferring adoption and application of Lord Selborne's rationalisation of the doctrine of part performance in *Maddison v Alderson*,[19] as opposed to the later formulation in *Steadman v Steadman*.[20]

II. Entire agreement clauses and implied terms

13.7 Entire agreement clauses are now commonly found in many written contracts. Typically, they seek to circumscribe the terms binding

12 *Rio Christofle v Tan Chun Chuen Malcolm* [2023] 5 SLR 684 at [71], following *iVenture Card Ltd v Bug Bus Singapore City Sightseeing Pte Ltd* [2022] 1 SLR 302 at [26].
13 [2020] EWHC 147 (Comm).
14 *Rio Christofle v Tan Chun Chuen Malcolm* [2023] 5 SLR 684 at [72]. For illustrations as to the application of this approach, see [73]–[78].
15 [2023] SGHC 81.
16 2020 Rev Ed.
17 [2013] 4 SLR 176.
18 [2021] SGHC 11, reversed in part on appeal, but on an unrelated point: *Sim Kwai Meng v Pang Moh Yin Patricia* [2022] SGHC(A) 1.
19 (1883) 8 App Cas 467.
20 [1976] AC 536. For discussion of the differences between these two lines of authority, see *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2nd Ed, 2022) at paras 08.171–08.191.

the contracting parties to those recorded within the document (or documents) to which the entire agreement clause refers. More controversially, however, entire agreement clauses may also seek to circumscribe the supplementation of a contract's express terms through the process of implication of terms. To what extent might such clauses be effective to preclude a successful implication of terms?

13.8 In *Ng Giap Hon v Westcomb Securities Pte Ltd*[21] ("*Ng Giap Hon*"), the Court of Appeal had before it an entire agreement clause of the following form:[22]

> **Entire Understanding**
>
> This Agreement embodies the entire understanding of the parties and there are no provisions, terms, conditions or obligations, oral or written, expressed *or implied*, other than those contained herein. All obligations of the parties to each other under previous agreements ([if] any) are hereby released, but without prejudice to any rights which have already accrued to either party.
>
> [emphasis added]

13.9 In relation to the proposition that this clause had the effect of precluding the claimant from implying two suggested implied terms, one in law, and the other in fact, the Court of Appeal observed as follows:[23]

> 31 … First, an implied term, by its very nature (as an implied term), would not, *ex hypothesi*, have been in the contemplation of the contracting parties to begin with when they entered into the contract. Secondly, if a term were implied on, so to speak, a 'broader' basis 'in law' (as opposed to on a 'narrower' basis 'in fact'), it would follow, *a fortiori*, that such a term would not have been in the contemplation of the parties for … a term which is implied 'in law' (unlike a term which is implied 'in fact') is not premised on the presumed intention of the contracting parties as such. Thirdly, it is clearly established law that a term cannot be implied if it is inconsistent with an express term of the contract concerned. This principle is, of course, both logical as well as commonsensical. Finally, as pointed out by Nigel Teare QC (sitting as a deputy judge of the English High Court) in *Exxonmobil Sales and Supply Corp v Texaco Ltd* [2004] 1 All ER (Comm) 435 at [27]:
>
> > It [is] … arguable that where it is necessary to imply a term in order to make the express terms work such an implied term may not be excluded by [an] entire agreement clause *because* it could be said that such a term is to be found *in* the document or documents forming part of the contract. [emphasis added]

21 [2009] 3 SLR(R) 518.
22 *Ng Giap Hon v Westcomb Securities Pte Ltd* [2009] 3 SLR(R) 518 at [29].
23 *Ng Giap Hon v Westcomb Securities Pte Ltd* [2009] 3 SLR(R) 518 at [31]–[32].

> 32 That having been said, we are not prepared to state that an entire agreement clause can never exclude the implication of terms into a contract. However, for an entire agreement clause to have this effect, it would need to express such effect in clear and unambiguous language. …

13.10 Ultimately, as the Court of Appeal held that the claimant had failed to meet the requirements to successfully imply the terms in issue in law, and in fact, the court did not need to apply its observations as to the interaction of the entire agreement clause before it, to the proposed implied terms. However, these *obiter* observations were subsequently adopted in a pair of decisions of the High Court, namely, *Singapore Rifle Association v Singapore Shooting Association*[24] ("*Singapore Rifle Association*") and *Tonny Permana v One Tree Capital Management Pte Ltd*[25] ("*Tonny Permana*").

13.11 While both cases accepted that the operation of an entire agreement clause was, in the first place, dependent on its true construction, each case applied the reasoning set out in *Ng Giap Hon*, and concluded that the entire agreement clause which was in dispute in each case did *not* preclude the implication of certain terms which, leaving aside the entire agreement clause, satisfied the requirements for implication in fact (*ie*, the single test of implication rooted in "business efficacy", in which the "officious bystander test" is merely the practical means of ascertaining the content of the relevant term to be implied in fact).[26]

13.12 In particular, both cases accepted that as an implied term in fact in order to give business efficacy to the contract would, in the sense used in *Exxonmobil Sales and Supply Corp v Texaco Ltd*[27] ("*Exxonmobil*"), be a term "intrinsic" to the written contract in which the entire agreement

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24 [2019] SGHC 13. The entire agreement clause in that case provided as follows:

> **15. Entire Agreement**
>
> This Agreement constitutes the entire agreement between the Parties with respect to the matters dealt with in this Agreement and supersedes and cancels in all respects all previous agreements and undertakings, if any, between the Parties, whether written or oral. Each Party acknowledges that, in entering into this Agreement, it does not do so on the basis of, and does not rely on, any representation, warranty or other provision except as expressly provided herein, and all conditions, warranties or other terms implied by statute or common law are hereby excluded to the fullest extent permitted by law.

The decision in the General Division was reversed on appeal in *Singapore Shooting Association v Singapore Rifle Association* [2020] 1 SLR 395, in part, but without disturbing the points made in the General Division on the impact of entire agreement clauses and implication of terms.

25 [2021] 5 SLR 477. The entire agreement clause in that case purported to supersede "all prior negotiations, representations, agreements and understandings".

26 See *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [41].

27 [2004] 1 All ER (Comm) 435.

clause had been incorporated, the entire agreement clause would not apply as such an implied term would *already* be part of the terms of the parties' contractual agreement, even if not recorded formally within the written document.

13.13 To this pair of cases, we may now add a third: *Auto Lease (Pte) Ltd v San Hup Bee Motor LLP*[28] ("*Auto Lease*"), being an appeal to the General Division from a decision from the District Court as to the effect of an entire agreement clause on a term *implied by law by statute*, namely, the Sale of Goods Act.[29] Although the basis for implication was different, in this case, the General Division reiterated the positions that had been set out in both *Singapore Rifle Association* and *Tonny Permana* in connection with implied terms in fact and appeared to apply them to the term before it even though it was a term implied by statute.

13.14 The dispute in *Auto Lease* arose over the alleged breach of two separate contracts relating to the sale and purchase of a Toyota HiAce Commuter GL2.7A. The vehicle had been acquired by the first respondent (San Hup Bee Motor LLP, or "San Hup LLP") from the appellant (Auto Lease Pte Ltd, or "Auto Lease") pursuant to a hire-purchase agreement. While a balance of $49,200.86 was still outstanding, the first respondent prevailed on a related entity, the second respondent (San Hup Bee (S) Pte Ltd, or "San Hup"), to sell the vehicle on a consignment basis, and pursuant to this arrangement, the first and second respondents entered into a sale and purchase agreement to sell the vehicle to the third respondent (Toh Beng Hock trading as V-Tech Auto Service, or "V-Tech").[30]

13.15 In accordance with the sale and purchase agreement, the third respondent paid the price of $52,200 in full. This included a sum of $49,200.86 to the appellant (being the sum outstanding on the hire-purchase agreement between it and the first respondent). However, the third respondent was subsequently unable to register a change in the legal ownership of the vehicle to himself on the registry of ownership of road vehicles maintained by the Land Transport Authority ("LTA"), because the first and second respondents had "failed to obtain and present to the [LTA] any evidence that the vehicle was not [still] under financing".[31] The third respondent accordingly sued the first and second respondents for breach of the contract of sale and purchase in having

28 [2023] SGHC 141.
29 Cap 393, 1999 Rev Ed.
30 For the purposes of the hearing, the first and second respondents were treated as joint vendors of the vehicle: *Auto Lease (Pte) Ltd v San Hup Bee Motor LLP* [2023] SGHC 141 at [6].
31 *Auto Lease (Pte) Ltd v San Hup Bee Motor LLP* [2023] SGHC 141 at [7].

failed to ensure that unencumbered title to the vehicle could be passed to the third respondent.

13.16 The reason for the third respondent's difficulties in registering the change of legal ownership lay in the appellant having applied the sums received from the third respondent in partial set-off of a debt owed to it by San Hup Bee Motoring Ltd ("SHB Motoring"), another separate legal entity related to the first and second respondents. Further, the Appellant refused to co-operate with the first and second respondents to submit the relevant documentation to the LTA to indicate that the vehicle was no longer under financing, notwithstanding its receipt of the $49,200.86 from the appellant.[32] This behaviour led the first and second respondents to sue the appellant for: (a) having wrongfully applied the receipts from the third respondent for a purpose not permitted under the terms of the hire-purchase agreement; and (b) having breached the hire-purchase agreement in failing to forward the requisite documentation to the LTA to record that the vehicle was no longer subject to financing previously provided by it.

13.17 At first instance, the district judge in the court below found that the appellant had breached the terms of the hire-purchase agreement by improperly applying part of the payment from the third respondent to set off amounts owed by an unrelated entity. The district judge also held that the appellant had breached the terms of the hire-purchase agreement by failing to remove the encumbrance on the legal title of the vehicle in the records maintained by the LTA although the sum outstanding had been received. Further, the district judge held that, by these breaches, the Appellant had caused the first and second respondents to breach their obligations to the third respondent in the sale agreement between them, and so ordered the appellant to indemnify the first and second respondents for any damages which they might be assessed to pay in respect of the third respondent's losses.[33]

13.18 For present purposes, the key issues in contention were: (a) whether the district judge had erred in holding that there was an implied term in the sales agreement between the first and second respondents (as vendors) and the third respondent (as purchaser) that the former would procure the transfer of legal title in the vehicle, free of all encumbrances, to the latter on grounds that the wording of the implied term in dispute had not been pleaded by the third respondent; and (b) whether the presence of an entire agreement clause in the sales

32 *Auto Lease (Pte) Ltd v San Hup Bee Motor LLP* [2023] SGHC 141 at [9]–[10].
33 *Auto Lease (Pte) Ltd v San Hup Bee Motor LLP* [2023] SGHC 141 at [12]–[13].

agreement[34] had the effect of precluding the implication of such a term into the agreement.

13.19 On appeal, Mavis Chionh J dismissed the appellant's submissions that implication of the disputed term was improper for want of pleading by pointing out that the district judge had, in effect, ruled that the term in question was to be implied in law (and not in fact) by statute, in keeping with s 12(2) read with s 2(1) of the Sale of Goods Act.

13.20 Being a term which was implied by operation of law, and not in fact, there was no need to plead the wording of the term to be implied, since such terms (and their wording) were matters which, "ought to be recognized by the court as a matter of law".[35] Adopting that proposition, Chionh J reasoned that, "even if the issue of a 'term implied in law' is not pleaded, the court should still recognize such implied terms [as] a matter of law".[36]

13.21 Since the contract between the first and second respondents and the third respondent was a contract falling within the ambit of the Sale of Goods Act 1979, such a term as provided for by s 12(2) had to be implied by statute to form part of the contract of sale between them, there also being nothing to indicate in the express terms that the first and second respondents had merely contracted to transfer "only such title as [they might] have]" (which would have triggered the application of s 12(3)).[37] Furthermore, though Chionh J alluded to the potential application of the Unfair Contract Terms Act 1977,[38] the point was not fully argued.[39] Even so, it should be kept in mind that s 6 read with s 13(1) of the Unfair Contract Terms Act 1977 arguably renders attempts by the parties to exclude liabilities arising from terms implied via s 12 of the Sale of Goods

34 The entire agreement clause in question is reproduced at *Auto Lease (Pte) Ltd v San Hup Bee Motor LLP* [2023] SGHC 141 at [98], and provided as follows:

> This Agreement constitutes the entire agreement of the parties relating to the subject matter addressed in this Agreement. This Agreement supersedes all prior communications, contracts, or agreements between the parties with respect to the subject matter addressed in this Agreement, whether oral or written.

35 *Jet Holding Ltd v Cooper Cameron (Singapore) Pte Ltd* [2006] 3 SLR(R) 769 at [93].

36 *Auto Lease (Pte) Ltd v San Hup Bee Motor LLP* [2023] SGHC 141 at [78].

37 *Auto Lease (Pte) Ltd v San Hup Bee Motor LLP* [2023] SGHC 141 at [76]–[77].

38 Cap 396, 1994 Rev Ed. See *Auto Lease (Pte) Ltd v San Hup Bee Motor LLP* [2023] SGHC 141 at [92], citing *Ng Giap Hon v Westcomb Securities Pte Ltd* [2009] 3 SLR(R) 518.

39 The report does not suggest that either party had submitted at all on the application and/or relevance of ss 6 and 13(1) of the Unfair Contracts Terms Act (Cap 396, 1994 Rev Ed).

Act 1979 by excluding such implication to be ineffective.[40] The general view, therefore, is that it is very difficult for parties to validly "contract out of" terms implied pursuant to s 12 of the Sale of Goods Act 1979.

A. Entire agreement clauses and implication of terms in fact: "intrinsic" implied terms in fact

13.22 Though it was not strictly necessary to do so, the learned judge also addressed the appellant's contention that the term was one which had been improperly implied *in fact*. Even if this were so, Chionh J pointed out that parties need only plead material facts, and not the legal result of those facts. Thus, the third respondent's failure to plead that the facts which *had* been pleaded might result in the implication in fact of the disputed term was not fatal.[41]

13.23 Chionh J then turned to the effect of the entire agreement clause on the implied term in question, had it been implied in fact. The learned judge pointed out that:[42]

> … an entire agreement clause would not, as a matter of principle, exclude the implication of terms into that contract … In *Ng Giap Hon*, the CA explained why this was so (at [31]). First, an implied term, 'by its very nature (as an implied term), would not, *ex hypothesi*, have been in the contemplation of the contracting parties to begin with when they entered into the contract'. Second, if a term were to be implied on a 'broader' basis 'in law' (as opposed to on a 'narrower' basis 'in fact'), it would follow *a fortiori* that 'such a term would not have been in the contemplation of the parties', since a term implied 'in law' – unlike a term implied 'in fact' – 'is not premised on the presumed intention of the contracting parties'. Third, a term cannot be implied if it is inconsistent with an express term of the contract concerned. Finally, the CA also observed (citing *Exxonmobil Sales and Supply Corp v Texaco Ltd* [2004] 1 All ER (Comm) 435 at [27]) that it could be argued that 'where it is necessary to imply a term in order to make the express terms work, such an implied term may not be excluded by [an] entire agreement clause because it could be said that such a term is to be found in the document or documents forming part of the contract'.

13.24 Chionh J then examined[43] the key portions of *Singapore Rifle Association* and *Tonny Permana*, both of which had followed and applied *Ng Giap Hon*, and concluded that as had been the case with the entire

40 In *Ng Giap Hon v Westcomb Securities Pte Ltd* [2009] 3 SLR(R) 518 at [32], the Court of Appeal recognised that an entire agreement clause could, in principle, fall within the ambit of and be regulated by the Unfair Contract Terms Act (Cap 396, 1994 Rev Ed). See also, *Lee Chee Wei v Tan Hor Peow Victor* [2007] 3 SLR(R) 537 at [36].

41 *Auto Lease (Pte) Ltd v San Hup Bee Motor LLP* [2023] SGHC 141 at [79]–[84].

42 *Auto Lease (Pte) Ltd v San Hup Bee Motor LLP* [2023] SGHC 141 at [91].

43 *Auto Lease (Pte) Ltd v San Hup Bee Motor LLP* [2023] SGHC 141 at [94]–[97].

agreement clause in each of those cases, the entire agreement clause in the sales agreement in the present dispute before the court had no effect on the implied term as to ensuring that unencumbered title was to be transferred by the first and second respondents to the third respondent:[44]

> Applying the principles articulated in *Singapore Rifle Association* and *Tonny Permana*, whether the implied term in the present case is characterized as a term implied 'in law' or as a term implied 'in fact' based on business efficacy, it can only be excluded with the use of clear and unambiguous language to that effect in the entire agreement clause. I find no such language in the above clause. The sentence 'this agreement constitutes the entire agreement of the parties relating to the subject matter addressed in the agreement' does not suffice to exclude matters intrinsic to the agreement. It only excludes matters extrinsic to the written agreement. The words used also do not exclude 'terms implied in law' – unlike the entire agreement clause in *Singapore Rifle Association* which stated that 'all conditions, warranties or other terms implied by statute or common law are hereby excluded to the fullest extent permitted by law'.

13.25 It may be apposite to make a few small points in response to this, as well as to the earlier decisions in *Ng Giap Hon*, *Singapore Rifle Association* and *Tonny Permana*.

13.26 Following *Auto Lease*, it is clear a term may be implied in fact, notwithstanding the presence of an entire agreement clause, *unless* the wording of the clause "clearly and unambiguously" addresses the term which is to be implied.

13.27 In *Singapore Rifle Association*, Pang Khang Chau JC summarised certain propositions which had been made in the English decisions in *Exxonmobil* and *Axa Sun Life Services Plc v Campbell Martin Ltd*[45] in the following way:[46]

> The following principles may be derived from the foregoing cases:
>
> (a) Terms implied in order to give business efficacy to an agreement are intrinsic to the agreement.
>
> (b) They would therefore not be precluded by an entire agreement clause which merely excludes matters extrinsic to the written agreement.
>
> (c) Nevertheless, since the effect of an entire agreement clause ultimately turns on the proper construction of the actual words used in the clause, it may still be possible for intrinsic implied terms to be

44 *Auto Lease (Pte) Ltd v San Hup Bee Motor LLP* [2023] SGHC 141 at [99].
45 [2011] 2 Lloyd's Rep 1.
46 *Singapore Rifle Association v Singapore Shooting Association* [2019] SGHC 13 at [140].

> excluded if there are clear and unambiguous words which expressly and specifically exclude such implied terms.

13.28 This passage was quoted with approval in *Tonny Permana*[47] as well as in *Auto Lease*.[48] However, the utility of the supposed distinction between implied terms in fact for reasons of business efficacy which are "intrinsic" to the "agreement", and those which are not, and which might thus be precluded by an entire agreement clause "which merely excludes matters extrinsic to the written agreement", is not entirely clear.

13.29 First of all, para (a) tells us that terms implied in fact for reasons of business efficacy are "intrinsic to the *agreement*" [emphasis added]. Presumably, this is to emphasise that such implied terms in fact will be part of the parties' agreement, even where the written *record* of that agreement does not set out such implied terms.

13.30 Paragraph (b) then states that *such* implied terms which are "intrinsic to the *agreement*" [emphasis added] would "therefore not be precluded by an entire agreement clause which merely excludes matters [*ie*, terms, for example] which are extrinsic *to the written agreement*" [emphasis added]. A contrast is therefore being drawn in this paragraph to terms which are "intrinsic to the *agreement*" [emphasis added], and "matters which are extrinsic to the *written* agreement" [emphasis added] – *ie*, between matters which form part of the agreement (specifically, terms implied in fact for reasons of business efficacy), and things which are not *recorded* in the written agreement.

13.31 Turning, then, to para (c), the passage above suggests that an appropriately-worded entire agreement clause could, *possibly*, exclude "intrinsic implied terms … if there are clear and unambiguous words which expressly and specifically exclude such implied terms". The suggestion, therefore, is that if the entire agreement clause in question was worded atypically, and made clear and unambiguous provision that even "intrinsic implied terms" – *ie*, implied terms in fact for reasons of business efficacy notwithstanding that terms implied in fact for business efficacy – were *not* part of the agreement given that such implied terms would, necessarily, not have been recorded in the *written* agreement, such implied terms in fact by reason of business efficacy might *possibly* be excluded.

13.32 The question which arises, then, is *when* might such possibility arise? Although the point was adopted in *Tonny Permana*, and also in

47 *Tonny Permana v One Tree Capital Management Pte Ltd* [2021] 5 SLR 477 at [161].
48 *Auto Lease (Pte) Ltd v San Hup Bee Motor LLP* [2023] SGHC 141 at [94].

Auto Lease, neither case provides significant elaboration on the point. With respect to the learned judges in *Singapore Rifle Association*, *Tonny Perdama* and *Auto Lease*, it may be helpful to begin from first principles. In particular, the point that it is not permissible to imply any term in fact if doing so would contradict the express terms of the contract.[49]

13.33 Where the written record of the parties' agreement sets out an entire agreement clause, it will usually be difficult to successfully deny that that clause is other than an express term of the parties' agreement. If so, the question arises whether a term implied in fact for business efficacy reasons may be so implied because it would potentially be contradicted by an aptly-worded entire agreement clause which "clearly and unequivocally" addresses and refers to such implied terms.

13.34 While it might be *possible* for such an aptly-worded entire agreement clause to contradict, and thus bar, the implication of a term in fact promoting business efficacy, it would be strange for such a *construction* of the clause to be adopted as the true one. That is, in a case where the express terms of a contract document set out an entire agreement clause which might *appear* to preclude the implication of the very implied term in fact for business efficacy which is in dispute, it remains open to question whether such a *perverse* interpretation be the true one, the relevant context against which the entire agreement clause is to be construed being that, in general, parties do not enter into contracts with the perverse intention that they be "unworkable".

13.35 To put it another way, the *possibility* that an aptly-worded entire agreement clause might actually be *effective* in precluding the implication of a term in fact for business efficacy reasons may well depend on whether the court can be convinced that the parties to the contract had, in light of the available evidence, the *perverse* intention to create a contractual relationship that *eschewed business efficacy*.

13.36 Hence, while there is nothing in principle to preclude the parties from incorporating express terms which record and manifest perverse intentions to result in an "unworkable" contract (which would, presumably, result in inevitable difficulties of performance and liability for breach), this should be a highly atypical case.

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49 *Lee Chee Wei v Tan Hor Peow Victor* [2007] 3 SLR(R) 537 at [17]. In *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [98], it was suggested that this may well not be an independent test, but forms part of the officious bystander test in that "a term that is not reasonable, not equitable, unclear, or that contradicts an express term of the contract, will not be implied. Such a term will necessarily fail the officious bystander test".

B. Entire agreement clauses and terms implied in law by statute

13.37 A secondary question then arises as to the extent to which the parties may, through an appropriately-worded entire agreement clause preclude the implication of a term in law *by statute*. At [99], the learned judge in *Auto Lease* provided the following summary:[50]

> Applying the principles articulated in *Singapore Rifle Association* and *Tonny Permana*, whether the implied term in the present case is characterized as a term implied 'in law' or as a term implied 'in fact' based on business efficacy, it can only be excluded with the use of clear and unambiguous language to that effect in the entire agreement clause. I find no such language in the above clause. The sentence 'this agreement constitutes the entire agreement of the parties relating to the subject matter addressed in the agreement' does not suffice to exclude matters intrinsic to the agreement. It only excludes matters extrinsic to the written agreement. The words used also do not exclude 'terms implied in law' – unlike the entire agreement clause in *Singapore Rifle Association* which stated that 'all conditions, warranties or other terms implied by statute or common law are hereby excluded to the fullest extent permitted by law'.

13.38 Care should be taken over the above passage. In particular, this passage should not be taken to have made the proposition that, had the entire agreement clause been worded more felicitously, that would have precluded the relevant term from being implied in law by statute (namely, pursuant to s 12 of the Sale of Goods Act 1979).

13.39 Sections 12(1) and 12(2) of the Sale of Goods Act 1979 provide that the terms set out therein are to apply in a contract of sale of goods, save where s 12(3) applies. In turn, s 12(3) provides that it is applicable in cases where the court is satisfied that the parties had intended for the vendor to transfer "only such title as he or a third person [might] have". If so, ss 12(4) and 12(5) would then apply, and would impose different terms from those which would be imposed by ss 12(1) and 12(2).[51] Hence, Parliament has provided that ss 12(1) and 12(2) may *only* be disapplied *if* s 12(3) is satisfied – in which case terms are to be implied pursuant to ss 12(4) and 12(5), instead.

13.40 In addition, as mentioned previously,[52] ss 6 and 13(1) of the Unfair Contract Terms Act 1977 have the effect of rendering express terms which limit liability by, "exclud[ing] or restrict[ing] the relevant obligation or duty" to be ineffectual.

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50 *Auto Lease (Pte) Ltd v San Hup Bee Motor LLP* [2023] SGHC 141 at [99].

51 Since the contract in issue in *Auto Lease (Pte) Ltd v San Hup Bee Motor LLP* [2023] SGHC 141 was formed after 18 May 1873, discussion of s 12(6) of the Sale of Goods Act 1979 (2020 Rev Ed) is unnecessary.

52 At para 13.21.

13.41 Taking these points on board, even if the entire agreement clause before the court in *Auto Lease* had explicitly referred to "terms implied in law", it is debatable whether such explicit reference would have been sufficient to bar the implication of the term mandated by s 12(2) of the Sale of Goods Act 1979.

13.42 To illustrate, suppose the entire agreement clause in question provided that, "this agreement constitutes the entire agreement of the parties relating to the subject matter addressed in the agreement *and excludes all terms implied by law*" [emphasis added]. The words which have been italicised would not, without more, lead to an inference that the parties had intended "that the seller should transfer only such title as he or a third person [might] have", as required by s 12(3) of the Sale of Goods Act 1979. If so, s 12(2) would still be in play. Further, even if the express wording excluded the obligation as would otherwise have arisen through the operation of s 12(2) (*ie*, "the relevant obligation or duty"), ss 6 and 13(1) of the Unfair Contract Terms Act would operate to deny the effectiveness of such express provision. The intent of Parliament to render the terms to be implied *vide* ss 12(1) and 12(2) to be mandatory, save where s 12(3) was applicable, is hard to resist.

13.43 While it is certainly true that whether an entire agreement clause might, or might not, preclude the implication of a term in law by statute depends on the wording of the clause, and its true construction, it is *also* important to keep in mind how Parliament had provided for the possibility of "contracting out" of such terms as would otherwise be implied by operation of statute. Though the point may have been underplayed in *Auto Lease*, that does not mean that it may be ignored. That is, whether an entire agreement clause may preclude implication of a term in law by statute does not depend *solely* on the question of construction: it depends also as much on the operation and construction of the relevant statutes.

III. Entire agreement clauses and collateral contracts setting out conditions precedent

13.44 Turning away from the effects of entire agreement clauses and the implication of terms, in *Cradle Wealth Solutions Pte Ltd v MTN Consultants & Building Management Pte Ltd*,[53] the General Division addressed the question as to whether the presence of an entire agreement

53 [2024] 4 SLR 276. However, the version of the decision in the Singapore Law Reports is partially reported and some significant paragraphs of the learned judge's grounds of decision are not set out therein.

clause might have the effect of denying efficacy to a seeming agreement arrived at separately from the contract of which the entire agreement clause was a part as a collateral contract. In that case, Lee Seiu Kin J concluded that it did. Unfortunately, the truncated nature of the partially-reported version of this case in the Singapore Law Reports obscures, somewhat, how the learned judge arrived at this result. Consequently, the following discussion will refer to the complete text of the judgment in the unreported version of the case.[54]

13.45 This case concerned the non-performance of a written agreement (the "Settlement Agreement") which had been reached to settle a prior legal dispute between the parties thereto. Under the terms of the Settlement Agreement, the defendants (MTN Consultants & Building Management Pte Ltd ("MTN"), and its sole director and shareholder, Mr Nazarisham bin Mohamed Isa ("Nazarisham")) agreed to pay US$4,000,000 to the claimant (Cradle Wealth Solutions Pte Ltd ("Cradle Wealth")) by 29 June 2020, with time being of the essence.[55]

13.46 The defendants contended, *inter alia*,[56] that there was a separate collateral contract that had been arrived at orally by which the parties had agreed *not* to enforce the terms as recorded in the Settlement Agreement until certain conditions precedent were satisfied:

> … assuming the court finds that the Settlement Agreement was not a sham, [the respondents contend] that there was an oral agreement between the parties constituting a condition precedent to the attaching of any obligation under the Settlement Agreement.

13.47 The defendants contended that since those conditions precedent[57] were not satisfied, the duty to pay the US$4m under the Settlement

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54 *Cradle Wealth Solutions Pte Ltd v MTN Consultants & Building Management Pte Ltd* [2023] SGHC 307.

55 *Cradle Wealth Solutions Pte Ltd v MTN Consultants & Building Management Pte Ltd* [2023] SGHC 307 at [11]:

> 1. In full and final settlement of Suit 940, the Parties agree as follows:-
> (1) [MTN] and [Nazarisham] shall, jointly and severally, pay the sum of US$4,000,000 (the "Settlement Sum") to [Cradle Wealth] by 29 June 2020, with time being of the essence.
> …

56 The defendants also contended that the Settlement Agreement was a sham, that the agreement recorded therein had been discharged by mutual agreement pursuant to a subsequent deed which superseded the Settlement Agreement and which made it null and void, and also raised a defence based on promissory estoppel. All of these were dismissed by the learned judge for relatively straightforward reasons which need not detain us.

57 Namely, the monetisation of certain gemstones owned by Nazarisham, into cash. This was rendered difficult as the gemstones subjected to a prohibition order issued

(cont'd on the next page)

Agreement was not yet due to be performed, notwithstanding time being of the essence, and the date of 29 June 2020 having passed.

13.48 The difficulties for the respondent rested on two fronts. First, the Settlement Agreement was a contract which had been reduced to written form. Consequently, if the parol evidence rule applied, it could, potentially, preclude admission of evidence pertaining to the formation of the alleged collateral agreement setting out the supposed conditions precedent.

13.49 Second, the Settlement Agreement contained an entire agreement clause. That clause provided as follows:[58]

> 5. This Agreement contains the entire agreement between the Parties with regard to the matters set forth herein. No representations, inducements, promises or agreements, oral or otherwise that are not embodied herein shall be of any force or effect.[59] [reference added]

13.50 As to these difficulties, the learned judge held in favour of the appellant. Dismissing the respondent's contention that the entire agreement clause ("cl 5") was *not* intended by the parties to operate so as to preclude the respondent from relying on the condition precedent set out in the oral collateral contract, Lee J held as follows:[60]

> … I find that the Defendants are unable to rebut the presumption expressed in *Zurich Insurance* at [40] and [132(b)] that a contract [document] which is complete on its face was intended to contain all the terms of the parties' agreement. Moreover, the language of cl 5 clearly precludes a defence based on a separate oral agreement constituting a condition precedent under s 94(*c*) of the EA. The Defendants are unable to sustain an interpretation of cl 5 that would allow recourse to an oral condition precedent.

13.51 The learned judge first rejected the Defendant's attempt to adduce extrinsic evidence purportedly with the aim of aiding in the construction

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by the Singapore Police Force, prohibiting access to or dealings with the gemstones: *Cradle Wealth Solutions Pte Ltd v MTN Consultants & Building Management Pte Ltd* [2023] SGHC 307 at [101].

58 *Cradle Wealth Solutions Pte Ltd v MTN Consultants & Building Management Pte Ltd* [2023] SGHC 307 at [12].

59 The contract document also contained a "no oral modification" clause (*ie*, cl 7, which provided that "[n]o modification or variation of this Agreement shall be effective unless made in writing and signed by or on behalf of the Parties"). However, no substantial arguments were made by the claimants or the defendants in respect of this clause.

60 *Cradle Wealth Solutions Pte Ltd v MTN Consultants & Building Management Pte Ltd* [2023] SGHC 307 at [79].

of cl 5 in a manner because the proposed construction simply went far beyond what the wording in cl 5 could reasonably bear:[61]

> … I observe that what the Defendants are essentially seeking to do is to admit extrinsic evidence to aid in the construction of cl 5. This much is clear from the nature of the extrinsic evidence which the Defendants rely on (ie, the context and circumstances under which cl 5 was drafted in the Settlement Agreement), as well as the Defendants' reliance on *CIFG Special Assets Capital Ltd v Ong Puay Boon* [2018] 1 SLR 170 in support. … That case concerned the application of the legal principles in Zurich Insurance on the contextual approach to contractual interpretation under s 94(*f*) of the EA (the 'Zurich Insurance principles') to the true construction of a general indemnity clause in the set of agreements between the parties. *In the present case, the proposed interpretation of cl 5 by the Defendants is essentially that its effect should be nullified.* In so doing, however, the Defendants have ignored the *Zurich Insurance* principles—critically, *it is not permissible to use extrinsic evidence to advance a construction that is well outside the scope of the meaning that the actual words of the clause can reasonably bear, much less one that directly contradicts the express words of the clause* (*Zurich Insurance* at [123] and [132(f)]. [references omitted; emphasis added]

13.52 Rather, given the language set out in cl 5, the learned judge construed it to be:[62]

> … a clause that clearly purports to deprive any pre-contractual or collateral agreement of legal effect. Clause 5 states that the Settlement Agreement contains the parties' entire agreement 'with regard to the matters set forth herein'. It explicitly states that any 'agreements, oral or otherwise' which are not contained in the Settlement Agreement shall be devoid of any force or effect. The alleged condition precedent as pleaded by the Defendants is therefore caught by cl 5, since it is related to the matters covered by the Settlement Agreement and was ostensibly reached by oral agreement. …

13.53 As to the impact of cl 5, so construed, on the defendants' contention that the obligations recorded in the contract document were not to arise until satisfaction of a condition precedent which had been agreed between the parties pursuant to a separate oral collateral agreement between them, the learned judge ruled as follows:[63]

> … The Court of Appeal in *Wen Wen Food Trading*[64] had found that any claim based on an oral collateral contract provable under s 94(*b*) of the EA would be precluded by the entire agreement clause in that case. I find in the present case that any claim based on a separate oral agreement constituting a condition

61 *Cradle Wealth Solutions Pte Ltd v MTN Consultants & Building Management Pte Ltd* [2023] SGHC 307 at [82].

62 *Cradle Wealth Solutions Pte Ltd v MTN Consultants & Building Management Pte Ltd* [2023] SGHC 307 at [83].

63 *Cradle Wealth Solutions Pte Ltd v MTN Consultants & Building Management Pte Ltd* [2023] SGHC 307 at [83].

64 See n 74 below.

> precedent provable under s 94(*c*) of the EA is likewise precluded by the entire agreement clause (cl 5) in the Settlement Agreement. … [reference added]

13.54 There is little room for disagreement in the above extracts from the learned judge's grounds of decision. However, given the terseness of the language, it may seem unclear as to *why* an entire agreement clause, worded as cl 5 was worded, would have the effect of *precluding* the defendants' claim "based on a separate oral agreement constituting a condition precedent".

13.55 While Singapore contract law is indeed *generally* premised on giving effect to party intention, party intention is given effect to *because* the substantive law permits that outcome. That is, it is not possible for parties to agree on an outcome which the law does not permit, and for the parties to expect the law to give effect to that agreement if the law does not so permit.

13.56 Party agreement is always subject to what the law will countenance, and we see this in the law on penalties, on the regulation of exception clauses, the law on illegality, and even on the preclusion of implication of terms in law by statute where Parliament has made such implication mandatory and without allowing parties to "contract out" of such implication.[65]

13.57 How, then, does an entire agreement clause worded like cl 5 *preclude* the making of submissions such as the one put forward by the defendants in this case? To help provide an answer to this question, the following will attempt to set out an exegesis of the learned judge's reasoning in *Cradle Wealth*, using that judgment as a springboard to supplement the points which have been made above (in connection with implied terms in fact and law), and to provide slightly greater clarity as to how an entire agreement clause does what it does, as a matter of Singapore law, and how it interacts with the Evidence Act 1893[66] ("EA").

13.58 First, where a contract document is, on its face, a "complete" record of the terms as had been agreed by the parties in respect of *a* contract (*ie*, the contract which the document was purportedly a complete record of), the onus is on the party asserting that the contract document was an *incomplete* record to show that that document did *not* contain "all the terms of the parties['] agreement", contrary to what the entire agreement clause might appear to assert on its face.

65 See, *eg*, discussion above at paras 13.37–13.43.
66 2020 Rev Ed.

13.59 The parol evidence rule set out in s 93 of the EA is only triggered where *all* the terms of a contract have been reduced by the parties (or with their consent) into writing. Hence, when the learned judge in *Cradle Wealth* held that "the Defendants [were] unable to rebut the presumption expressed in *Zurich Insurance* at [40] and [132(b)] that a contract [document] which is complete on its face was intended to contain all the terms of the parties", that meant that s 93 of the EA would be triggered.

13.60 If so, the defendants would be barred by s 93 of the EA from tendering evidence to show that there were *other* agreed terms in that very contract whose terms had been completely recorded within that contract document. But that was not what the defendants were concerned to do in *Cradle Wealth*. Their goal was to adduce evidence proving that there was *another* agreement, extrinsic to *this* contract as had been reduced into writing, which set out conditions precedent to the operation of the contract as had been reduced into documentary form.

13.61 Given that s 93 of the EA had been triggered, the defendants would also be barred from tendering evidence to show that there had been oral agreements or statements for the purpose of proving that those terms as had been completely recorded within that contract document were to be added to, subtracted from, contradicted, or varied. However, this exclusionary rule set out in the "chapeau[67] to s 94" is not absolute, as it is subject to the further qualifications set out in s 94 of the EA: in particular, the exception set out in s 94(*c*) permitting the adducing of evidence of oral agreements or statements to prove "the existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract".

13.62 By supporting a finding that the parties *had* reduced the entirety of their settlement agreement into the written contract document, cl 5 (the entire agreement clause) would indeed trigger the operation of s 93, and, in turn, the *chapeau* to s 94. However, the *chapeau* to s 94 is qualified. *Inter alia*, it would still be open to the respondent to adduce extrinsic evidence for the purpose of "adding to" the terms set out in the contract document recording the terms of the parties' settlement agreement, *ie*, evidence of any oral agreement or statement to prove the existence of "any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract", pursuant to s 94(*c*) of the EA.

67 *Cradle Wealth Solutions Pte Ltd v MTN Consultants & Building Management Pte Ltd* [2023] SGHC 307 at [85], meaning "hat" in French, but referring to the main body of s 94 of the EA, preceding the words, "subject to the following provisions".

13.63 Even so, that only tells us that such evidence is *not* rendered inadmissible by reason of the *chapeau* to s 94. Although s 94(*f*) of the EA has been recognised by the Court of Appeal to be an *independent* rule providing for the admissibility of extrinsic evidence tendered for the purpose of aiding in the process of interpretation,[68] the same approach appears not to have been adopted for the *other* "exceptions" to the *chapeau* in s 94.[69]

13.64 Consequently, even if the evidence which the Defendants were aiming to adduce was able to avoid the bar imposed *vide* the *chapeau* in s 94 because of the s 94(*c*) exception, the question would still remain as to whether such evidence was admissible at all – and as to that, reference would have to be made to *other* provisions under the EA.

13.65 Though the learned judge did not draw attention to it, it is probably helpful to turn to s 5 of the EA. That provides as follows:[70]

> Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others.

68 *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at [72], citing with approval the following extract from *Sarkar's Law of Evidence* (Wadhwa & Co, 16th Ed, 2007) at pp 1538–1539, addressing the nature of s 92(6) of the Indian Evidence Act, with which s 94(*f*) of the Singapore Evidence Act 1893 (2020 Rev Ed) is *in pari materia*:

> ... Proviso (6) is of an exceptional nature, in so far as it is not an exception to the rule laid down in the main part of the section. *It is a substantive provision itself laying down the law relating to the admissibility of extrinsic evidence as an aid to the construction of a document in cases in which it is necessary to find out how the document is related to existing facts* ... [E]xtrinsic evidence is admissible for the purpose of showing the circumstances in which the document came to be executed with a view to arrive at the true effect of the transaction to which the document relates ... [emphasis added]

69 *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [48]:

> … *Unlike the other provisos under s 94 of the EA* [*ie*, ss 94(*a*)–94(*e*)] *which serve as specific exceptions to the general rule in s 94 that no evidence of an* oral *agreement of statement is admissible for the purpose of contradicting, varying, adding to or subtracting from the terms of the instrument*, proviso (f) is of general application. It permits the admission of any fact which shows in 'what manner the language of a document is related to existing facts'. It is, so to speak, a general rule which seems to permit wide recourse to extrinsic evidence. … [emphasis added]

70 Evidence Act 1893 (2020 Rev Ed) s 5.

13.66 In *Cradle Wealth*, the Defendants were seeking to admit evidence that there was a *separate* oral agreement providing for a condition subsequent which would have to be satisfied *before* the provisions in the settlement agreement (whose terms had been completely reduced into writing in the form of the written contract document) were to become operative. That is, the *extent* of the rights set out in the contract document would be circumscribed by such a condition precedent, if proved.

13.67 Such evidence appears to involve the proof of facts in issue where:[71]

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

13.68 If so, it would follow that such evidence *would* be admissible, pursuant to s 5, as a "fact in issue". But at this point, it is apposite to turn back to cl 5:[72]

> 5. This Agreement contains the entire agreement between the Parties with regard to the matters set forth herein. No representations, inducements, promises or agreements, oral or otherwise that are not embodied herein shall be of any force or effect.

13.69 For present purposes, the key part of this entire agreement clause lies in its second sentence, that "[n]o… promises or agreements, oral or otherwise that are not embodied herein shall be of any force or effect".

13.70 As V K Rajah JA explained in *Lee Chee Wei v Tan Hor Peow Victor*[73] ("*Lee Chee Wei*"):

> An entire agreement clause can … be viewed through a legal prism and construed as denuding a collateral warranty of legal effect ('the legal perspective') and/or by rendering inadmissible extrinsic evidence which reveals terms inconsistent with those in the written contract ('the evidential perspective').

13.71 The point made above in *Lee Chee Wei* was clearly referred to and relied on by the learned judge in *Cradle Wealth*, but without explaining *how* these effects, particularly the former (*ie*, the legal perspective

71 Evidence Act 1893 (2020 Rev Ed) s 3(1).
72 *Cradle Wealth Solutions Pte Ltd v MTN Consultants & Building Management Pte Ltd* [2023] SGHC 307 at [12].
73 [2007] 3 SLR(R) 537 at [36].

operated.[74] As to this, the following passages set out in the Court of Appeal's judgment in *Lee Chee Wei* are telling:[75]

> 26 The purpose and effect of an entire agreement clause were succinctly summarised by Gavin Lightman J with his customary clarity in *Inntrepreneur Pub Co v East Crown Ltd* [2000] 2 Lloyd's Rep 611 (at 614) as follows:
>
> > The purpose of an entire agreement clause is to preclude a party to a written agreement from threshing through the undergrowth, and finding in the course of negotiations some (chance) remark or statement (often long forgotten or difficult to recall or explain) on which to found a claim such as the present to the existence of a collateral warranty. The entire agreement clause obviates the occasion for any such search and the peril to the contracting parties posed by the need which may arise in its absence to conduct such a search. *For such a clause constitutes a binding agreement between the parties that the full contractual terms are to be found in the document containing the clause and not elsewhere, and that accordingly any promises or assurances made in the course of the negotiations (which in the absence of such a clause might have effect as a collateral warranty) shall have no contractual force, save insofar as they are reflected and given effect in that document.*
>
> … [T]he formula of words used in the clause is abbreviated to an acknowledgement by the parties that the agreement constitutes the entire agreement between them. In my judgment that formula is sufficient for it constitutes an agreement that the full contractual terms to which the parties agreed to bind themselves are to be found in the agreement and nowhere else. … That can be the only purpose of the provision.
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> 27 From the freedom of contract perspective, Lightman J's dictum makes eminent sense, *a fortiori* in the context of parties who are commercial entities or knowledgeable businessmen who have negotiated the terms of their

74 *Cradle Wealth Solutions Pte Ltd v MTN Consultants & Building Management Pte Ltd* [2023] SGHC 307 at [76]. The learned judge also referred to the brief note of the Court of Appeal's reasoning in *Wen Wen Food Trading Pte Ltd v Food Republic Pte Ltd* [2019] SGHC 60 ("*Wen Wen Food Trading*") – though the appeal was dismissed by the Court of Appeal without any written grounds, the report of *Wen Wen Food Trading* appends the following Editorial Note:

> [LawNet Editorial Note: The plaintiff's appeal from this decision in Civil Appeal No 16 of 2019 was dismissed by the Court of Appeal on 25 September 2019 with no written grounds of decision rendered. Although the Court noted that the facts as pleaded might possibly have given rise to a claim based on an oral collateral contract under s 94(b) of the Evidence Act (Cap 97, 1997 Rev Ed), it ultimately rejected this argument as the fact that there was no option to renew the License Agreement was inconsistent with such an alleged collateral contract. The Court was also of the view that such a claim was precluded by the language of cl 30.1 of the License Agreement, which was an entire agreement clause that effectively deprived any pre-contractual or collateral agreement of legal effect.]

75 *Lee Chee Wei v Tan Hor Peow Victor* [2007] 3 SLR(R) 537 at [26]–[27].

agreement with the benefit of legal advice. In *Sere Holdings Limited v Volkswagen Group United Kingdom Limited* [2004] EWHC 1551 (Ch), Mr Christopher Nugee QC, sitting as a deputy judge of the High Court, considered Lightman J's observations on the purpose and effect of an entire agreement clause, and perceptively concluded (at [22]):

> I can see no flaw in the reasoning. It is elementary that whether an agreement has legal effect is a matter of the intentions of the parties …. I can see no reason why parties who have in fact reached an agreement in precontractual negotiations that would otherwise constitute a collateral contract should not subsequently agree in their formal contract that any such collateral agreement should have no legal effect, or in other words should be treated as if the parties had not intended to create legal relations; and for the reasons given by Lightman J this is precisely what an entire agreement clause on its face does.

[emphasis in original]

13.72 Hence, the Court of Appeal in *Lee Chee Wei* appears to be setting out the proposition that an appropriately-worded entire agreement clause may operate as a "binding agreement"[76] in which the parties had promised each other that, "the full contractual terms to which the parties agreed to bind themselves are to be found in the agreement [*ie*, the contract document] and nowhere else", *or* that any *other* agreement beyond that which had been recorded in the contract document "should have no legal effect, or in other words should be treated as if the parties had not intended to create legal relations".

13.73 The latter of these binding promises is of particular relevance to *Cradle Wealth*. Applied to the facts in *Cradle Wealth*, as a matter of *substantive* law, following Rajah JA's clarification in *Lee Chee Wei*, the entire agreement clause set out in cl 5 (specifically, the words, "[n]o … promises or agreements, oral or otherwise that are not embodied herein shall be of any force or effect") would have the effect of recording that the parties had promised each other that any other agreement beyond that which had been recorded in the contract document should be treated as if the parties had not intended to create legal relations, and would not, accordingly, have any legal effect.

13.74 If so, if that *promise* were given substantive effect by the courts by reason of it being part of a binding agreement between the parties

76 The basis for Lightman J to conclude that the promises set out in an entire agreement clause which he had identified took effect as a "binding agreement" is not explicitly explained. But, presumably, if consideration be required to make such agreement "binding", the *mutual* promises made by one party as recorded in the entire agreement clause would be sufficient executory consideration for each other.

that be the case, evidence of there having been some extrinsic collateral agreement containing a condition precedent would no longer be admissible as a fact-in-issue.

13.75 This is because, given the substantive effect of cl 5, where the courts give effect to such promises (that there are or were no extrinsic agreements to that documented within the four corners of the contract document) by denying legal efficacy[77] to any alleged agreements between the parties extrinsic to the contract document, evidence pertaining to the existence of the extrinsic collateral agreement would no longer be a fact "from which either by itself or in connection with other facts the … nature or extent of any right … asserted … in any suit or proceeding *necessarily follows*"[78] [emphasis added].

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77 The source for *this* may lie in how, in England, even prior to the enactment of the Common Law Procedure Act 1854 (c 125), the common law courts such as the Court of Queen's Bench, the Court of Common Pleas and the Court of Exchequer had "seized" for themselves a form of "equitable jurisdiction". As was explained in *Phillips v Clagett* (1843) 11 M & W 84 at 91:

> It has been the practice of Courts of law (especially in modern times) where they see that justice demands the interference of a Court of equity, and that a Court of equity would interfere – in every such case to save parties the expense of proceeding to a Court of equity by giving them the aid of the equitable jurisdiction of a Court of common law, to enable them to effect the same purpose. … From that principle has arisen where they [the courts of common law] have prevented a plea of release, or any other matter of the same sort, from being pleaded; and where they have seen clearly and distinctly that a Court of equity would declare the release to be void, they set the release aside, in order to save the parties the necessity of having recourse to a tedious, and certainly sometimes an expensive, litigation.

Significantly, this "equitable jurisdiction" of the common law courts was already extant as early as in 1799, given the decision of the Common Pleas in *Legh v Legh* (1791) 1 Bos & Pul 447, where, in an action in debt brought at common law by an assignee of the benefit of a debt owed to the assignor, and where the debtor sought to adduce a release of debt executed by the assignor by way of defence after having paid the sum owed to the assignor and not the assignee, notwithstanding it having received notice of the assignment to the assignee. On these facts, the court of Common Pleas held that such reliance on the release was "against good faith", and which would have entitled the claimant to seek injunctive relief in Chancery to bar the defendant from relying on the release in the action at law. Given this, Eyre CJ held that, in his judgment, "the Court [of Common Pleas] ought not to allow the Defendant to avail himself of this plea [of release] since a Court of Equity would order the Defendant [debtor] to pay the Plaintiff [assignee] the amount of his lien on the bond, and probably all the costs of the application". Significantly, the position set out in *Legh v Legh* as at 1799 would have been received into Singapore owing to the general reception of English law pursuant to the Second Charter of Justice 1826. And, indeed, it seems that such "equitable jurisdiction of the common law courts" has survived to the present day: see s 3(*b*) of the Civil Law Act 1909 (2020 Rev Ed).

78 See para 13.67 above.

13.76 To conclude, given the Court of Appeal's approval in *Lee Chee Wei* of Lightman J's reasoning in *Inntrepreneur Pub Co v East Crown Ltd*,[79] an entire agreement clause can amount to a binding agreement between the parties that, "the full contractual terms to which the parties agreed to bind themselves are to be found in the agreement [*ie*, the contract document] and nowhere else", and that any *other* agreement not recorded in the contract document "should have no legal effect, or in other words should be treated as if the parties had not intended to create legal relations".

13.77 Viewed as a binding agreement, the entire agreement clause may thus have *substantive* effects, over and beyond rendering evidence of matters beyond the boundaries of the contract document to be inadmissible. If so, it would seem to follow that as a matter of *substantive law*, *no* oral collateral contract of the kind alleged by the defendants in *Cradle Wealth* would have formed. But, this would also mean that it would no longer be open to the defendants to adduce such evidence. Even if admission of such evidence was not barred by *chapeau* to s 94 of the EA given the exception in s 94(*c*), that exception would *not* provide any basis for admission of such evidence – and it would seem that so far as such evidence might have been admissible pursuant to s 5 of the EA, as facts-in-issue, since, as a matter of substantive law, *no* oral collateral contract had formed, the evidence in question would no longer be facts-in-issue, at all, and would thus no longer be admissible pursuant to s 5 of the EA.

IV. Remedies

A. Limiting factors and quantification of loss

13.78 In *Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd*,[80] Crescendas Bionics Pte Ltd ("Crescendas"), a property developer, had engaged Jurong Primewide Pte Ltd ("JP"), a general building contractor, as its management contractor to build Biopolis III, a business park development.

13.79 Crescendas sued JP for exceeding the 18 months stipulated in the parties' letter of intent for completing the project, and losses arising therefrom. Following the first tranche of the trial determining liability, it was found that Crescendas was itself liable for an aggregate of 173 days of delay, and JP was responsible for 161 days of delay, leading to a combined

79 [2000] 2 Lloyd's Rep 611.
80 [2023] 1 SLR 536.

delay of 334 days.[81] The second tranche concerned the assessment of damages,[82] and the decision below was appealed *inter alia* on issues of loss of chance claims, causation, remoteness and quantification.

13.80 As a preliminary issue, the Appellate Division considered Crescendas's characterisation of its claim as premised on a loss of chance to earn net rental revenue due to the combined delay. It agreed with the court below that notwithstanding Crescendas's characterisation, the claim was in substance one for loss of rental revenue rather than for loss of chance.[83] To be precise, the loss of chance doctrine "allows a claimant to claim for the loss of a *chance* of a favourable outcome (rather than the favourable outcome itself), where that favourable outcome is contingent on the action of a third party"[84] [emphasis in original]. The claimant needs to show that the defendant's contractual breach caused it to lose a real and substantial chance of acquiring a favourable outcome. It need not go further to prove on a balance of probabilities (*ie*, a more than 50% likelihood) that the third party would have conferred the favourable outcome in a no-breach situation. To put it another way, the "doctrine allows the claimant to avert the difficulty of proving that the claimant *would* have acquired the favourable outcome, by allowing the claimant to claim that he ***could* (not *would*)** have obtained the favourable outcome but for the breach"[85] [emphasis in original].

13.81 It was clear that Crescendas's case was premised not on the loss of a *chance* to earn net rental revenue but for loss of the revenue *per se*. Crescendas apparently used the expression because of difficulties in calculating the precise amount of additional net rental revenue it would have earned but for the breach. But such difficulty in calculating the quantum of loss was said to be different from asserting that there might not have been a favourable outcome at all, and only a loss of chance to secure that outcome.[86] Since that was not the case, the loss of chance label was a "misnomer".[87]

81 *Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd* [2023] 1 SLR 536 at [8]–[9], making reference to *Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd* [2019] SGHC 4 and *Jurong Primewide Pte Ltd v Crescendas Bionics Pte Ltd* [2019] SGCA 63.

82 *Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd* [2021] SGHC 189.

83 *Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd* [2023] 1 SLR 536 at [36].

84 *Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd* [2023] 1 SLR 536 at [40], citing *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric* [2007] 3 SLR(R) 782 at [74]; *Justlogin Pte Ltd v Oversea-Chinese Banking Corp Ltd* [2007] 1 SLR(R) 425 at [38]; *Auston International Group Ltd v Ng Swee Hua* [2009] 4 SLR(R) 628 at [38]; and *BCBC Singapore Pte Ltd v PT Bayan Resources TBK* [2022] SGHC(I) 2 at [200]–[207].

85 *Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd* [2023] 1 SLR 536 at [40].

86 *Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd* [2023] 1 SLR 536 at [45].

87 *Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd* [2023] 1 SLR 536 at [44].

13.82 Indeed, as Kramer has explained, the reason why there is a separate loss of chance rule is to recognise the intervention of third-party actions, unlike claimant or defendant actions governed by the balance of probabilities.[88] The "intuitive appeal" of a distinct rule is captured in the observation that the loss of chance doctrine applies to an opportunity to achieve a result outside the claimant's control.[89]

13.83 On causation, the court cited *Great Eastern Hotel Company Ltd v John Laing Construction Ltd*[90] where it was stated that:[91]

> If a breach of contract is one of the causes both co-operating and of equal efficiency in causing loss to the Claimant the party responsible for breach is liable to the Claimant for that loss. The contract breaker is liable for as long as his breach was an 'effective cause' of his loss… The Court need not choose which cause was the more effective.

The Appellate Division agreed with the court below that the delays attributable to Crescendas and JP were almost evenly balanced and interspersed throughout the period of construction. Consequently, each was an independent and effective cause of the loss suffered by Crescendas.[92]

13.84 On the issue of remoteness, the court affirmed the well-established rule in *Hadley v Baxendale*[93] ("*Hadley*"). Ordinary damage is awarded under the first *Hadley* limb for consequences which may be seen as arising naturally from the breach of contract or flowing from what may reasonably be in the contemplation of both parties at the time they made the contract. Under the second *Hadley* limb, extraordinary damage – not within the reasonable contemplation of the parties or flowing naturally from breach – may arise due to special circumstances outside the usual course of things, and requires that the contract breaker have actual knowledge of these special circumstances.[94]

88 Adam Kramer KC, *The Law of Contract Damages* (Hart Publishing, 3rd Ed, 2022) at para 13-98.
89 Adam Kramer KC, *The Law of Contract Damages* (Hart Publishing, 3rd Ed, 2022) at para 13-98, citing *Greg v Scott* [2005] AC 176 at [15], *per* Lord Nicholls.
90 [2005] EWHC 181 (TCC).
91 *Great Eastern Hotel Company Ltd v John Laing Construction Ltd* [2005] EWHC 181 (TCC) at [314]; see also *Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd* [2023] 1 SLR 536 at [57].
92 *Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd* [2023] 1 SLR 536 at [60]–[63].
93 (1854) 9 Exch 341. See also *Out of the Box Pte Ltd v Wanin Industries Pte Ltd* [2013] 2 SLR 363 at [13]–[15] and [17]–[18]; and *Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd* [2008] 2 SLR(R) 623 at [55] and [81]–[82].
94 *Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd* [2023] 1 SLR 536 at [86]–[87].

13.85 The appeal chiefly concerned the remoteness of Crescendas's post-completion net rental revenue losses, *viz*, losses of net rental revenue from longer tenancies that would have been entered into if not for the delay, and from the additional time required for Biopolis III to achieve a stabilised occupancy.[95] Disagreeing with the court below on this point, the Appellate Division held that post-completion net rental revenue loss came within the first *Hadley* limb. Both parties were aware that Biopolis III was a multi-tenanted development at the time of contracting, and would take multiple years to fill up. A not insubstantial delay would in the usual course of things also cause potential tenants to walk away. It must therefore have been in the parties' reasonable contemplation that a considerable delay would disrupt Crescendas's post-completion net rental revenue stream as well. This type or kind of loss was reasonably contemplatable at the time of contract, even if the precise detail or extent was not.[96]

13.86 Lastly, the Appellate Division also overruled the court below on the appropriate model of quantification. It preferred a multi-year model (calculating loss of net rental revenue over a longer time frame spanning a number of years beyond the period of combined delay, to when stabilised occupancy would be attained) to the single-year model (only calculating loss of net rental revenue for approximately one year, representing the period of combined delay), adopted by the court below. The Appellate Division found that the expert evidence had on the whole supported a finding that the delay had resulted in post-completion net rental revenue loss over multiple years. This was because Biopolis III was a multi-tenanted development and Crescendas's income stream arose from multi-year leases.[97] Moreover, the Appellate Division did not consider the multi-year model too speculative. Crescendas had put forward considerable empirical data, market data of comparable buildings and island-wide market trends, providing a sufficient foundation for the court to evaluate multi-year projections of net rental revenue.[98] And the fact that the multi-year model depended on variables outside the contract-breaker's control (*eg*, Crescendas's marketing and pricing strategies determining the level of stabilised occupancy) did not itself preclude recovery – the quantum of loss is always constrained by the requirements of proof, reasonable mitigation and remoteness.[99]

95 *Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd* [2023] 1 SLR 536 at [13] and [98].
96 *Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd* [2023] 1 SLR 536 at [105]–[109].
97 *Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd* [2023] 1 SLR 536 at [146].
98 *Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd* [2023] 1 SLR 536 at [170].
99 *Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd* [2023] 1 SLR 536 at [181].

13.87 Issues of quantification, causation, remoteness and mitigation also arose in *3N Investments Group Ltd v Lim Boon Chye Victor*[100] ("*3N Investments*"). The plaintiffs claimed damages arising from the defendants' failure to effect a transfer of shares by the stipulated deadline of 31 December 2019 under two sale and purchase agreements (these agreements had been entered into following certain corporate disputes among the parties).

13.88 Having found that the defendants had indeed breached the agreements by failing to transfer the shares by the contractual deadline, the court confirmed the applicability of the usual diminution in market value measure, referencing *McGregor on Damages*:[101]

> Where the breach concerned is a delayed transfer of property, the normal loss recoverable is the market value at the date of due delivery less the market value at the date of actual delivery. The prime example is once again the sale of goods, and again will apply to hire and hire-purchase of goods, to sale of stocks and shares, and today to all sales and leases of land.

The court rejected the defendants' argument that the plaintiffs were not entitled to any such damages since they had already received specific performance, on the alleged basis that the shares had ultimately been transferred on 29 July 2020. But no order for specific performance had in fact been obtained. The defendants simply made a late delivery in breach of contract. Since the value of the shares had dropped by the time of delivery, the court found that the plaintiffs were entitled to a diminution in value measure.[102] Neither was it necessary for this measure to be expressly provided contractually, since the right to this measure arises from the general law of contract. The wording of the agreements, with references to warranties of performance and indemnities for damages and losses "directly or indirectly" caused, were in any event consistent with this measure.[103]

13.89 The court also found that causation in fact (as well as law) was established: the failure to transfer the shares by the deadline was a but-for cause, resulting in the plaintiffs' coming into ownership at a much later time, when the shares were worth less.[104] The court distinguished the

100 [2023] SGHC 76.

101 *3N Investments Group Ltd v Lim Boon Chye Victor* [2023] SGHC 76 at [79], citing James Edelman, *McGregor on Damages* (Sweet & Maxwell, 21st Ed, 2021) at para 4-008. See also the general approach set out in the Court of Appeal decision of *City Securities Pte Ltd v Associated Management Services Pte Ltd* [1996] 1 SLR(R) 410 (in the context of non-acceptance of shares by a buyer).

102 *3N Investments Group Ltd v Lim Boon Chye Victor* [2023] SGHC 76 at [83]–[87].

103 *3N Investments Group Ltd v Lim Boon Chye Victor* [2023] SGHC 76 at [89].

104 *3N Investments Group Ltd v Lim Boon Chye Victor* [2023] SGHC 76 at [97].

ostensibly more complicated situation in *Judah Value Activist Fund v Open Faith Investment Ltd*,[105] where the Singapore International Commercial Court had found no causal link between a defendant's failure to transfer a certain company's ("Agritrade") shares, and their decline in value. There, the defendant's breach in failing to transfer shares by the contractual deadline caused the plaintiff's broker, a third party, to make a margin call under a separate margin loan facility with the plaintiff, forcing the sale of the plaintiff's entire portfolio of Agritrade shares in three tranches and substantial losses to the plaintiff. This was not the situation here, where the loss of market value was much more direct.[106]

13.90 Relatedly, the plaintiff's loss fell squarely within the first *Hadley* limb and was not too remote. The shares were publicly traded, and the defendants would have reasonably been aware that any delay could result in loss to the plaintiffs if the share price dropped during the relevant period of delay. The damages sought were not something out of the ordinary or unusual.[107]

13.91 Lastly, the court addressed the interesting issue of whether the duty to mitigate may require an innocent party to accept an offer by the party in breach. It held that:[108]

> [W]hile innocent parties may in certain circumstances be required to mitigate by accepting offers by defaulting parties, it cannot be the case that they must do so for any and every offer made. The content of the offer matters, particularly in relation to whether it amounts to a significant variation of the contract.

13.92 The court held that the defendants' offers to sell the shares in the open market and transfer the proceeds to the plaintiffs were not unreasonably refused. In particular, the mode of performance envisaged was significantly different, requiring the plaintiffs to accept a variation transforming the contract into a completely different bargain: no longer involving a transfer of shares but the acceptance of a different asset (cash).[109] On the facts, the court also found that the offers could not realistically have been carried out by the defendants.[110] Hence the plaintiffs were not required to accept the offers in question as a matter of reasonable mitigation.

105 [2021] 5 SLR 114.
106 *3N Investments Group Ltd v Lim Boon Chye Victor* [2023] SGHC 76 at [96]–[97].
107 *3N Investments Group Ltd v Lim Boon Chye Victor* [2023] SGHC 76 at [102].
108 *3N Investments Group Ltd v Lim Boon Chye Victor* [2023] SGHC 76 at [112].
109 *3N Investments Group Ltd v Lim Boon Chye Victor* [2023] SGHC 76 at [114].
110 *3N Investments Group Ltd v Lim Boon Chye Victor* [2023] SGHC 76 at [115].

13.93 What constitutes reasonable mitigation is always a fact-sensitive inquiry, *a fortiori* when it concerns substitute performance proposed by the contract-breaker, who has already failed to live up to contractual expectations. So in one older English decision it was held that one who is wrongfully dismissed need not accept an offer of re-employment where this would involve a reduction in status or loss in confidence due to past treatment.[111] In the context of sale, a defaulting vendor's offer to repurchase from the claimant a house which they failed to deliver with vacant possession was not considered one the buyer was obliged to accept.[112] On the other hand, the leading case of *Payzu v Saunders*[113] demonstrates that it would be unreasonable for a buyer to refuse a defaulting seller's offer to supply silk on cash on delivery terms as opposed to credit terms as per their agreement, given that the only difference was the mode of payment. The situation in *3N Investments* is arguably distinguishable from *Payzu* and closer to the above-mentioned decisions, given that the very subject matter of the contract (a share transfer) was unreasonably altered on the defendants' offers in question (to transfer cash proceeds instead).

B. Specific performance

13.94 As a matter of principle, the requirements for specific performance have previously been set out by the Court of Appeal in *Lee Chee Wei*, where it was held that:[114]

> While the dominant principle is that equity will only grant specific performance 'if under all the circumstances, it is just and equitable to do so' … factors affecting the court's discretion include considerations such as (a) whether damages would be an adequate remedy; and (b) whether the person against whom the relief of specific performance is being sought would suffer substantial hardship …

13.95 As a matter of textbook law, these principles, commonly described as bars to specific performance, have typically been discussed in relation to contracts to sell land, goods, shares and personal services contracts.[115] Under what circumstances can a dispute resolution clause, in particular a contractual obligation to refer a dispute to mediation, be specifically enforced?

111 *Yetton v Eastwoods Froy Ltd* [1967] 1 WLR 104.
112 *Strutt v Whitnell* [1975] 1 WLR 870.
113 [1919] 2 KB 581.
114 *Lee Chee Wei v Tan Hor Peow Victor* [2007] 3 SLR(R) 537 at [53].
115 See Andrew Burrows, *Remedies for Torts, Breach of Contract, and Equitable Wrongs* (Oxford University Press, 4th Ed, 2019) at ch 22.

13.96 This was a key question that arose in *Maxx Engineering Works Pte Ltd v PQ Builders Pte Ltd*[116] ("*Maxx*"). In this case the parties' contract contained a tiered dispute resolution clause. The first clause required (a) that "the parties shall endeavor to resolve the dispute through negotiations"; (b) "if negotiations fail, the parties shall refer the dispute for mediation at the Singapore Mediation Centre in accordance with the Mediation Rules for the time being in force"; (c) "[f]or the avoidance of doubt, prior reference of the dispute to mediation … shall not be a condition precedent for its reference to arbitration … nor shall it affect either party's rights to refer the dispute to arbitration under [the arbitration clause]". Under the second "arbitration clause", it was stipulated that disputes "not resolved by the parties" in accordance with the first clause "shall [be referred] for arbitration by an arbitrator agreed upon by the parties within 14 days of either party giving written notice requiring arbitration to the other".[117]

13.97 When the respondent ("PQ") referred the dispute to arbitration (without an attempt at mediation) pursuant to the second clause, Maxx sought an order to compel PQ to refer the dispute to mediation pursuant to the first clause. While it was accepted that the parties were not obliged to mediate *before* commencing arbitration, the position taken by the claimant ("Maxx") – which was not sufficiently rebutted by PQ – was that the parties must attempt dispute resolution both by mediation and arbitration, and thus were obliged to mediate even if arbitration had been commenced.[118] As a matter of interpreting the clauses, the court was persuaded to hold in favour of Maxx, finding that the requirement "the parties shall refer the dispute for mediation" created an enforceable legal obligation on the parties to refer their dispute to mediation, if negotiations failed.[119]

13.98 The court then considered whether it was just and equitable to order specific performance of PQ's contractual obligation to refer the dispute to mediation. It examined the following factors and held as follows:[120]

> (a) Adequacy of damages: The parties had bargained for an obligation to refer their disputes to mediation, and damages for breach of this obligation would have been an inadequate and unsuitable substitute.[121]

116 [2024] 3 SLR 715.
117 *Maxx Engineering Works Pte Ltd v PQ Builders Pte Ltd* [2024] 3 SLR 715 at [4].
118 *Maxx Engineering Works Pte Ltd v PQ Builders Pte Ltd* [2024] 3 SLR 715 at [7]–[9].
119 *Maxx Engineering Works Pte Ltd v PQ Builders Pte Ltd* [2024] 3 SLR 715 at [15].
120 *Maxx Engineering Works Pte Ltd v PQ Builders Pte Ltd* [2024] 3 SLR 715 at [17].
121 *Maxx Engineering Works Pte Ltd v PQ Builders Pte Ltd* [2024] 3 SLR 715 at [20].

(b) Substantial hardship: There was no evidence that PQ would suffer any substantial hardship by having the dispute mediated.[122]

(c) Futility: There was no basis to suggest that mediation would be futile. Any lack of a proposal from Maxx as at the date of the hearing did not mean that mediation would be futile, nor did it show that Maxx was insincere in seeking to resolve the dispute by mediation.[123]

(d) Impracticality: Concerns about the ability of the court to supervise the acts to be carried out by PQ pursuant to a specific performance order were overstated, since the order sought was in specific and concrete terms, including steps such as replying to the Singapore Mediation Centre to confirm assent to mediation, providing dates and a case summary. There was no serious difficulty in determining compliance with these steps.[124]

(e) Any other circumstances relating to the "just and equitable requirement": Both parties would benefit from the mediation process, in having the opportunity to resolve their dispute without further legal costs or substantial delay.[125] The parties' choice to refer their dispute to mediation would be respected.[126] Moreover, specific performance would be consistent with the trend towards promoting amicable dispute resolution. This is fortified by case law on parties negotiating in good faith to "promote consensus and conciliation",[127] as well as O 5 r 1(1) of the Rules of Court 2021, which provides that "[a] party to any proceedings has the duty to consider amicable resolution of the party's dispute before the commencement and during the course of any action or appeal".[128]

13.99 The decision in *Maxx* is worth taking note of for several reasons. Firstly, though alternative dispute resolution clauses are no doubt ubiquitous, the court noted that there "does not appear to be any

122 *Maxx Engineering Works Pte Ltd v PQ Builders Pte Ltd* [2024] 3 SLR 715 at [21].
123 *Maxx Engineering Works Pte Ltd v PQ Builders Pte Ltd* [2024] 3 SLR 715 at [23].
124 *Maxx Engineering Works Pte Ltd v PQ Builders Pte Ltd* [2024] 3 SLR 715 at [25].
125 *Maxx Engineering Works Pte Ltd v PQ Builders Pte Ltd* [2024] 3 SLR 715 at [27].
126 *Maxx Engineering Works Pte Ltd v PQ Builders Pte Ltd* [2024] 3 SLR 715 at [28], citing *HSBC Institutional Trust Services (Singapore) Ltd v Toshin Development Singapore Pte Ltd* [2012] 4 SLR 738 at [45].
127 *Maxx Engineering Works Pte Ltd v PQ Builders Pte Ltd* [2024] 3 SLR 715 at [29], again citing *HSBC Institutional Trust Services (Singapore) Ltd v Toshin Development Singapore Pte Ltd* [2012] 4 SLR 738 at [45].
128 *Maxx Engineering Works Pte Ltd v PQ Builders Pte Ltd* [2024] 3 SLR 715 at [30].

caselaw in respect of [this] issue"[129] regarding specific performance of an obligation to refer a dispute to mediation.

13.100 Secondly, as Andre Maniam J has observed extrajudicially, "*Maxx v PQ* is significant for the Court's citing of the trend towards the promotion of ADR (as embodied in Order 5 of the new Rules) as a reason for ordering a party to abide by its agreement to refer disputes for mediation".[130] Hence, if the default position under O 5 already requires a party to make an offer of amicable resolution before commencing an action,[131] unless it has reasonable grounds not to do so, and requires the other party not to reject such an offer without reasonable grounds,[132] with the court also empowered to order parties to attempt amicable resolution,[133] it makes sense that the courts will want to ensure that contractual obligations to mediate are properly performed.

13.101 Thirdly, on a more theoretical note, *Maxx* also illustrates that attention to contextual factors matters in deciding the appropriateness of a specific performance order, as one of the authors has emphasised elsewhere.[134] For instance, while it may seem that orders concerning continuing activities or personal services (as opposed to land or goods) would more readily fall foul of the constant supervision objection, sufficient definition and precision in the terms of an order to refer disputes to mediation can alleviate worries about verification and compliance. Moreover, as Lord Burrows has previously observed, notwithstanding resources expended on making and supervising an order, "specific performance may also save judicial time and effort, namely that involved in the often-complex task of assessing damages".[135] In a case like *Maxx*, mediation could potentially and additionally save time, resources and costs expended in litigation.

129 *Maxx Engineering Works Pte Ltd v PQ Builders Pte Ltd* [2023] SGHC 71 at [3].
130 See Justice Andre Maniam, Supreme Court of Singapore, "A Review of Emerging Themes in ADR (2023 Version)", keynote address at ADR Symposium 2023 (1 September 2023) at para 45.
131 Rules of Court 2021 O 5 r 1(2).
132 Rules of Court 2021 O 5 r 1(4).
133 Rules of Court 2021 O 5 r 3(1).
134 See Tan Zhong Xing, "The Prospects for Pluralism in Contract Theory" (2021) 41(4) *Legal Studies* 547 at 561–564.
135 Andrew Burrows, *Remedies for Torts, Breach of Contract, and Equitable Wrongs* (Oxford University Press, 4th Ed, 2019) at p 419.

C. Liquidated damages and penalties

13.102 In 2021, the Court of Appeal in *Denka Advantech Pte Ltd v Seraya Energy Pte Ltd*[136] ("*Denka*") had reaffirmed the applicability of the traditional approach in *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd*[137] ("*Dunlop*"). The *Dunlop* test focuses on whether the sum stipulated is a genuine pre-estimate of loss, and thus liquidated damages; or whether it is *in terrorem* of the offending party, rendering it an unenforceable penalty. In *Denka*, Andrew Phang JA had emphasised that:[138]

> (a) First, the Penalty Rule applies only in the context of a breach of contract. This does not preclude the applicability of other doctrines (including the narrow doctrine of unconscionability …) from operating where relevant.
>
> (b) Secondly, the legal criteria to ascertain whether the Penalty Rule applies may be found in the statement of principles enunciated by Lord Dunedin in *Dunlop*… The focus is whether the clause concerned provided a genuine pre-estimate of the likely loss at the time of contracting. In this regard, the only 'legitimate interest' which the Penalty Rule is concerned with is that of compensation.
>
> (c) Third, it is nevertheless important to emphasise that in applying the aforementioned principles, much would depend on the precise facts and circumstances of the case itself. Hence, factors such as the relative bargaining power of the parties as well as the purpose for which the parties entered into the contract concerned would be relevant.
>
> [emphasis omitted]

13.103 This reassertion of *Dunlop* was intentional and significant in resisting the developments in Australia and the UK that sought to expand the jurisdiction and scope of the penalties doctrine. The Court of Appeal had maintained, firstly, that the penalty rule applied only to breaches of contract and secondary obligations to pay damages, rather than extending to collateral or accessory stipulations to primary stipulations that impose additional detriments upon the failure of the primary stipulation, not necessarily amounting to a breach of contract – a controversial position taken by the High Court of Australia in *Andrews v Australia and New Zealand Banking Group Limited*.[139] Secondly, the penalties doctrine centres on whether the sum is a genuine pre-estimate of likely loss for which compensation should be paid; it does not rely on a more ambiguous idea of an unspecified "legitimate interest" of the innocent

136 [2021] 1 SLR 631.
137 [1915] AC 79.
138 *Denka Advantech Pte Ltd v Seraya Energy Pte Ltd* [2021] 1 SLR 631 at [185].
139 (2012) 247 CLR 205.

party in the enforcement of the primary obligation – the concept used by the UK Supreme Court in *Cavendish Square Holding BV v Makdessi*[140] ("*Cavendish*") to provide parties more leeway in stipulating secondary obligations to secure the performance of primary duties.

13.104 Given this background to the current state of the law, one might have wondered how the stance adopted in Singapore law – less interventionist than Australia in terms of the type of obligations policed, yet potentially more interventionist than the UK in terms of ensuring that sums stipulated as secondary obligations are not over-compensatory or penal – would play out, looking at the number of recent challenges brought on the basis of the penalties doctrine, and their success in the courts.

(1) Primary versus *secondary obligations*

13.105 In the Court of Appeal judgment of *Ethoz Capital Ltd v Im8ex Pte Ltd*[141] ("*Ethoz*") (on appeal from an earlier General Division decision),[142] issues arose as to whether payment of certain "total interest" and "default interest" sums under a loan facilities agreement constituted unenforceable penalties.[143] Pursuant to this agreement, a total amount of $6.3m was advanced to the respondent, at an interest rate of 3.75% per annum, and repayments in the form of 180 instalment payments to be made monthly over 15 years. The facilities were also secured by mortgages over properties belonging to the controllers of the respondent. Certain "acceleration" clauses provided that "total interest" (the aggregate of all interest payments) would be deemed earned and accrued in full upon the drawdown of the loan advance, and that "default interest" (interest at a rate of 0.0650% per day if the respondent defaulted on payment) along with the advance and total interest would become immediately due and payable upon an event of default.[144] Given the respondent's default, the appellant sought enforcement of the facilities, which engaged the question of whether the total interest and default interest obligations

140 [2016] AC 1172.
141 [2023] 1 SLR 922.
142 *Ethoz Capital Ltd v Im8ex Pte Ltd* [2022] SGHC 12.
143 For present purposes, this chapter will focus on the issue of penalties, on which the Court of Appeal agreed with the General Division, as elaborated on in the text below. The Court of Appeal allowed the appeal in part on other issues: that the General Division erred in finding that certain misrepresentations were made to the respondent (see *Ethoz Capital Ltd v Im8ex Pte Ltd* [2023] 1 SLR 922 at [23]–[30]), and in permitting the respondent to redeem the loan facilities by making prepayments, given that it was in default (see *Ethoz Capital Ltd v Im8ex Pte Ltd* [2023] 1 SLR 922 at [105]–[111]).
144 See *Ethoz Capital Ltd v Im8ex Pte Ltd* [2023] 1 SLR 922 at [10]–[15].

were unenforceable penalties. On these points, both the General Division and Court of Appeal held in favour of the respondent.

13.106 A threshold issue was raised as to whether the total interest was a *secondary* obligation that arose from the breach of the respondent's *primary* obligation to repay the advance and interest in monthly instalments. The appellant's main argument was that the payment of total interest upon default constituted an accelerated *primary* obligation, by virtue of the contract deeming total interest to be earned and accrued upon drawdown, thus understood as a present debt to be paid at a future time.[145]

13.107 Both the General Division and Court of Appeal were not persuaded by this characterisation. The Court of Appeal emphasised that acceleration of liability on an existing debt effectively creates an obligation to pay more. It does not merely represent the same primary repayment obligations due at an earlier point of time, given the time value of money and the immediate enhancement of one's purchasing power, assuming positive inflation. There was a substantial difference between paying total interest in full upon default as opposed to paying it over 180 instalments.[146]

13.108 As a matter of authority, the Court of Appeal dealt in some detail with the relevance of *Wallingford v Mutual Society*[147] ("*Wallingford*") where the House of Lords had held that an acceleration provision for the payment of an advance and premium upon default was *not* a penalty. *Wallingford* concerned a rather different tontine-like scheme where members could be granted loan advances by making the highest bids for repayment amounts, with such premiums then repaid in instalments, and the total sum accelerated if there were a default. The appellant attempted to draw an analogy. Arguably, the loan agreement in *Wallingford* could be understood as providing for immediate payment of the premium with an option to defer payment by making punctual instalment payments. Hence it was suggested that the facilities in *Ethoz* required total interest to be due as present debt payable in the future, hence a primary obligation that avoided the penalty rule.

13.109 The Court of Appeal rejected this argument, observing that the comments by the House of Lords in *Wallingford* were strictly *obiter*.

145 *Ethoz Capital Ltd v Im8ex Pte Ltd* [2023] 1 SLR 922 at [36].

146 *Ethoz Capital Ltd v Im8ex Pte Ltd* [2023] 1 SLR 922 at [44]–[46], citing Roger Halson, *Liquidated Damages and Penalty Clauses* (Oxford University Press, 2018).

147 (1880) 5 App Cas 685. See *Ethoz Capital Ltd v Im8ex Pte Ltd* [2023] 1 SLR 922 (CA) at [39]–[48]; and *Ethoz Capital Ltd v Im8ex Pte Ltd* [2022] SGHC 12 at [82]–[85].

Moreover, the immediate and full payment of total interest was construed as a secondary obligation triggered upon breach, and not the respondent's primary obligation under the facilities.[148] Following *Denka*, the focus is on substance over form,[149] guided by the non-exhaustive list of factors in *Leiman, Ricardo v Noble Resources Ltd*,[150] including the overall context of the bargain, any particular reasons for the clause, and whether the clause was contemplated as a primary obligation to meet some independent commercial purpose, or only to secure compliance with primary obligations. In this respect, unlike in *Wallingford* where the primary obligation was understood as for immediate payment of the premium which could then be postponed, it was clear that on the plain wording of the agreement that in consideration for the loan facilities being given, the respondent covenanted to repay the advance and total interest in instalments, with full and immediate payment only triggered in the event of default. In the General Division, Maniam J also emphasised that the appellant's characterisation would entitle it to total interest in all circumstances, regardless of whether the respondent duly made instalment payments, prepayments, or defaulted in payment, which made little sense.[151] The Court of Appeal underscored this point, holding that such an interpretation was "devoid of commercial sense",[152] since the purpose of a prepayment is to allow the borrower to avoid paying interest over the remaining period of the facilities. Thus, the appellant could not make out the case for elevating immediate and full payment of total interest into a primary obligation representing the essential purpose of the facilities.

13.110 The General Division and Court of Appeal's careful analysis of this acceleration clause correctly prioritises substance over form and prevents a party from escaping the scrutiny of the penalty rule through "clever drafting".[153] It is true that some commentators have expressed doubt over the primary/secondary distinction. Worthington asks rhetorically:[154]

> When one party fails to perform under the first option, is there *any* test which can determine whether the second option is, at law, a 'secondary obligation' (conditional on failure to perform the primary obligation, but then defining ensuing remedies for this breach of the first option, and so reviewable under

148 *Ethoz Capital Ltd v Im8ex Pte Ltd* [2023] 1 SLR 922 at [54]–[63].
149 *Denka Advantech Pte Ltd v Seraya Energy Pte Ltd* [2021] 1 SLR 631 at [95].
150 [2020] 2 SLR 386 at [101].
151 *Ethoz Capital Ltd v Im8ex Pte Ltd* [2022] SGHC 12 at [84].
152 *Ethoz Capital Ltd v Im8ex Pte Ltd* [2023] 1 SLR 922 at [60].
153 *Denka Advantech Pte Ltd v Seraya Energy Pte Ltd* [2021] 1 SLR 631 at [95].
154 Sarah Worthington, "Penalty Clauses" in *Commercial Remedies: Resolving Controversies* (Graham Virgo & Sarah Worthington eds) (Cambridge University Press, 2017) ch 16.

> the penalties rule) or a 'conditional primary obligation' (conditional on failure to perform the primary obligation, but still itself primary, and merely providing an alternative mode of performance, and therefore not so reviewable)? … If substance not form governs, then either construction seems equally open … the rationale for intervening … only in relation to secondary obligations, has never been successfully articulated. [emphasis in original]

13.111 This, however, concededly "leave[s] the penalties jurisdiction with no content", since re-characterisations of stipulations as primary obligations is always a possibility. It is also perhaps doubtful if the primary/secondary distinction in this context is purely "transcendental nonsense", a conceptual distinction consignable to the heaven of legal concepts.[155] As Lord Mance put it in *Cavendish*:[156]

> I do not see the distinction between situations of breach and non-breach as being without rational or logical underpinning. It is true that clever drafting may create apparent incongruities in particular cases. But in most cases parties know and reflect in their contracts a real distinction, legal and psychological, between what, on the one hand, a party can permissibly do and what, on the other hand, constitutes a breach and may attract a liability to damages for – or even to an injunction to restrain – the breach.

13.112 Here, the obligation to make repayments of the loan sum and interest via instalments was the primary obligation giving effect to the commercial purpose of the loan agreement. It was a genuine obligation that a borrower was bound to comply with. Failing to do so would thus be a breach – an infringement of the lender's contractual rights, giving rise to secondary obligations. This is a more sensible and less strained construction compared with one presuming immediate and full payment of total interest to be the primary obligation, coupled with an alternative to pay via regular instalments.

(2) Application of Dunlop *tests*

13.113 The approach in *Dunlop*, focusing on a genuine pre-estimate of loss, is guided by certain tests, including:[157] (a) the "greatest loss" test, looking at whether the stipulated sum is extravagant and unconscionable in comparison with the greatest loss that could conceivably be proved following breach; (b) the "greater sum" test, assessing if the stipulated sum is greater than the sum ought to have been paid, where the breach consists only in not paying money; (c) the "single lump sum test", presuming a

155 Felix S Cohen, "Transcendental Nonsense and the Functional Approach" (1935) 35 Colum L Rev 809.

156 *Cavendish Square Holding BV v Makdessi* [2016] AC 1172 at [130].

157 See summary in *Ethoz Capital Ltd v Im8ex Pte Ltd* [2023] 1 SLR 922 at [67].

penalty where "a single lump sum is payable on occurrence of one or more events, which may involve either serious or trifling damage".

13.114 These tests operated to classify the secondary obligations in respect of total interest and default interest as penalties. The Court of Appeal found that the total interest was a single lump sum made payable on various events of default, some more serious and some less so. The greater sum test also applied, as the appellant would be entitled to a very substantial remainder of total interest even if the breach concerned a single, and much smaller, instalment payment.[158] As to default interest, the General Division found that the default interest rate amounted to 26.08% per annum, an increase of almost 20% from the regular contractual interest rate of 6.444% per annum, a finding that the Court of Appeal pointed out was not contested.[159] This was held to fall foul of the greater sum and greatest loss tests, since there appeared to be an extravagant increase on the sum due as a primary obligation, and such an increase was not referable to the greatest loss suffered by the lender.[160] The Court of Appeal also observed that it did not help the appellant's case to say that the default rate of about 1.95% per month was lower than the statutory maximum ceiling under the Moneylenders Act[161] and Moneylenders Rules 2009, which provides that a licensed moneylender must not enter into a contract for a loan under which late interest exceeds 4% per month. The statutory scheme involves criminal liability which by virtue of its sanctions sets higher standards than that tolerated by the penalty rule in the civil context of contract law.[162]

13.115 As a contrast, it is worth mentioning the decision of the General Division in *Alternative Advisors Investments Pte Ltd v Asidokona Mining Resources Pte Ltd*[163] ("*Asidokona*"), where the default rate in a loan agreement was 6% per month and challenged as extortionate. While the General Division acknowledged that, depending on the totality of circumstances (including the urgency of the loan and type of security demanded), a default rate of 6% could be penal, it pointed out that the primary obligation was for a regular interest rate of 5%

158 *Ethoz Capital Ltd v Im8ex Pte Ltd* [2023] 1 SLR 922 (CA) at [80]–[81]; see also *Ethoz Capital Ltd v Im8ex Pte Ltd* [2022] SGHC 12 at [92]–[102] (also applying the "greatest loss principle" to find the acceleration of total interest an unenforceable penalty).

159 *Ethoz Capital Ltd v Im8ex Pte Ltd* [2023] 1 SLR 922 (CA) at [90]–[91]; see also *Ethoz Capital Ltd v Im8ex Pte Ltd* [2022] SGHC 12 at [104].

160 *Ethoz Capital Ltd v Im8ex Pte Ltd* [2023] 1 SLR 922 at [91]–[94].

161 Cap 188, 2010 Rev Ed.

162 *Ethoz Capital Ltd v Im8ex Pte Ltd* [2023] 1 SLR 922 (CA) at [100]–[103]. See also *Ethoz Capital Ltd v Im8ex Pte Ltd* [2022] SGHC 12 at [105]–[125] (comparing and distinguishing default interest rates in other local cases).

163 [2023] 4 SLR 284.

per month, a difference of only 1%.[164] The Court of Appeal in *Ethoz* thus distinguished *Asidokona*, since there was no significant difference between the regular and default rates there, while in *Ethoz* the difference was more substantial.[165]

(3) Relationship with general damages

13.116 The question of the relationship between liquidated damages and general damages arose in *Terrenus Energy SL2 Pte Ltd v Attika Interior + MEP Pte Ltd*[166] ("*Terrenus*") in the context of delay in meeting certain contractual requirements in a solar power project. The plaintiff ("Terrenus") had engaged the defendant ("Attika") as the main contractor for constructing a solar farm and linkway at Changi Business Park, pursuant to a main builder agreement ("MBA") under which Attika was required to achieve partial completion on or before 30 June 2021 and completion by 31 July 2021.[167] Terrenus had entered into a separate Renewable Energy Purchase Agreement ("REPA") with Malkoha Pte Ltd, a subsidiary of Meta Platforms, Inc (for convenience, "Meta"), under which Terrenus was required to achieve a guaranteed capacity by 30 June 2021. When Attika did not achieve partial completion timeously, Terrenus claimed liquidated damages as well as general damages against Attika under the MBA, including Terrenus' liability to Meta under the REPA, arising from Attika's delays.

13.117 Clause 17.1.2 of the MBA provided that "[Attika] shall pay [Terrenus] 0.1% of Contract Sum per day for each day of delay as liquidated damages".[168] Clause 17.1.4 provided that "[i]f [Terrenus] suffers other losses and damages which cannot be covered by such liquidated damages, such losses and damages incurred by [Terrenus] shall be deemed as its losses and damages resulting from [Attika's] default and shall be reimbursed by [Attika] to [Terrenus]".[169]

164 *Alternative Advisors Investments Pte Ltd v Asidokona Mining Resources Pte Ltd* [2023] 4 SLR 284 at [134]–[135]. In any event, on appeal, the parties in this case agreed to limit the default interest rate to 5% per month, hence there was no need for the Appellate Division to decide whether the default interest rate, as adjusted, was a penalty. The appeal was also allowed on other grounds: see *Asidokona Mining Resources Pte Ltd v Alternative Advisors Investments Pte Ltd* [2023] 1 SLR 954 at [107].

165 *Ethoz Capital Ltd v Im8ex Pte Ltd* [2023] 1 SLR 922 at [96]–[97].

166 [2023] SGHC 333.

167 *Terrenus Energy SL2 Pte Ltd v Attika Interior + MEP Pte Ltd* [2023] SGHC 333 at [5].

168 *Terrenus Energy SL2 Pte Ltd v Attika Interior + MEP Pte Ltd* [2023] SGHC 333 at [197].

169 *Terrenus Energy SL2 Pte Ltd v Attika Interior + MEP Pte Ltd* [2023] SGHC 333 at [207].

13.118 The court held that cl 17.1.2 of the MBA was not a penalty. It remarked that the "question to be considered is not whether there are possible circumstances where a lesser loss would be suffered, but whether Attika can show that the sum is so extravagant, having regard to the range of damages which Terrenus as the innocent party was likely to suffer, that cl 17.1.2 could not constitute a genuine estimate of the damages".[170] It further rejected Attika's submission that the single lump sum test was applicable to render the liquidated damages rate of $5,100 per day a penalty, on the alleged basis that the same rate was applicable for delays to partial completion as well as completion. This was because both of the substations contractually provided for under the MBA (each energising 50% of the solar farm) had to be commissioned and energised to reach at least 70% of the capacity of the solar farm, and for partial completion to be achieved. This was an event "not practically or theoretically" separable from achieving generating 100% capacity at completion.[171] Moreover, in the absence of a positive case from Attika on the greatest loss test, the court concluded that cl 17.1.2 was not penal.[172]

13.119 On the relationship between liquidated and general damages, however, the court disagreed with Terrenus that it could claim general damages due to delay on the grounds that cl 17.1.4 of the MBA entitled it to recover "other losses" not covered by cl 17.1.2. The court relied on the leading authority of *Chan Ah Beng v Liang and Sons Holdings (S) Pte Ltd*[173] ("*Chan Ah Beng*"), where it was stated that:[174]

> It is an established principle of law that an innocent party cannot claim unliquidated damages in addition to the liquidated damages which were designed to deal with the loss that has occurred … However, the courts will allow unliquidated damages to be claimed in addition to liquidated damages if the damages which is the subject matter of the former claim arises wholly or partially from some other breach that does not fall within the ambit of the liquidated damages provision …

13.120 In *Terrenus*, the liquidated damages referred to in cl 17.1.2 of the MBA were specified to be for Attika's failure to achieve timely completion, hence "[a]ll damages arising from delay would therefore

170 *Terrenus Energy SL2 Pte Ltd v Attika Interior + MEP Pte Ltd* [2023] SGHC 333 at [203].
171 *Terrenus Energy SL2 Pte Ltd v Attika Interior + MEP Pte Ltd* [2023] SGHC 333 at [205].
172 *Terrenus Energy SL2 Pte Ltd v Attika Interior + MEP Pte Ltd* [2023] SGHC 333 at [206].
173 [2012] 3 SLR 1088.
174 *Chan Ah Beng v Liang and Sons Holdings (S) Pte Ltd* [2012] 3 SLR 1088 at [55].

fall within the ambit of the liquidated damages provision".[175] Terrenus' contention would allow it to claim unliquidated damages for delay, contravening the principle in *Chan Ah Beng*. Clause 17.1.4's reference to "other losses" also plainly referred to losses and damages not emerging from delay, rather than "additional" losses emerging from delay.[176] Consequently, Terrenus' claims for general damages arising from delay, including its liability to pay delay damages to Meta and lost income under the REPA, were unsuccessful.

13.121 This is a very sensible approach consistent with authority. As Halson explains, where the actual loss happens to be greater than the liquidated damages sum stipulated, the "claimant will receive the amount stipulated in the clause, even if this understates the actual loss incurred".[177] The proper application of this approach requires identifying precisely the breaches to which the provision covers, and only if breaches have occurred to which the clause "was not meant to apply, [will] the claimant be able to recover unliquidated damages … in the usual way".[178] Respecting the intended coverage of a liquidated damages clause gives effect to party autonomy and the commercial advantages of drafting such clauses, including avoidance of difficulty, uncertainty and expenses involved in proving damages. Any claim that general damages are required to "top-up" a shortfall where actual loss is greater than the sum stipulated is only a superficially attractive one, given that a demand for more precise correction runs up against the considerations of principle and policy referred to above.

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175 *Terrenus Energy SL2 Pte Ltd v Attika Interior + MEP Pte Ltd* [2023] SGHC 333 at [214].

176 *Terrenus Energy SL2 Pte Ltd v Attika Interior + MEP Pte Ltd* [2023] SGHC 333 at [214].

177 Roger Halson, *Liquidated Damages and Penalty Clauses* (Oxford University Press, 2018) at para 3.05.

178 Roger Halson, *Liquidated Damages and Penalty Clauses* (Oxford University Press, 2018) at para 3.06.