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Deposits: At the Intersection of Contract, Restitution, Equity and Statute

Tiong Min Yeo
Singapore Management University, tmyeo@smu.edu.sg

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Whether a partial payment is recoverable in restitution by a party in breach of contract depends on the classification of the payment as a deposit or a part-payment. A part payment may be recoverable in unjust enrichment if the contract is terminated and a vitiating factor can be found (usually total failure of consideration in this context), and subject to a counterclaim for damages. However, a deposit is intended to be earnest for performance and will not be recoverable, at least generally. Six questions will be considered: (1) Is the penalty rule applicable to a deposit? (2) If not, is the deposit subject to any other common law control? (3) Is equitable relief against forfeiture applicable? (4) Does a stipulation of "non-refundable" payment describe the essential feature of a deposit as generally not subject to a restitutionary claim, or does it purport to exclude such a claim completely? (5) If the latter, is the exclusion effective? (6) If it is, does it reveal a statutory gap in the regulation of exclusion clauses?

Preamble

1. It is a great honour to deliver the 6th Yong Pung How Professorship of Law Lecture. This lecture series, and the Yong Pung How Professorship of Law, was made possible by a very generous donation of the Yong Shook Lin Trust to SMU. Mr Yong's enormous contributions to Singapore are well known. He had been a prominent lawyer, banker and judge. He was first and foremost an institution builder. As Chief Justice of Singapore from 1990 to 2006, he had brought sweeping reforms to the legal system, lifting it to world class status. The foundations that he laid has enabled his successors to take the legal system to even greater heights. After his retirement he became closely involved in starting the SMU School of Law. The School was able to draw upon his wisdom and experience as the first Chairman of its Advisory Board. After stepping down from the Board, he continues to contribute to the University as the Chancellor.

2. Yong CJ delivered 882 judgments during his service on the Bench.[1] They spanned the entire spectrum of the law, and many are landmark precedents. Of the many themes to be found in his decisions, one which stands out is the desideratum of upholding the contractual bargain. Contractual freedom is not an absolute value, of course, but as he said in *Citicorp Investment Bank (Singapore) Ltd v Wee Ah Kee*:[2] "The courts … would be most chary and slow … to

[1] *Speeches and Judgments of Chief Justice Yong Pung How* (2006), vol I, at p 17.
[2] [1997] 2 SLR(R) 1, [1997] SGCA 64 at [42].

interfere with the freedom of contract". The lecture topic deals with the tension between freedom of contracting and the regulatory impulses in a troublesome area of the common law.

Introduction

3. The concept of a deposit is deeply entrenched in the common law. It is also a familiar occurrence in commercial and daily lives. It is thus somewhat surprising that the modern law relating to the recovery of deposits remains somewhat obscure. This paper will focus on the specific concept of deposit as a pre-payment made as security for the performance of a contract. It will focus on the general law. Specific legislation that may apply to deposits to particular types of transactions will not be dealt with here.[3]

4. A part payment is intended to be part of the purchase price, and may be recoverable by a party in breach of contract, possibly under an implied term in the contract (though this is not likely in practice[4]), or more likely under the law of unjust enrichment if a vitiating factor, usually total failure of consideration, can be established.[5]A deposit is often a part payment as well but the two are distinct concepts which have different legal consequences. A deposit provides "a guarantee that the contract should be performed",[6] or an "earnest" for the performance of the contract,[7] and is generally intended not to be recoverable if the party paying the deposit is in default of performance.[8] If he performs the deposit is part of the payment, and if he breaches the deposit is forfeited whether the innocent party has suffered any loss. The defaulting party has no claim for the return of a deposit under the law of unjust enrichment for two reasons: there is no failure of consideration because the purpose of the payment – the earnest for his performance – has not failed,[9] and in any event, an unjust enrichment claim cannot circumvent the risk allocation – again the earnest – in the contract.[10]

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[3] Eg, Hire Purchase Act (Cap 125, 1999 Rev Ed), Consumer Protection (Fair Trading) Act (Cap 52A, 2009 Rev Ed).
[4] *Dies v British and International Mining and Finance Corp Ltd* [1939] 1 KB 724 at 736.
[5] *Stocznia Gdanska SA v Latvian Shipping Co* [1998] 1 WLR 574 at 588 (HL); *Rover International Ltd v Cannon Film Sales Ltd (No 3)* [1989] 1 WLR 912 (CA); *Hyundai Heavy Industries Co Ltd v Papadopoulos* [1980] 1 WLR 1129 (HL); *Foran v Wright* (1989) 168 CLR 385 at 432, 438, and 455; *Dies v British and International Mining and Finance Corp Ltd* [1939] 1 KB 724 (the reference to implied contracts must today be read as restitutionary).
[6] *Ex Parte Barrell* ((1875) LR 10 Ch App 512 at 514 (James LJ), *Howe v Smith* (1884) 27 Ch D 89 at 95.
[7] *Howe v Smith* (1884) 27 Ch D 89 at 102 (Fry LJ).
[8] *Sprague v Booth* [1909] 1 AC 576 (PC, Ontario) (Lord Dunedin).
[9] PBH Birks, *An Introduction to the Law of Restitution* (1989 rev ed) at 224.
[10] *OMG Holdings Pte Ltd v Pos Ad Sdn Bhd* [2012] 4 SLR 231, [2012] SGCA 36 at [48]. The same arguments may defeat the restitutionary recovery of non-contractual deposits: *Sharma v Simposh Ltd* [2011] EWCA Civ 1383, [2013] Ch 23.

5. Whether a partial payment amounts to a deposit or a part payment is a question of the construction of the contract.[11] In the ordinary case, the payment of money (whether as deposit or part payment) transfers absolute title to the money.[12] The recovery of the money lies in the law of obligations, ie, contract or unjust enrichment. What is forfeited in a deposit is not title to a sum of money, but a (contractual or restitutionary) chose in action. Sometimes, a transaction involving a payment of deposit may be interpreted to give rise to a trust relationship.[13] Where this is the case, the law of trust is engaged, and forfeiture of proprietary rights may be involved.

6. Characterisation problems can arise outside the simple transaction where one party makes a part payment which is also a deposit. Characterisation is important because of the special rules that apply to deposits. Where the contracting parties have opened a special account in their joint names where a sum of money is paid in by one party liable to be forfeited by the other, a majority in the Canadian Supreme Court held that it was not a deposit.[14] In *Commissioner of Public Works v Hills*,[15] a contract provided for a certain percentage of money payable by one contracting party to be retained, and forfeited upon certain breaches of the other party. This case is usually treated as dealing with a deposit by subsequent authorities, but this legal characterisation is not without doubt.

7. The law on the forfeiture of deposits predated the intervention of equity to prevent penalties. This explains the difficult relationship between the law deposits on the one hand and the law

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[11] *Lee Chee Wei v Tan Hor Peow Victor* [2007] 3 SLR(R) 537 at [85]; *Mayson v Clouet* [1924] 1 AC 980 (PC, Singapore) at 985, 987; *Howe v Smith* (1884) 27 Ch D 89 at 101.

[12] *Sharma v Simposh Ltd* [2011] EWCA Civ 1383, [2013] Ch 23 at [44].

[13] *Typhoon 8 Research Ltd v Seapower Resources International Ltd* [2002] 2 HKLRD 660. Criticised in Rebecca Wing Chi Lee, "Rental Deposits as (*Quistclose*) Trusts" (2003) 33 HKLJ 27, and P Smart (2003) HK Lawyer 64. See also *Sitt Tatt Bhd v Goh Tai Hock* [2009] 2 SLR(R) 44, [2008] SGHC 220 which considered whether an upfront payment was a deposit, a fee, or paid on trust. See also *Brien v Dwyer* (1978) 141 CLR 378. In *Triangle Auto Pte Ltd v Zheng Zi Construction Pte Ltd* [2000] 3 SLR(R) 594 at [14] it was stated that: "a deposit with a right of forfeiture is a right *in rem*. The buyer places the money or its equivalent in the power and possession of the seller. Upon breach by the buyer, the deposit is transformed into the property of the seller by operation of the forfeiture clause." This is not the legal characterisation of the deposit (or part payment) paid in a typical sale contract, although on specific facts it may be that the money is transferred on a trust. In *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457 at 477, Dixon J referred to the vendor's "title to retain money" as being conditional upon the completion of the contract, but this has been explained as a *contractual* remedy of the purchaser: *Stocznia Gdanska SA v Latvian Shipping Co* [1998] 1 WLR 574 at 589 (HL). Similar language was used in the discussion of a *restitutionary* remedy: *Sharma v Simposh Ltd* [2011] EWCA Civ 23, [2013] Ch 23 at [45]-[47]. At common law, the mechanism for the recovery of a conditional transfer of money would lie in an action for money had and received, ie, restitution: Robert Chambers, "Conditional Gifts", in Normal Palmer and Ewan McKendrick (eds), *Interests in Goods* (2nd ed, 1998) 429 at 432-433.

[14] *Waugh v Pioneer Logging Co* [1949] SCR 299. Kerwin, Rand and Estey JJ determined that it was not a deposit because it was not also a part payment and struck it down as a penalty, while Locke and Teschereau JJ, dissenting, held that it was a deposit and thus forfeitable irrespective of the penalty rules.

[15] [1906] 1 AC 368 (PC, Ontario).

regulating liquidated damages on the other. The law on deposits was imported from the civil law,[16] and remained largely insulated from developments in equity and common law on the penalty rule as it applied to liquidated damages. But it was an imperfect reception in two respects. First, the civil law did not distinguish as a matter of policy between deposits and liquidated damages clauses; both were regarded as penal but acceptable.[17] Secondly, subsequent developments in the civil law placed limitations of good faith on the exercise of the right to obtain excessive penalties,[18] while the common law remains to this day resistant to any general duty of good faith. Instead, the common law courts have struggled with three different techniques (penalty, forfeiture, and recharacterisation) to deal with deposits. These techniques are not always clearly distinguished in the cases and academic writings.

Question 1: Is the penalty rule applicable to a deposit?

8. The penalty rule in contract law developed out of the equitable jurisdiction to relieve penal bonds which were enforceable at common law, and subsequently, the common law courts adopted the same approach. Today (except possibly in Australia[19]) the rules in common law and equity are regarded as the same. A clause stipulating a sum to be payable upon breach (ie, a liquidated damages clause) will not be enforceable to the extent that it exceeds a genuine pre-estimate of the loss and acts as a deterrence to breach of contract. The law in this area is well-established.[20]

9. The reception of the civil law and the separate development of the law of deposits has been the main restraining force in preventing the penalty rule from applying to deposits.[21] The special treatment for deposits was endorsed by the Privy Council on appeal from Singapore in *Mayson v Clouet*,[22] and the distinction was recently accepted by the Singapore Court of Appeal in *Lee Chee Wei v Tan Hor Peow Victor*.[23] Not all common law judges had been receptive about the

[16] *Howe v Smith* (1884) 27 Ch D 89 at 101-102; *Wallis v Smith* (1882) 21 Ch D 243 at 258; *Linggi Plantations Ltd v Jagatheesan* [1972] 1 MLJ 89 at 91.
[17] R Zimmerman, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (OUP, 1990), pp 230-234 and chapter 4.
[18] Ibid, at pp 106-108.
[19] It is not clear whether the common law rule will move in tandem with the expansion of the equitable rule in *Andrews v Australia and New Zealand Banking Group Ltd* [2012] HCA 12. Equity will prevail over the common law anyway.
[20] Andrew Phang Boon Leong (gen ed), *The Law of Contract in Singapore* (2012) at [23-009]-[23-021]; Edwin Peel (ed), *Treitel: The Law of Contract* (13th ed, 2011) at [20-130]-[20-146].
[21] A deposit does not lose its character as such even if it is described to be intended to liquidated damages: *Union Eagle Ltd v Golden Achievement Ltd* [1997] 1 AC 514 at 518 (PC, Hong Kong).
[22] [1924] 1 AC 980 (PC, Singapore).
[23] [2007] 3 SLR(R) 537, [2007] SGCA 22 at [83]-[84].

civilian influence, however.[24] There had also been a number of Singapore cases which had proceeded on the assumption that the penalty rule was applicable to a deposit.[25] There is some academic support that the penalty rule applies equally to the forfeiture of deposits.[26] However, it is notable that in 1975 the English Law Commission recommended the *extension* of penalty rule to deposits as a matter of law reform.[27] This distinction in Singapore and English law[28] appears to be also accepted at least in Scotland,[29] Australia,[30] Canada,[31] New Zealand,[32] Hong Kong SAR,[33] Malaysia,[34] India,[35] and Jamaica.[36] In contrast, it has been reported that in the United States, the balance of authorities regard the forfeiture of deposits as being subject to the same test as liquidated damages.[37]

10. One objection to the application of the penalty rule to the forfeiture of deposits lies in the legal requirement in the law of penalty that it applies to money that is *payable upon breach*.[38] In the

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[24] *Pye v British Automobile Commercial Syndicate Ltd* [1906] 1 KB 425; *In re Dagenham (Thames) Dock Company, ex parte Hulse* (1873) 8 Ch App 1022.

[25] *Indian Overseas Bank v Cheng Lai Geok* [1993] 1 SLR(R) 32, [1993] SGCA 4 at [32], overruling the finding of the High Court ([1991] 2 SLR(R) 574 at [75]) that a 25% deposit amounted to a penalty, not on the basis that the penalty rules did not apply, but on the basis it was not a penalty on the facts. In *Hua Khian Co (Pte) Ltd* v *Lee Eng Kiat* [1996] 2 SLR(R) 562, [1996] SGCA 42 at [16], the Court of Appeal referred to a finding of the High Court that the deposit was not a penalty. See KB Soh, "Deposits and Reasonable Penalties" [1997] SJLS 50 at 61. See also *Zalco Marine Services Pte Ltd v Humboldt Shipping Co Ltd* [1998] 2 SLR(R) 195; [1998] SGCA 26 at [42]. In *Triangle Auto Pte Ltd v Zheng Zi Construction Pte Ltd* [2000] 3 SLR(R) 594 at [13], Selvam J said: "If the deposit amount is excessive it will also be caught by the law of penalty", but the authorities cited do not support the proposition if it is the jurisdiction to relieve against penalty that was being referred to.

[26] Edwin Peel (ed), *Treitel: The Law of Contract* (13th ed, 2011) at 20-149; C Mitchell, P Mitchell and S Watterson (eds), *Goff and Jones: The Law of Unjust Enrichment* (8th ed, 2011) at 14-08.

[27] *Penalty Clauses and Forfeiture of Monies Paid*, Working Paper No 61 (1975), at paras 57-67

[28] *Ex Parte Barrell* ((1875) LR 10 Ch App 512; *Wallis v Smith* (1882) 21 Ch D 243; *Howe v Smith* (1884) 27 Ch D 89. See HG Beale (gen ed), *Chitty on Contracts* (31st ed, 2012), Vol I, para [26-193].

[29] Scottish Law Commission, *Discussion Paper on Penalty Clauses* (No 103, 1997).

[30] *Andrews v Australia and New Zealand Banking Group Ltd* [2012] HCA 12 at 43; *NLS Pty Ltd v Hughes* (1966) 120 CLR 583 at 589; [1966] HCA 63. See also *Goods and Services Tax Ruling Goods and services tax: deposits held as security for the performance of an obligation*, GSTR 2006/2, available at: http://law.ato.gov.au/atolaw/view.htm?docid=gst/gstr20062/nat/ato/00001. Elizabeth Peden, "Forfeiture of Deposits: Where law and equity collide?" (2012) 28 JCL 161.

[31] *Waugh v Pioneer Logging Co* [1949] SCR 299; *Tang v Zhang* 2013 BCCA 52; *Marshall v Bernard Place Corp* (2000) 36 RPR (3d) 153.

[32] *Garratt v Ikeda* [2002] 1 NZLR 577 (NZCA).

[33] *Polyset Ltd v Panhandat Ltd* (2002) 5 HKCFAR 234.

[34] *Linggi Plantations Ltd v Jagatheesan* [1972] 1 MLJ 89 at 91 (PC, Malaysia).

[35] *Shri Hanuman Cotton Mills v Tata Air Craft Limited* AIR 1970 SC 1986, [1970] SCR 127.

[36] *Workers Trust & Merchant Bank Ltd v Dojap Investments Ltd* [1993] 1 AC 573 (PC, Jamaica).

[37] See GH Treitel, "Remedies for Breach of Contract", in A Von Mehren (ed), *International Encyclopaedia of Comparative Law* (1976) Vol 7, Ch 16, at p 108. The position under the Uniform Commercial Code in the United States appears to be similar to that in the civil law: the retention of an excessive deposit may be regarded as unconscionable or a breach of good faith: s 2-718(2) read with ss 1-304 and 2-302.

[38] *Stansfield Business International Pte Ltd v Vithya Sri Sumathis* [1999] 3 SLR(R) 927 at [8]-[9]; *Alder v Moore* [1961] 2 QB 57. Lord Browne-Wilkinson in *Workers Trust & Merchant Bank Ltd v Dojap Investments Ltd* [1993] 1 AC 573 at 578 considered the penalty rule to be applicable when a contract requires one party "to pay or forfeit a sum of money" upon breach, but that the deposit in a sale of land contract was a long-established exception. This suggests that the penalty rule could apply to deposits in other types of contracts but this has not been taken

case of a deposit, money has already been paid. It may well be that the law of penalty is more flexible, and that a forfeiture that is functionally for a breach of contract could fall within the penalty rule.[39] This is not easy to reconcile with the current law, but the Singapore High Court in *Stansfield Business International Pte Ltd v Vithya Sri Sumathis* had left open the possible reception of a "disguised penalty" rule,[40] where sums which are made payable upon events other than breach may be subject to the equal scrutiny of the court, but it has never been applied in English[41] or Singapore law. This step was taken by the High Court of Australia in the controversial case of *Andrews v Australia and New Zealand Banking Group Ltd*, which held that bank charges payable upon events other than breach could be subject to the equitable jurisdiction to relieve against penalties.[42] However, it is notable that notwithstanding this momentous development, the unanimous opinion of the court also made the observation that the deposit cases remain untouched by the penalty jurisdiction.[43]

11. The factual distinction between a deposit which is paid or payable at the time of contracting and a liquidated damages clause which is payable upon breach is not very strong on explanatory power. This is especially since a deposit which is due but not paid can be claimed in an action on a debt or as part of damages suffered by the innocent party without reference to actual loss.[44]

12. A more substantive reason is that while the liquidated damages clause is intended to be an estimated measure of loss, the deposit serves an additional function of being an earnest for performance. This distinction has been criticised in Treitel:[45]

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up in subsequent cases. See especially *Lee Chee Wei v Tan Hor Peow Victor* [2007] 3 SLR(R) 537, [2007] SGCA 22 and *Triangle Auto Pte Ltd v Zheng Zi Construction Pte Ltd* [2000] 3 SLR(R) 594 at [13].

[39] Some authority for a functional approach could be found in dicta that penalty rules could apply to performance bonds: *Pun Serge v Joy Head Investments Ltd* [2010] 4 SLR 478, [2010] SGHC 182 at [49]; *Cargill International SA v Bangladesh Sugar & Food Industries Corp* [1996] 2 Lloyd's Rep 524 at 531. Performance bonds are not payable upon breach but upon a complying demand, though the purpose is to address a breach of contract. See N Enonchong, "Recovery of Overpayments made under Performance Bonds" [2010] RLR 14 at 16.

[40] [1999] 3 SLR(R) 927 at [13]-[16], referring to *Interfoto Picture Library Ltd v Stiletto Visual Programes Ltd* [1989] QB 433 (CA) at 445-446 (Dillon LJ) and *Willson v Love* [1896] 1 QB 626.

[41] Edwin Peel (ed), *Treitel: The Law of Contract* (13th ed, 2011) at 20-144.

[42] [2012] HCA 30.

[43] [2012] HCA 30 at [43].

[44] *Indian Overseas Bank v Cheng Lai Geok* [1993] 1 SLR(R) 32 at [27]-[31]; *Stansfield Business International Pte Ltd v Vithya Sri Sumathis* [1999] 3 SLR(R) 927. See also *The Blankenstein* [1985] 1 WLR 435 (CA); *Garratt v Ikeda* [2002] 1 NZLR 577 (NZ CA).

[45] Edwin Peel (ed), *Treitel: The Law of Contract* (13th ed, 2011) at 20-149. See also Scottish Law Commission, *Discussion Paper on Penalty Clauses* (No 103, 1997) at para 5.3: "It seems clear on principle that it should make no difference whether a penalty takes the form of a payment of a sum or of the forfeiture of a sum already paid. This is just a matter of the mechanics of the transaction which should not affect the result." (Footnote omitted).

> [T]he only difference between "a guarantee that the contract shall be performed" and "a payment of money stipulated as *in terrorem* of the offending party" lies in the emotive force of the words used.

13. However, there is clearly a stronger signalling function in the deposit than in the liquidated damages clause. The functional difference is admittedly one of degree rather than of kind. Accepting that they both are potentially penal in function and effect, it does not necessarily follow that the penalty rule should apply to deposits. One could argue with equal force that the deposit rules should apply to liquidated damages, or that a new unitary rule should apply to both of them. While some have defended the penalty rule as promoting economic efficiency in encouraging efficient breaches of contract,[46] there is also a school of thought that the rules are inefficient because they increase transaction costs.[47] The penalty rule appears to be a proxy for controlling some effects of inequality of bargaining power.[48] The commercial purpose of liquidated damages was acknowledged by Lord Woolf in *Phillips Hong Kong Ltd v Attorney-General of Hong Kong*[49] that contracting parties "should be able to know with a reasonable degree of certainty the extent of their liability and the risks which they run as a result of entering into the contracts". Recent English cases have been warming up to the idea of taking into consideration the commercial justification for having a liquidated damages clause in determining whether the clause amounts to a penalty.[50] The idea has received a cool reception in one Singapore High Court decision,[51] but the argument had perhaps been somewhat inelegantly put that the court should uphold a liquidated damages clause on commercial grounds where it otherwise would clearly be a penal clause under the traditional test. On the other hand, an earlier Singapore Court of Appeal decision had cited with approval the use of commercial justification as a basis for inferring that the dominant purpose of a liquidated damages clause was not to deter a breach of contract.[52]

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[46] Though there is also a counter-argument that it *encourages* efficient breaches because it provides clear datum on the cost of breach.

[47] For an overview of the various economics arguments, see AN Hatzis, "Having the cake and eating it too: efficient penalty clauses in Common and Civil contract law", (2003) 22 International Review of Law and Economics 381.

[48] *AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170 at 193-194, cited with approval in *Hong Leong Finance Ltd v Tan Gin Huay* [1999] 1 SLR(R) 755, [199] SGCA 18 at [21].

[49] [1993] 2 CLJ 272 at 276.

[50] *Azimut-Bennetti SpA (Bennetti Division) v Darrell Marcus Healey* [2010] EWHC 2234; *Lordsvale Finance Plc v Bank of Zambia* [1996] QB 752 at 763-764; *Cine Bes Filmcilik Ve Yapimcilik v United International Pictures* [2003] EWCA Civ 1669 at [15]; *Euro London Appointments Ltd v Claessens International Ltd* [2006] 2 Lloyd's Law Rep 436 at [30]; *Murray v Leisureplay Plc* [2005] EWCA Civ 963.

[51] *Pun Serge v Joy Head Investments Ltd* [2010] 4 SLR 478, [2010] SGHC 182 at [42]-[45].

[52] *Hong Leong Finance Ltd v Tan Gin Huay* [1999] 1 SLR(R) 755, [199] SGCA 18 at [25].

14. It is also notable that the English courts in exercising statutory power[53] to order return of deposits in conveyancing contracts have resisted invitations to apply the penalty test, but have instead taken the cue directly from the broad words of provision[54] to hold that the power will be exercised whenever the justice of the case requires.[55]

15. In conclusion, the weight of authorities in the Commonwealth is heavily against the application of the penalty rule to the forfeiture of deposits. The reason is historical rather than substantive. However, while it may be desirable to apply the same test to deposits and liquidated damages clauses, it is not so obvious that the ideal solution is to apply the existing penalty rule to deposits.

Question 2: Is the deposit subject to common law control?

16. On the basis that deposits are not subject to the penalty rule, the courts have recognised the possibility of abuse and sought solutions elsewhere.[56] The first trace of a common law solution can be found in the Privy Council decision in *Linggi Plantations Ltd v Jagatheesan*.[57] It affirmed that the position under the Malaysian Contracts Act 1950 was the same as the English common law for deposits. Recognising the possibility of abuse, Lord Dunedin, delivering the advice of the Board said (obiter):[58]

> No doubt … there may be cases when equity would relieve a purchaser who has paid a deposit and then defaulted, although it is to be said that the last word is probably not yet spoken on this subject. ... **It is also no doubt possible that in a particular contract the parties may use language normally appropriate to deposits properly so-called and even to forfeiture which turn out on investigation to be purely colourable and that in such a case the real nature of the transaction might turn out to be the imposition of a penalty, by purporting to render forfeit something which is in truth part payment**. This no doubt explains why in some cases the irrecoverable nature of a deposit is qualified by the insertion of the adjective "reasonable" before the noun. But the truth is that a reasonable deposit has always been regarded as a guarantee of performance as well as a payment on account, and its forfeiture has never been regarded as a penalty in English law or common English usage.

17. Lord Dunedin refers to two methods of control in this passage. It is probably because he regarded the first, relief against forfeiture, as uncertain in scope that he proposed the *recharacterisation* approach. In appropriate cases, even if the parties had described a payment

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[53] Law of Property Act 1925, s 49(2). There is no Singapore equivalent.
[54] "Where the court refuses to grant specific performance of a contract, or in any action for the return of a deposit, the court may, if it thinks fit, order the repayment of any deposit."
[55] *Aribisala v St James' Homes (Grosvenor Dock) Ltd (No 2)* [2008] EWHC 456 (Ch), [2009] 1 WLR 1089; *Omar v El-Wakil* [2001] EWCA Civ 1090, [2002] 2 P & CR 36 at [33]-[35]; *Universal Corporation v Five Ways Properties Limited* [1979] All ER 552.
[56] *Workers Trust & Merchant Bank Ltd v Dojap Investments Ltd* [1993] 1 AC 573 at 579 (PC, Jamaica).
[57] [1972] 1 MLJ 89 (PC, Malaysia).
[58] Ibid, at 94 (emphasis added).

as a "deposit", the court will disregard the earnest element in the deposit, and thus characterise the deposit as part payment. This operates as a shield and not a sword. It merely puts an impugned deposit in the same position as a part payment. A cause of action needs to be established to base the recovery of the payment. This is normally by way of establishing a vitiating factor in the law of unjust enrichment, usually total failure of consideration.[59]

18. This passage was approved by a subsequent Privy Council decision from Jamaica in *Workers Trust & Merchant Bank Ltd v Dojap Investments Ltd*.[60] The plaintiff was seeking to recover a 25% deposit paid pursuant to the sale of certain properties. Lord Browne-Wilkinson, delivering the advice of the Board, endorsed the above statement of the law of Lord Dunedin in *Linggi Plantations Ltd v Jagatheesan*, holding that:[61] "It is not possible for the parties to attach the incidents of a deposit to the payment of a sum of money unless such sum is reasonable as earnest money". On the facts, the sum of the deposit was held to be unreasonable in the circumstances, and thus it could not be forfeited as a deposit. It was ordered to be returned to the contract breaker subject to damages suffered by the innocent party.[62]

19. *Workers Trust & Merchant Bank Ltd v Dojap Investments Ltd* has curiously been cited in subsequent cases and academic writings as an authority for applying any one of the three techniques – the penalty rule, relief against forfeiture, as well as common law recharacterisation. It is arguable by a process of elimination that what was actually applied was common law recharacterisation. Lord Browne-Wilkinson had clearly considered the penalty cases to be distinct and inapplicable, and had refrained from engaging in discussion of the scope of relief against forfeiture. He had clearly distinguished the test of "reasonableness" in a deposit from the test applied under the penalty rule.[63] In overruling the Court of Appeal which allowed the vendor to retain 10% of the deposit which would have been regarded as reasonable, the Board advised that an unreasonable deposit must be returned as a whole because the parties had not contracted for a 10% deposit.[64] This is consistent with the recharacterisation technique but difficult to reconcile with relief against forfeiture.

20. This reading of *Workers Trust & Merchant Bank Ltd v Dojap Investments Ltd* was confirmed by a 4-1 majority in the Hong Kong Court of Final Appeal in *Polyset Ltd v Panhandat Ltd*,[65]

[59] See footnote 5 above.
[60] [1993] 1 AC 573 (PC, Jamaica).
[61] Ibid, at 579.
[62] The ground for recovery was not explained.
[63] [1993] 1 AC 573 at 580.
[64] [1993] 1 AC 573 at 582.
[65] (2002) 5 HKCFAR 234. Noted in Lusina Ho, "Deposit: the Importance of Being (an) Earnest" (2003) 119 LQR 34.

where the passage from Lord Dunedin in *Linggi Plantations Ltd v Jagatheesan* above and its application in *Workers Trust & Merchant Bank Ltd v Dojap Investments Ltd* was so endorsed. While not rejecting the relief against forfeiture line of reasoning, the Court of Final Appeal found the common law route more attractive. The Court ordered the return of a 35% deposit, a sum which they found to be unreasonable on the facts, subject to any damages suffered by the innocent party in a sale of land contract.

21. What is the status of this line of reasoning in Singapore law? No case has directly applied *Workers Trust & Merchant Bank Ltd v Dojap Investments Ltd*, though it has been cited as supporting a jurisdiction to relieve against forfeiture;[66] the penalty rule,[67] as well as common law recharacterisation.[68] The *locus classicus* in Singapore is found in the statement of VK Rajah JA in *Lee Chee Wei v Tan Hor Peow Victor*:[69]

> **The invariable judicial approach to forfeitable deposits at common law is that the deposit will be forfeited to the payee upon the discharge of the contract on the default of the payer, irrespective of whether it would have been deemed part-payment had the contract been completed**. The payer cannot insist on abandoning the contract and yet expect to recover the deposit as this would enable him to take advantage of his own wrong (*Howe v Smith* (1884) 27 Ch D 89 at 98). An advance payment, on the other hand, does not fall within the category of forfeitable deposits and is neither designed nor intended to secure performance (*Lim Lay Bee v Allgreen Properties Ltd* [1998] 3 SLR(R) 1028 ("*Lim Lay Bee*")). This is underscored by the premise that the vendor is already amply protected by the recovery of damages he has sustained (*Dies v British and International Mining and Finance Corporation Limited* [1939] 1 KB 724).

22. At first sight, the reference to the "invariable" judicial approach of forfeiture of deposits appears to leave no scope for the common law technique. However, two points should be noted. First, the common law technique is one of recharacterisation, and the effect is that the earnest element is disregarded so that the deposit is no longer treated as a deposit but as part-payment. An unreasonable deposit is not a deposit at all in the eyes of the common law. Secondly, it is suggested that this is not a strained reading of this passage, because immediately preceding this passage, the Court had approved this statement from *Triangle Auto Pte Ltd v Zheng Zi Construction Pte Ltd*:[70]

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[66] *Metro Alliance Holdings & Equities Corp v WestLB AG* [2008] 1 SLR(R) 139, [2007] SGHC 175 at [22]-[23];
[67] *Triangle Auto Pte Ltd v Zheng Zi Construction Pte Ltd* [2000] 3 SLR(R) 594 at [13].
[68] *Tan Wee Fong v Denieru Tatsu F&B Holdings (S) Pte Ltd* [2010] 2 SLR 298, [2009] SGHC 290 at [70].
[69] [2007] 3 SLR(R) 537, [2007] SGCA 22 at [84] (emphasis added).
[70] [2000] 3 SLR(R) 594 at [9] (emphasis added).

> If, however, the contract provides that the deposit is to be forfeited to the seller upon breach by the purchaser, and **provided the amount of deposit is customary or moderate**, the seller is entitled to retain it even if he suffered no loss …

23. This arguably provides a vindication of Lord Dunedin's statement in *Linggi Plantations Ltd v Jagatheesan*[71] that: "This no doubt explains why in some cases the irrecoverable nature of a deposit is qualified by the insertion of the adjective 'reasonable' before the noun." Thus, it is suggested that the common law technique is not inconsistent with Singapore law. Should it be adopted in Singapore? Does it provide a better solution than applying the rule against penalties or relief against forfeiture? One obvious criticism is that the recharacterisation technique effectively involves modification of the parties' bargain, but on this this score it is on par with the equitable techniques. But equity operates in a more sophisticated way in restraining the enforcement of a common law right, while the common law technique involves outright revision. There are several other criticisms.

24. The first is that the recovery of an unreasonable deposit requires an independent cause of action, usually in the law of restitution. There are likely to be difficulties in establishing total failure of consideration as a vitiating factor in the law of unjust enrichment outside straightforward sale cases.[72] In many cases, an argument may be made that at least part of the payment is in the nature of a "fee" for negotiation or other services.

25. However, two points may be noted. First, these difficulties apply to the recovery of part-payments anyway. There is no reason for unreasonable deposits to stand in a better position than part-payments. The answer to the criticism lies in a more nuanced approach towards failure of consideration, the recognition of severability of consideration in appropriate cases, and perhaps the recognition of partial failure of consideration as a sufficient ground of restitution. Secondly, the same issue arises in theory within equity's jurisdiction. Whether it is relief against penalty or relief against forfeiture, the traditional equitable intervention restrains the exercise of a common law (contractual) right of forfeiture. Unless a trust can be established, property has already passed, and what is forfeited is a right of recovery, which goes back to contract and restitution. It may well be that equity is capable of taking that further step, but this has been an under-investigated issue.

26. A second criticism is that there has been no clear explanation of what constitutes a "reasonable" deposit for this purpose of this rule. The starting point is invariably to look at the customary

[71] [1972] 1 MLJ 89 at 94 (PC, Malaysia). See para 16 above.
[72] See, eg, *Tan Wee Fong v Denieru Tatsu F&B Holdings (S) Pte Ltd* [2010] 2 SLR 298, [2009] SGHC 290.

practice of the industry.[73] Whether a deposit is reasonable or not in the circumstances of a particular case is necessarily a heavily factual investigation. Common law judges are arguably well-equipped because reasonableness is a cornerstone of common law reasoning and methodology. What makes the investigation particularly difficult in this context is that insofar as it involves scrutiny of value of the exchanges within the contract to justify a larger deposit than usual, this goes against the grain of contract law in not examining the adequacy of consideration.[74] Further, the assumption that customary practice has justificatory force can be questionable.[75]

27. A third criticism is that it appears to provide an all or nothing solution. There is no fall-back to a reasonable amount if a deposit is found unreasonable. Thus, while the Privy Council in *Workers Trust & Merchant Bank Ltd v Dojap Investments Ltd* thought 10% would have been a reasonable deposit in the circumstances, the entire 25% was ordered to be returned (subject to damages). In contrast, there is flexibility in some civil law jurisdictions to make orders for partial returns.[76] However this pre-supposes a greater degree of judicial intervention which is prevalent in civil law systems as a result of a general doctrine of good faith, although the flexibility may be found in the equitable relief against forfeiture jurisdiction.[77] In common law systems, this type of order has been given under statutory power under the Malaysian Contracts Act,[78] and may be possible under UK legislation.[79] However, it should be noted that the interest of the innocent party can be protected by a claim for contractual damages.

[73] [1993] 1 AC 573 at 580.
[74] Lusina Ho, "Deposit: the Importance of Being (an) Earnest" (2003) 119 LQR 34 at 36-37.
[75] In the context of the penalty, prevailing industry practice clearly does not justify penal clauses: *Hong Leong Finance Ltd v Tan Gin Huay* [1999] 1 SLR(R) 755, [1999] SGCA 18 at [27]. There is an alternative interpretation of *Workers Trust & Merchant Bank Ltd v Dojap Investments Ltd* [1993] 1 AC 573 (at 578) that deposits other than for sale of land contracts need to be shown to be reasonable irrespective of any customary practice (Hugh Beale, "Unreasonable Deposits" (1993) 109 LQR 524 at 529) but this has not been taken up in the case law.
[76] Lusina Ho, "Deposit: the Importance of Being (an) Earnest" (2003) 119 LQR 34 at 38. See also Aristides N Hatzis, "Having the cake and eating it too: efficient penalty clauses in Common and Civil contract law" (2003) 22 International Review of Law and Economics 381 at 400-401.
[77] Application of the relief penalty jurisdiction would leave the deposit taker strictly to recovery of his loss.
[78] *Koperasi Mahadaya Bhd v Koperasi Polis Diraja Malaysia Bhd* [2012] 2 MLJ 569. Section 75 of the Contracts Act 1950 provides: "**Compensation for breach of contract where penalty stipulated for**: When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for."
[79] Law of Property Act 1925, s 49(2). See para 14 above.

28. Finally, it is instructive to note an observation by Lord Millett NPJ in *Polyset Ltd v Panhandat Ltd*[80] in rebutting the dissent of Litton NPJ who had held that the parties should be held to their contractual bargain:

> The principle of party autonomy is, of course, a cornerstone of the law of contract. But the principle is not without limits, and it does not permit parties to contract in whatever terms they choose in all circumstances. It cannot be invoked to prevent a party from challenging a contractual term to which he has agreed which stipulates for the payment of a penalty (in the strict sense) in the event of breach. **Nor does it prevent a party from challenging a contractual term to which he has agreed which stipulates for the payment in advance of a forfeitable deposit so large that it cannot be objectively justified by reference to the functions which such a deposit properly serves**.

29. There is a telling parallel between this observation and the use of "manifest disadvantage" to raise a presumption, or at least evidence, of undue influence.[81] This raises the wider question whether the problem of excessive deposits (and liquidated damages as well) should be dealt with on the basis of *procedural* irregularity in the formation of the agreement instead of substantive unfairness in the terms of the agreement.[82] However, the doctrines of duress, undue influence and unconscionability are likely to be of little relevance in this context, because most of the time unreasonable deposits are simply the result of inequality of bargaining power. This type of issue is more appropriately the subject of legislative intervention.[83]

Question 3: Is equitable relief against forfeiture applicable?

30. There are a few key differences between the jurisdiction to relieve against penalty and the jurisdiction to relieve against forfeiture, although they have the same historical origin.[84] The relief against penalty jurisdiction has been reduced into rules of law (the penalty rule) and unconscionability has a reduced role. Relief against forfeiture does not depend on the forfeiture

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[80] (2002) 5 HKCFAR 234.
[81] *Royal Bank of Scotland plc v Etridge (No 2)* [2002] 2 AC 773.
[82] Hugh Beale, "Unreasonable Deposits" (1993) LQR 524 at 530; Lusina Ho, "Deposit: the Importance of Being (an) Earnest" (2003) 119 LQR 34 at 37.
[83] See para 43-48 below.
[84] See generally, Charles Harpum, "Equitable Relief: Penalties and Forfeitures" [1989] CLJ 370. *Cf Interstar Wholesale Finance Pty Ltd v Integral Home Loans* (2008) 257 ALR 292, [2008] NSWCA 310 at [104]. On the scope of the relief against forfeiture outside land cases, see Sarah Worthington, "What is left of equity's relief against forfeiture?" in Elise Bant and Matthew Harding (eds), *Exploring Private Law* (2010) 249 and M Bryan, "Equitable Relief from Forfeiture: Peformance or Restitution?", in CEF Rickett (ed), *Justifying Private Law* (2008) 363.

being a penalty; the fundamental principle upon which equity acts is that a party having a legal right shall not be permitted to exercise it in such a way that the exercise amounts to unconscionable conduct.[85] The relief against forfeiture jurisdiction has remained fluid and discretionary, and unconscionability remains a touchstone. The question whether a contractual clause amounts to a penalty is determined at the time of contracting, while the question whether relief against forfeiture would be granted involve considerations of all the facts of the case, including facts occurring after the formation of the contract. Relief against penalty is clearly not confined to the protection of proprietary interests, while relief against forfeiture in England and Singapore remains largely concerned with the protection of such interests.

31. Under the Supreme Court of Judicature Act,[86] the Singapore High Court has "[p]ower to grant all reliefs and remedies at law and in equity …". This necessarily includes the power to relieve against forfeiture. Notwithstanding the broad statutory language, Singapore courts have adopted a very guarded approach in the exercise of this jurisdiction. In *Pacific Rim Investments Pte Ltd v Lam Seng Tiong*,[87] the Singapore Court of Appeal noted the caution expressed by Lord Diplock in *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana*[88] that the jurisdiction was "never meant to apply generally to contracts not involving any transfer of proprietary or possessory rights". The Court also noted, following an observation in *Sport Internationaal Bussum BV v Inter-Footwear Ltd*,[89] that the equitable relief has not been granted to purely commercial contracts unconnected with any interests in land.

32. Such jurisdiction, where it exists, would only be exercised in highly exceptional circumstances because the courts would ordinarily hold the parties to their contractual bargain. To invoke the jurisdiction, "the circumstances of the case must reveal elements of unconscionability and injustice".[90] It should also be noted that the normal exercise of the jurisdiction to relieve against forfeiture involves giving more time to the contract breaker to perform the contract to avoid the forfeiture.[91] In the context of land transactions, the issue of relief against forfeiture of deposits often arises when the court has, in denying specific performance because of the

[85] *Pacific Rim Investments Pte Ltd v Lam Seng Tiong* [1995] 2 SLR(R) 643, [1995] SGCA 58 at [60]; *Legione v Hateley* (1983) 152 CLR 406 at 444.
[86] Section 18(2), Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed), First Schedule, para 14.
[87] [1995] 2 SLR(R) 643, [1995] SGCA 58 at [42].
[88] [1983] 2 AC 694 at 702.
[89] [1984] 1 WLR 776 at 788 (Oliver LJ delivering the judgment of the Court of Appeal), affirmed by HL, ibid.
[90] *Pacific Rim Investments Pte Ltd v Lam Seng Tiong* [1995] 2 SLR(R) 643, [1995] SGCA 58 at [60].
[91] *Pacific Rim Investments Pte Ltd v Lam Seng Tiong* [1995] 2 SLR(R) 643, [1995] SGCA 58 at [42]; *Stockloser v Johnson* [1954] 1 QB 476 (Romer LJ).

purchaser's breach, refused to grant relief against forfeiture of the prospective purchaser's beneficial interest (as purchaser) in the land.

33. *Pacific Rim Investments Pte Ltd v Lam Seng Tiong*[92] is direct authority that the relief against forfeiture jurisdiction may be exercised in respect of forfeiture of part payments and deposits in sale of land contracts, even though what is forfeited in such cases is in reality a restitutionary right. This is also the judicial position in Australia.[93] This is the statutory position in the United Kingdom,[94] where it is particularly important because of its strict approach in refusing to relieve against the forfeiture of the purchaser's interest in the land where a "time of the essence" stipulation has been breached.[95] This is not the case in Singapore,[96] but jurisdiction to relieve against forfeiture of the deposit adds a second layer of flexibility.

34. The more controversial question is whether the relief against forfeiture jurisdiction applies to cases which do not involve proprietary interests in land at all. *Stockloser v Johnson*[97] remains the leading case on this question, and it is as controversial today as it was when it was delivered 60 years ago. The purchaser of some machinery under a hire-purchase agreement failed to pay certain instalments resulting in the vendor terminating the contract and forfeiting the instalments paid and retaking possession of the machinery. The Court of Appeal was unanimous that the purchaser could not recover the instalments, but there was a difference in views as to the reasons. Denning LJ (with whom Somervell LJ agreed) held that the court had equitable jurisdiction to relieve against forfeiture of the instalments provided the sum forfeited was penal in the sense that it was out of proportion to the damage, and it would be unconscionable for the vendor to retain the money.[98] It appears that the unconscionability requirement can be satisfied by showing that the vendor has been unjustly enriched at the purchaser's expense.[99] Romer LJ, on the other hand, took a narrower view, and would require

[92] [1995] 2 SLR(R) 643, [1995] SGCA 58.
[93] *Legione v Hateley* (1983) 152 CLR 406; *Stern v McArthur* (1987-8) 165 CLR 489. For the law of Hong Kong SAR, see *Union Eagle Ltd v Golden Achievement Ltd* [1997] 1 AC 514 at 520 (PC, Hong Kong).
[94] Law of Property Act 1925, s 49(2).
[95] *Steedman v Drinkle* [1916] 1 AC 275 (PC Saskatchewan). This has been received in the law of Hong Kong SAR, see *Union Eagle Ltd v Golden Achievement Ltd* [1997] 1 AC 514 (PC, Hong Kong), but not Singapore or Australian law: *Pacific Rim Investments Pte Ltd v Lam Seng Tiong* [1995] 2 SLR(R) 643, [1995] SGCA 58 at [60].
[96] *Pacific Rim Investments Pte Ltd v Lam Seng Tiong* [1995] 2 SLR(R) 643, [1995] SGCA 58 at [60], following the Australian position.
[97] [1954] 1 QB 476 (CA).
[98] Ibid at 483-484 and 490.
[99] Ibid, at 492.

special circumstances such as fraud, sharp practice or other unconscionable conduct, and the only remedy was an extension of time to perform the contract.[100]

35. The status of *Stockloser v Johnson* has not been settled in English law. In the United Kingdom, pressure has been taken off the courts somewhat by statutory provision for a relief against forfeiture jurisdiction in respect of deposits in conveyancing contracts,[101] and broad consumer protection legislation.[102] Whether the majority or minority view in *Stockloser v Johnson* will prevail in Singapore is still a matter of conjecture. Cases in Singapore have generally been cautious about the expansion of this jurisdiction.[103] However, it appears that Australian[104] and Canadian[105] courts are willing to applying the relief against forfeiture jurisdiction to deposits in contracts not involving interests in land.

36. It was the uncertain scope of this jurisdiction and an unwillingness to extend its boundaries that led the Privy Council to avoid it and to seek a solution elsewhere in *Linggi Plantations Ltd v Jagatheesan*[106] and *Workers Trust & Merchant Bank Ltd v Dojap Investments Ltd*.[107] On the basis that equitable intervention is generally only justified if common law remedies are inadequate, then it may well be the development of the solution in common law will reduce recourse to this jurisdiction. But this jurisdiction plays a slightly different role from the common law technique. While the focus in the common law is the reasonableness of the deposit, unconscionable behaviour is the key to unlock this equitable jurisdiction.

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[100] Ibid, at 501.
[101] Law of Property Act 1925, s 49(2).
[102] Consumer Credit Act 1974; Unfair Terms in Consumer Contracts Regulations 1999.
[103] The question was left open in at *Tan Wee Fong v Denieru Tatsu F&B Holdings (S) Pte Ltd* [2010] 2 SLR 298, [2009] SGHC 290 at [71]; *Metro Alliance Holdings & Equities Corp v WestLB AG* [2008] 1 SLR(R) 139, [2007] SGHC 175, at [23]. The High Court in *Indian Overseas Bank v Cheng Lai Geok* [1991] 2 SLR(R) 574, [1991] SGHC 141 at [76] approved of Denning LJ's approach; but the issue was not discussed on appeal in [1993] 1 SLR(R) 32, [1993] SGCA 4. *Triangle Auto Pte Ltd v Zheng Zhi Construction Pte Ltd* [2000] 3 SLR(R) 594, [2000] SGHC 229 at [12]-[13] suggests that the relief against forfeiture jurisdiction is not confined to sale of land contracts. The High Court in *Li Chuen Li v Singapore Island Country Club* [1992] 2 SLR(R) 266, [1992] SGHC 165 at [45]-[51] held that the relief against forfeiture jurisdiction could be exercised in the case of the forfeiture of a club member's contractual rights on the basis that they were at least sufficiently analogous to property rights because of the substantial underlying assets (including immovable property) owned by the club. At the same time, the Court left open the possibility that the jurisdiction may be extended beyond the protection of proprietary and possessory rights (at [52]). Litton NPJ, dissenting in *Polyset Ltd v Panhandat Ltd* (2002) 5 HKCFAR 234 at [152] expressly endorsed Denning LJ's approach.
[104] *Fiorelli Properties Pty Ltd v Professional Fencemakers Pty Ltd* [2011] VSC 661 at [39]; *Hill v James* [2004] NSWSC 55, partially reversed in [2004] NSWCA 301 on the issue of exercise and not the existence of the jurisdiction.
[105] *Waichenberg v University of British Columbia* (22 June 2006, Ontario SCJ); *Hou v Bhattacharya* (2 December 2005, Ontario SCJ).
[106] [1972] 1 MLJ 89 (PC, Malaysia).
[107] [1993] 1 AC 573 (PC, Jamaica).

Question 4: Does a stipulation of "non-refundable" payment describe the essential feature of a deposit as generally not subject to a restitutionary claim, or does it purport to exclude such a claim completely?

37. The starting point must be that the meaning of a term of a contract is a question of the construction of the contract. Whether an upfront payment is intended to be a deposit or part payment must be determined as a question of construction of the contract. The words used are not conclusive. A payment may be construed as a deposit even if the word "deposit" is not used.[108] Conversely, "deposit" may be used in a non-technical sense denoting part-payment without the element of earnest.[109] If a part payment is described as "non-refundable", cases have generally treated it as equivalent to a deposit,[110] since they have the same effect for practical purposes.[111]

38. When a deposit is described as "non-refundable" in a contract, it can get a little more tricky. Does it merely describe the essential feature of the deposit that it is not to be returned if the party paying the deposit defaults on the contract,[112] or that it is not intended to be refunded in any circumstances? The answer must surely be found in the construction of the contract. *Primus Telecommunications Pty Ltd v CCP Australian Airships Ltd*[113] was an extraordinary case from the state of Victoria in Australia where the plaintiff had paid a "non-refundable deposit" of A$400,000 to the defendants for an exclusive licence to use the defendant's airship for advertising purposes. The plaintiff terminated the contract for the defendant's repudiatory breach and sought the return of the deposit either as damages or in restitution. The defence raised against both claims was that the deposit was "non-refundable". Giving short shrift to the defence, Habersberger J said:

> 152 The question is whether the addition of the word "non-refundable" changed a normal deposit into something else. In my opinion, the extra word simply makes it clear that on default by Primus it is not able to claim a refund of the deposit, even if CCP had suffered no loss. The contrary view would lead to the extraordinary result that, having received the $400,000 deposit, CCP could have walked away from

[108] *Lee Chee Wei v Tan Hor Peow Victor* [2007] 3 SLR(R) 537, [2007] SGCA 22 at [85]-[88].
[109] See, eg, *Trans-Cab Services Pte Ltd v Smart Automobile Pte Ltd* [2012] SGHC 110; *The Law Society of Singapore v Mak Kok Weng* [2008] SGDSC 9.
[110] *Lee Chee Wei v Tan Hor Peow Victor* [2007] 3 SLR(R) 537, [2007] SGCA 22; *Stockloser v Johnson* [1954] 1 QB 476 at 490; *Tan Wee Fong v Denieru Tatsu F&B Holdings (S) Pte Ltd* [2010] 2 SLR 298, [2009] SGHC 290 at [53].
[111] But see para 42 below.
[112] It is not uncommon in legal discourse to see "non-refundable" and "deposit" used conjunctively in a tautologous sense, usually for the avoidance of doubt. See, eg, *Lee Chee Wei v Tan Hor Peow Victor* [2006] SGHC 116 at [12].
[113] [2003] VSC 120.

> the contract, yet Primus could not complain about its loss of the $400,000 simply because it was described as non-refundable. …
>
> 153 In my opinion, the meaning of the words "non-refundable deposit" in clause 4.1 is clear, although perhaps slightly tautological. The $400,000 was non-refundable in the sense that Primus could not recover this sum if it changed its mind and decided not to proceed with the proposal to use the airship for advertising purposes. … It is another thing entirely, in my opinion, to construe a non-refundable deposit as something which could never be recovered by Primus, even as part of the quantification of its damages, but could be retained by CCP even if CCP were in flagrant breach of the Licence Agreement.

39. The defendant's appeal, "which can with considerable kindness be described as optimistic"[114] was unanimously dismissed by the Victorian Court of Appeal.[115] In other words, the earnest element is irrelevant when the party paying the deposit is the innocent party seeking recovery. The innocent party is effectively seeking the return of a part payment. Since it is a question of construction, however, it is possible for the contracting parties to spell out the intended consequence expressly. Indeed, contracting parties may go further, and use clear words in an attempt to exclude the application of the penalty rule, relief against forfeiture, and the recharacterisation rule in *Workers Trust & Merchant Bank Ltd v Dojap Investments Ltd*.[116]

Question 5: If the latter, is the exclusion effective?

40. The common law allows contracting parties to agree to virtually anything, provided there is no contravention of public policy or statutory rules. So a payment described as "non-refundable" in a contract has no legal effect if there is a statutory rule that says otherwise.[117] The equitable jurisdiction to relieve against penalty and to relieve against forfeiture are mandatory rules which are designed to override the parties' bargain. It is clear that parties cannot contractually exclude the equitable jurisdiction.[118]

41. The common law technique in *Workers Trust & Merchant Bank Ltd v Dojap Investments Ltd*[119] was somewhat euphemistically described as a technique of "construction" by two judges in *Polyset Ltd v Panhandat Ltd*.[120] If it were truly a technique of construction, then parties can surely contract out of the rule. But the technique clearly goes beyond ascribing meaning to the words in the contract. The Privy Council in *Workers Trust & Merchant Bank Ltd v Dojap*

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[114] [2004] VSCA 232 at [42] (Vincent JA).
[115] [2004] VSCA 232.
[116] [1993] 1 AC 573 (PC, Jamaica).
[117] *Chia Ah Sim v Ronny Chong and Co* [1993] 1 SLR(R) 321, [1993] SGHC 36.
[118] *Terry Donald Hill v David Anthony James* [2004] NSWSC 55 at [255]. Whether exclusion by the choice of a foreign law to govern the contract is effective raises issues which are beyond the scope of this paper.
[119] [1993] 1 AC 573 (PC, Jamaica).
[120] (2002) 5 HKCFAR 234 at [40] (Bokhary PJ), [43] (Chan PJ).

Investments Ltd effectively expunged the reference in the contract[121] that the "deposit shall be forfeited to the vendor". Similarly in *Polyset Ltd v Panhandat Ltd*, the words "the Vendor shall be entitled to … forfeit the said deposit in full absolutely …"[122] were practically expurgated.[123] Consequently, it is not likely that words like "non-refundable" will get in the way of this common law technique.

42. However, it is a different question whether the recharacterisation approach can be applied when the parties have made no pretence that a part payment is a deposit (ie, a security for performance), but expressly stipulated that a part payment (not amounting to a deposit) was to be forfeitable (or non-refundable). It may well stipulate that the payment is non-refundable even if there is no breach by the payer.[124] The recharacterisation approach knocks out the earnest element from the bargain, but what if it was not there in the first place? Cases have generally treated part payment with forfeiture (or non-refundable) clauses as equivalent to a deposit,[125] but the recharacterisation approach has not been applied in any case not manifesting the element of earnest. Lord Browne-Wilkinson in *Workers Trust & Merchant Bank Ltd v Dojap Investments Ltd* did not think forfeiture of uncontroverted part payment cases to be relevant to deposits.[126] Theoretically, a *double* recharacterisation approach is possible: a simple part payment with a forfeiture clause is recharacterised as an unreasonable deposit and then re-recharacterised as simple part payment without a forfeiture clause. But this pushes the common law technique very far and recourse to such mental acrobatics is often symptomatic that there is something wrong with the law. Ironically, the recipient may be better off forfeiting an express simple part payment than to stipulate a deposit. Thus, notwithstanding that the parties cannot contract out of judicial control, contractual exclusion of restitutionary claims[127] remains a live issue in some cases.

Question 6: If the exclusion is effective, does it reveal a statutory gap in the regulation of exclusion clauses?

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[121] [1993] 1 AC 573 at 577.
[122] *Polyset Ltd v Panhandat Ltd* (2002) 5 HKCFAR 234 at [54].
[123] This is the converse of the situation which Bingham LJ in *Antoniades v Villiers* [1990] 1 AC 417 at 444 described as: "A cat does not become a dog because the parties have agreed to call it a dog".
[124] See, eg, paras 38-39 above.
[125] *Lee Chee Wei v Tan Hor Peow Victor* [2007] 3 SLR(R) 537, [2007] SGCA 22; *Stockloser v Johnson* [1954] 1 QB 476 at 490; *Tan Wee Fong v Denieru Tatsu F&B Holdings (S) Pte Ltd* [2010] 2 SLR 298, [2009] SGHC 290 at [53].
[126] [1993] 1 AC 573 at 582, distinguishing *Stockloser v Johnson* [1954] 1 QB 476.
[127] See para 4 above.

43. It thus appears that there is scope for contractual terms to be effective to prevent the recovery of part payments. Insofar as it prevents contractual recovery,[128] the Unfair Contract Terms Act[129] is not triggered. There is no contractual claim because there is no implied term and thus no contractual obligation for the return of part payments; there is no exclusion of liability.

44. Insofar as the contract purports to exclude restitutionary claims, the Unfair Contract Terms Act needs closer examination. The Act states as its purpose (emphasis added):

> An Act to impose further limits on the extent to which **civil liability for** breach of contract, or for negligence or **other breach of duty**, can be avoided by means of contract terms and otherwise.

45. At first sight, "civil liability for … other breach of duty" appears to be broad enough to cover a duty arising under the law of unjust enrichment. The language used refers to the exclusion of secondary obligations arising from violations of primary obligations. There is some controversy whether the restitutionary action for money had and received enforces a primary or a secondary obligation to pay a sum of money.[130] It has been noted that the famous legal philosopher John Austin could not decide which one it was.[131] This theoretical debate need not be resolved in this context because it is clear from the structure of the Act that it also protects against the exclusion of the performance of primary duties.[132]

46. However, when the text of the Act is examined closely, the only duties mentioned are duties arising in contract and tort. It does not deal with restitutionary liability at all. Was this a gap or was it intentional? The Unfair Contract Terms Act was based on the equivalent UK legislation of 1977. The principle against unjust enrichment was recognised as an independent source of obligations in English law by the House of Lords only in 1991,[133] and in Singapore law by the Court of Appeal in 1994.[134] Similar problems have been encountered elsewhere. The Subordinate Courts Act[135] was recently amended to add restitutionary claims to its

[128] See text to footnote 4 above.
[129] Cap 396, 1994 Rev Ed.
[130] Dennis Klimchuk, "The Structure and Content of the Right to Restitution for Unjust Enrichment" (2007) 57 U of Toronto LJ 661
[131] Ibid, at 662.
[132] Section 3(2)(b), Unfair Contract Terms Act (Cap 396, 1994 Rev Ed).
[133] *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548.
[134] *Seagate Technology Pte Ltd v Goh Han Kim* [1994] 3 SLR(R) 836, [1994] SGCA 128.
[135] Cap 321, 2007 Rev Ed.

jurisdiction.[136] The failure of the Limitation Act to address restitutionary claims explicitly has been the source of some anxiety.[137]

47. In principle, it is difficult to see why the Unfair Contract Terms Act should regulate the exclusion of contractual and tortious but not restitutionary liability. It may be argued that Parliament intended contracting parties to have full faculty to exclude restitutionary liability. Support may be found in the Frustrated Contracts Act,[138] where parties can freely exclude[139] the restitutionary[140] consequences of a frustrated contract. However, this statute was based on the Law Reform (Frustrated Contracts) Act 1943 (UK), also predating the common law recognition of the law of unjust enrichment.

48. The problem has not been felt in the UK because exclusion of restitutionary liability is covered under the Unfair Terms in Consumer Contract Regulations 1999 which gives effect to a European Council Directive to harmonise the protection of consumers in the European Union member states. In Singapore, hire purchase agreements are separately regulated,[141] and the Consumer Protection (Fair Trading) Act[142] may capture the exclusion of restitutionary liability in the categories of contracts which fall within the statute. However, there is arguably a gap in the Unfair Contract Terms Act.

49. While there is no doubt that forfeiture of a part payment without an element of earnest[143] is an exclusion of restitutionary liability,[144] it is less clear whether a stipulation of a deposit by itself amounts to an exclusion of restitutionary liability. On one hand, it is arguable that because the earnest element is a condition of the payment[145] or alternatively that the payer has voluntarily assumed the risk of his own failure to perform the contract, no restitutionary claim arises in the first place, so there is no liability to exclude. On the other hand, the bar to restitutionary

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[136] Subordinate Courts (Amendment) Act (No 31 of 2010). See also *The Redwood Tree Pte Ltd v CPL Trading Pte Ltd* [2009] SGDC 204.

[137] *OMG Holdings Pte Ltd v Pos Ad Sdn Bhd* [2012] 4 SLR 231 at [41]-[45]; *eSys Technologies Pte Ltd v nTan Corporate Advisory Pte Ltd* [2013] SGCA 27 at [41]. See also *Report of the Law Reform Committee on the Review of the Limitation Act* (Cap 163) (February 2007). See further, (2002) 3 SAL Ann Rev 345 at 358–360, paras 19.42–19.47; (2004) 5 SAL Ann Rev 436 at 442–444, paras 19.20–19.26.

[138] Cap 115, 1985 Rev Ed.

[139] Ibid, section 3(3).

[140] Even if the consequences are classified as "contractual" liability, any exclusion would appear to oust the operation of the Unfair Contract Terms Act by virtue of section 29(1)(a).

[141] Hire Purchase Act (Cap 125, 1999 Rev Ed).

[142] Consumer Protection (Fair Trading) Act (Cap 52A, 2009 Rev Ed).

[143] This includes the case of an innocent party recovering a deposit paid to the contract breaker.

[144] Assuming that a ground for restitutionary recovery can be made out.

[145] This reasoning is supported in the non-recovery of a non-contractual deposit: *Sharma v Simposh Ltd* [2011] EWCA Civ 1383, [2013] Ch 23.

recovery of a deposit[146] is the element of earnest which is imposed by the contract[147] in the absence of which it is part payment that may be recovered in a restitutionary action,[148] so it is for all practical purposes an exclusion of liability. It is not possible to answer this question in the abstract as there is no statutory language to interpret at this moment, and as a matter of policy there is no easy answer. However, it is arguable that if the objective of the clause serves only the purpose of defeating an otherwise available restitutionary claim, it should come within the suggested protective policy. Statutory reform makes better sense if the common law recharacterisation technique is rejected.[149] The exclusion would be tested against familiar norms of reasonableness within the Act for protected contractual relationships.[150] For other contracts, perhaps equitable relief against forfeiture should be the only other avenue, and rightly rarely ever available. Any such statutory reform will have wider implications beyond deposits and part payments, and it should naturally be taken only after serious consideration.

Summary and Conclusion

50. While it is clear that liquidated damages clauses in contracts are subject to the penalty rule, the law regulating deposits is quite distinct and cannot be very clearly stated. At least where a deposit is regarded as reasonable, two consequences follow: (1) It is earnest for performance and the defaulting party has no claim to recovery under the law of contract or the law of restitution. (2) Equity will not intervene, either in its jurisdiction to relieve penalty or to relieve against forfeiture.

51. The law becomes murkier if the deposit is argued to be excessive. Three judicial techniques have been considered: (1) penalty rule; (2) common law recharacterisation; and (3) relief against forfeiture.

52. The balance of authorities is against the application of the penalty rule, but the main reason is the historical reception of civil law relating to earnest given as security for the performance of a contract. It is difficult to distinguish in substance between payments made at the time of contracting intended to encourage performance and post-contractual liability intended to

[146] See para 4 above.
[147] *Howe v Smith* (1884) 27 Ch D 89 at 101.
[148] See cases at footnote 5 above.
[149] There is some parallel with the common law doctrine of fundamental breach as a "rule of law" where liability cannot be excluded, which has been doubted to be part of Singapore law: *Sun Technosystems Pte Ltd v Federal Express Services (M) Sdn Bhd* [2007] 1 SLR(R) 411, [2006] SGCA 40 at [19].
[150] One could venture further to suggest that in parity to deposits, liquidated damages clauses should generally be enforceable unless unreasonable by the same standards, but this will bring the subject of regulation beyond exclusion of liability, but perhaps closer to its name: unfair contract terms.

penalise non-performance. On the other hand, the penalty rule has been criticised as economically inefficient and a derogation from party autonomy, though it is recognised to be an important counterpoint to imbalance of bargaining power.

53. The common law technique recharacterises an unreasonable deposit as part payment, and leaves the recovery to the law of restitution. It has not been applied in Singapore but it is not necessarily inconsistent with the existing law. This approach has the attraction of conceptual simplicity, and in a sense approximates the good faith limitation to the earnest in the civil law, but there are practical difficulties in applying the reasonableness test. The defaulting party needs to rely on the law of unjust enrichment, but he is no worse position than someone who has made a simple part payment. A more serious objection is that in substance the court is exercising extraordinary power to rewrite the contract.

54. The scope of the equitable relief against forfeiture jurisdiction beyond the protection of proprietary interests in land is unclear. The Singapore courts have been very cautious in marking the boundaries of this jurisdiction. It is clearly applicable to deposits in sale of land contracts, but it has not been applied in any case to allow the recovery of deposits or part payment outside the context of sale of land.

55. Because the penalty jurisdiction is unlikely to be invoked for historical reasons and the relief against forfeiture jurisdiction is unlikely to be invoked for reasons of non-interference with contractual rights generally, the common law technique is the most likely path that litigants will take in the future. The common feature of the three techniques is that they modify the contractual agreement. This raises the question of the extent to which parties are allowed to restrict recovery of deposits and part payments.

56. What liabilities contracting parties purport to exclude is a question of construction. Contracting parties are free to stipulate forfeiture of deposits and part payments, and while contractual terms cannot oust judicial control, they can be effective in excluding or negating restitutionary liability for the recovery of part payments and reasonable deposits. Exclusion of restitutionary liability is not caught by the Unfair Contract Terms Act, probably for historical reasons because of the belated recognition of the law of unjust enrichment in the common law. In principle, exclusion of restitutionary liability should be regulated on the same basis as for contractual and tortious liability. Bringing restitutionary recovery of deposits and part payments within the Unfair Contract Terms Act would give the courts a more familiar tool to deal with the problem of inequality of bargaining power.

57. The law relating to the recovery of deposits and part payments sits at an uncomfortable intersection of contract, restitution and equity. If we look beyond the historical baggage of the subject, there are two competing conceptions. One is that it is essentially a contractual problem to do with recovery of damages, and consequently deposits should be subject to the same rules as liquidated damages clauses. The other is that it is a restitution problem, specifically one of the exclusion of restitutionary liability, in which case there is perhaps also a missing intersection with statute to which we should look for at least part of the solution. Unfortunately, the two possible conceptually clear solutions are in danger of being obscured and marginalised by common law recharacterisation.

Yeo Tiong Min, SC (honoris causa)
Yong Pung How Professor of Law
School of Law, Singapore Management University

tmyeo@smu.edu.sg