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Contract law [2015]

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12. CONTRACT LAW

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Formation of contract

Offer and acceptance

12.1 The coincidence of offer and acceptance is a basic but necessary requirement of every valid contract. Whether this requirement is satisfied is largely dependent on the precise facts of the case concerned. Due to the fact-centric nature of the enquiry, it is difficult to draw general propositions from the cases, but the High Court's approach in *Lim Beng Cheng v Lim Ngee Sing* [2016] 1 SLR 524 ("*Lim Beng Cheng*") provides some guidance in this regard.

12.2 The principal question in that case was whether the parties entered into an agreement in October 2010, under which the defendant promised to transfer a 46.5% stake in a property to the plaintiff. The defendant contended that the alleged contract was merely a proposal that he never accepted. Judith Prakash J rejected this contention, finding it clear that a binding agreement was indeed formed. Importantly, her Honour found that the language used in the document suggested that it was meant to be binding between the parties. In particular, the document had used words such as "the *agreed* settlement", "in view of this *agreement*" and "it is *agreed*". The learned judge's focus on the contractual language is in line with the Court of Appeal's approach in *Woo Kah Wai v Chew Ai Hua Sandra* [2014] 4 SLR 166 (noted in Alvin W-L See, "Contract for the Grant of a Compliant Option to Purchase" [2015] Sing JLS 241 and discussed in (2014) 15 SAL Ann Rev 217 at 217–218, paras 12.2–12.5), where the court also

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emphasised the parties' express references to the words "offer" and "acceptance" as being crucial towards its finding of a binding contract.

12.3 Prakash J in *Lim Beng Cheng* also considered it important that the parties signed the document after spending an hour preparing it. In her Honour's view, if the document was a mere proposal, the parties would not have signed it, much less spent a considerable amount of time preparing it. Furthermore, Prakash J also rejected the defendant's contention that he would not have agreed to the terms, which were "onerous and commercially insensible" (*Lim Beng Cheng* at [50]). On the facts, her Honour struggled to find any commercial insensibility of the kind that would cast doubt on the genuineness of the defendant's consent. Finally, Prakash J also dismissed as an afterthought the defendant's argument that the parties' subsequent conduct showed that the document signed in October 2010 was meant to be a proposal. Indeed, the defendant did not deny his obligation to transfer the promised share of the property concerned to the plaintiff until 2013.

12.4 More broadly, Prakash J's approach in *Lim Beng Cheng* is entirely consistent with, and an apt reminder of, the objectivity principle that underlies the ascertainment of offer and acceptance (see generally, *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) at paras 03.006–03.014). Indeed, as Blackburn J said in the classical case of *Smith v Hughes* (1871) LR 6 QB 597 at 607, regardless of a man's real intention, he would be bound if his conduct reasonably leads another party to enter into a contract with him. This also accords with the Court of Appeal's adoption of the promisee-objectivity approach in *Tribune Investment Trust Inc v Soosan Trading Co Ltd* [2000] 2 SLR(R) 407 ("*Tribune Investment*"), where the court said (at 422–423) that "the language used by one party, whatever his real intention may be, is to be construed in the sense in which it would be reasonably understood by the other". These general principles were undeniably applied in *Lim Beng Cheng*, in which Prakash J adopted a decidedly objective approach towards the language used in the document, as well as the parties' conduct before and after the conclusion of the agreement.

12.5 As a legal matter, Prakash J's treatment of the defendant's argument, that the parties' subsequent conduct showed that the original document remained a proposal, requires some clarification. Although her Honour rightly found on the facts that the defendant's argument was a mere afterthought, the issue could have been dealt with on the legal principle that the parties' subsequent conduct cannot alter the existence of the contract between them (see, *eg*, *Perry v Suffields Ltd* [1916] 2 Ch 187). The "exception" to this principle is if the parties' subsequent conduct shows an agreement to rescind the original contract. However, the defendant's argument in *Lim Beng Cheng* was not on such a basis,

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and had seemingly proceeded on the legally impermissible approach that the parties' subsequent conduct had somehow altered the objectively ascertained nature of *the* original agreement.

12.6 A more specific aspect of offer and acceptance was discussed in the Court of Appeal decision of *Ong & Ong Pte Ltd v Fairview Developments Pte Ltd* [2015] 2 SLR 470 ("*Ong & Ong*"). The primary issue in that case was whether general contractual principles applied generally to the offer to settle ("OTS") regime under O 22A of the Rules of Court (Cap 322, R 5, 2006 Rev Ed). The court held that they did not, contrary to the High Court's analysis in *Chia Kim Huay v Saw Shu Mawa Min Min* [2012] 4 SLR 1096 (discussed in (2012) 13 SAL Ann Rev 195 at 197–198, paras 12.8–12.15). However, the court also emphasised that this did not mean that contractual principles have no place at all under the OTS regime: *Ong & Ong* at [53].

12.7 Apart from that issue of civil procedure, the court also had occasion to consider whether a fundamental change in circumstances, occurring between the time an offer was made and before it was accepted, could cause the offer to lapse. This issue had previously been considered by the High Court in *Norwest Holdings Pte Ltd v Newport Mining Ltd* [2010] 3 SLR 956 ("*Norwest Holdings*") (see (2010) 11 SAL Ann Rev 239 at 241, para 11.7). As was discussed in (2011) 12 SAL Ann Rev 182 at 187, para 11.15, Belinda Ang Saw Ean J considered that the contemporary juridical basis for an offer lapsing due to changed circumstances was premised on the explanation in either *Financings Ltd v Stimson* [1962] 1 WLR 1184 ("*Financings Ltd*") (which had implied a condition into the offer that the subject matter of the offer must remain in substantially the same condition as it was at the time of the offer, failing which the offer lapses), or *Dysart Timbers Ltd v Roderick William Nielsen* [2009] 3 NZLR 160 ("*Dysart Timbers*") (which had required the change in circumstances to be fundamental before the associated offer could be said to have lapsed). In the end, however, her Honour dismissed the explanations employed in *Financings Ltd* and *Dysart Timbers* as unconvincing due to the artificiality of implying a term to unanticipated changes in circumstances. Instead, her Honour thought that the doctrine of offer and acceptance and common mistake were adequate to explain the consequences of changed circumstances which occur after an offer was made and before the offer was accepted. Although the decision generated some degree of academic interest (see, *eg*, Christopher Hare, "Changed Circumstances and Lapsing Offers" [2010] LMCLQ 379 and David McLauchlan & Rick Bigwood, "Lapse of Offers Due to Changed Circumstances: A Contract Conversation" (2011) 27 JCL 222), the Court of Appeal declined to comment on the correctness of Ang J's views when the case went on appeal before it (see [2011] 4 SLR 617).

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12.8 In *Ong & Ong*, the Court of Appeal had to consider the appellant's argument that a fundamental change in circumstances in that case freed it from being bound to the OTS. In the course of doing so, the court appeared to accept the explanation provided in *Dysart Timbers* in relation to the lapse of an offer caused by a fundamental change in circumstances. In particular, the court alluded to the views expressed in *The Law of Contract in Singapore* ((Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) at paras 03.096–03.098) that, contrary to the view expressed in *Norwest Holdings*, the doctrines of offer and acceptance, and common mistake, cannot properly explain why an offer would lapse in a fundamental change in circumstances. The court then said (at [73]) that "there seem[ed] to be room for the application of the doctrine of fundamental change in circumstances *per Dysart Timbers*". While it is not entirely clear whether the court accepted the explanation provided in *Dysart Timbers*, the better view is that it has, given that it proceeded to examine whether there was any fundamental change in circumstances on the facts of *Ong & Ong* itself.

Consideration

12.9 The issue of whether the forbearance of an invalid claim furnished sufficient consideration arose in *Lim Beng Cheng* (above, para 12.1). The defendant argued that the only consideration provided by the plaintiff, in support of the agreement between them, was the withdrawal of a caveat over another property, which the plaintiff was supposedly bound to do in any case. While Judith Prakash J found that the plaintiff had provided good consideration elsewhere, her Honour considered that the plaintiff's forbearance to sue on a doubtful or even "clearly invalid" claim is good consideration, if there are reasonable grounds for the promisor's claim and if the promiser honestly believes he has a fair chance of success (*Lim Beng Cheng* at [58], citing *Abdul Jalil bin Ahmad bin Talib v A Formation Construction Pte Ltd* [2006] 4 SLR(R) 778 ("*Abdul Jalil*") at [42]). The learned judge considered that this principle applied to the plaintiff's promise to withdraw the caveat. On the facts, the plaintiff was actually not entitled to lodge the caveat since it claimed an interest as purchaser in respect of a contract for sale dated April 2008, and the plaintiff only obtained an interest in November 2008. The plaintiff did not lodge a caveat after November 2008 because the April 2008 caveat had not been discharged, and he believed in good faith in October 2010 that he was entitled to maintain the caveat. Thus, the plaintiff's promise to withdraw the caveat constituted good consideration. In any event, Prakash J also noted that, had the plaintiff not removed the caveat, the defendant would have been put to expense and delay in obtaining an order to effect its removal. This likewise conferred a benefit on the defendant and hence could be construed as good consideration.

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12.10 Strictly speaking, the facts of *Lim Beng Cheng* did not involve a forbearance to sue, since the plaintiff made no promise not to sue. Instead, it involved a promise not to *maintain* a claim. Understood in this manner, there is in principle no objection to Prakash J's application of the principle in *Abdul Jalil* to the facts in *Lim Beng Cheng*. Undergirding both an action to sue and the maintenance of a claim is the existence of a right over the defendant that the plaintiff thought, rightly or wrongly, that it has. If the plaintiff forgoes this right, then that would result in a practical benefit to the defendant even if the right were invalid to begin with. There would be such a practical benefit because, as Prakash J explained in *Lim Beng Cheng*, the defendant in such cases is likely spared the expenses and time involved in contesting the plaintiff's alleged right over it. More broadly, Prakash J's invocation of this principle accords with how courts both in Singapore and abroad find consideration most readily in commercial matters (see, *eg*, *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2004] 2 SLR(R) 594 at [139] and *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric* [2007] 1 SLR(R) 853 at [29]).

Certainty and completeness

12.11 It is trite law that a contract must be certain and complete before it can be enforceable. Another way of putting this principle across is that, before there can be a concluded contract, its terms must be certain and the agreement must similarly be complete. A term that is "uncertain" exists but is otherwise incomprehensible. In contrast, an agreement that is "incomplete" has certain terms that do not (but should) exist and the non-existence of these terms make the agreement incomprehensible. A contract may be unenforceable for uncertainty or incompleteness even though there has otherwise been both offer and acceptance between the parties.

12.12 In *Lim Beng Cheng* (above, para 12.1), the defendant contended (at [93]) that the agreement in question was uncertain because of the "various factual distortions on [its] face". It is unclear what this meant, although Judith Prakash J rightly held that this was a non-starter since what must be certain in a contract are its terms and not recitals of facts. Moreover, her Honour said (*Lim Beng Cheng* at [93]) that the uncertainty of the secondary obligations cannot render a contract unenforceable. Prakash J's reference to a "secondary obligation" must not be taken to refer to the sense that term is used in distinction to a "primary obligation". This is because the principle is that it is uncertainty in *essential* terms that renders the contract unenforceable, and there is every possibility that a secondary obligation, which arises on the part of the party in breach of a primary obligation to pay the other party a sum of money, can constitute an essential term. Thus, it is likely that

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Prakash J's reference to "secondary obligations" was intended to refer to "non-essential obligations", as contrasted with "essential" or "primary" obligations, which, if uncertain, would render the contract unenforceable.

12.13 The principle that uncertain essential terms would render the contract unenforceable was also applied in the High Court decision of *Harwindar Singh s/o Geja Singh v Wong Lok Yung Michael* [2015] 4 SLR 69. In that case, the plaintiff claimed that he agreed to join the first defendant on a business venture in the Middle East on a low salary and commission on the latter's oral promises that: (a) if any of the companies to be incorporated in the Middle East were sold, he would be paid a lump sum to make up for the loss in salary he would suffer; and (b) if any of those companies were listed, he would be paid a lump sum as would all senior management of the companies; and (c) be appointed to a senior management position and given a significant salary increase. The first defendant moved to strike out the plaintiff's claim on, among others, the ground that the alleged promises were insufficiently certain to form a contract.

12.14 Chua Lee Ming JC held that the alleged promises were too uncertain to constitute a binding contract between the parties. His Honour agreed with the first defendant that it was unclear: (a) what the "loss in salary" should be or how it was to be calculated; (b) what the "lump sum" to be paid should be or who in "senior management" that sum should be pegged to; and (c) what "senior management position" the plaintiff was supposed to be appointed to. Above all, there was also no mechanism to decide any of these matters. This remained the case even though the plaintiff had provided a range of salaries which his "loss in salary" would fall within; there was simply no way for the court to ascertain what the parties had agreed to within that range.

12.15 The issue of the certainty of contractual terms also surfaced in the High Court decision of *Likpin International Ltd v Swiber Holdings Ltd* [2015] 5 SLR 962 ("*Likpin International*"). The case concerned the alleged breach of an oral charterparty. Steven Chong J held that the alleged oral charterparty was unenforceable because the supposedly agreed rate of hire was said to be "approximately US$130,000" per day. As his Honour rightly noted (*Likpin International* at [44]), should the law recognise a contract with such a term, "there would be endless, insoluble, disputes as to what the agreed rate of hire is". The inability of the courts to ascertain just what the parties had agreed where there is insufficient certainty is indeed the underlying rationale behind the principle that contracts containing uncertain essential terms are unenforceable.

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Existence of an oral agreement

12.16 The High Court decision of *ARS v ART* [2015] SGHC 78 ("*ARS*") provides a helpful summary of the principles used to ascertain the existence of an oral agreement. The starting point, as laid down by the Court of Appeal in *Tribune Investment* (above, para 12.4), is that where no formal written agreement was entered into or signed by the parties, the existence of any contract "must thus be culled from the written correspondence and contemporaneous conduct of the parties at the material time": *Tribune Investment* at [39].

12.17 After a careful analysis of the relevant cases, Quentin Loh J set out (*ARS* at [53]) the following guiding principles on the proper approach for determining the existence of an oral agreement:

> (a) in ascertaining the existence of an oral agreement, the court will consider the relevant documentary evidence (such as written correspondence) and contemporaneous conduct of the parties at the material time;
>
> (b) where possible, the court should look first at the relevant documentary evidence;
>
> (c) the availability of relevant documentary evidence reduces the need to rely solely on the credibility of witnesses in order to ascertain if an oral agreement exists;
>
> (d) oral testimony may be less reliable as it is based on the witness's recollection and it may be affected by subsequent events (such as the dispute between the parties);
>
> (e) credible oral testimony may clarify the existing documentary evidence;
>
> (f) where the witness is not legally trained, the court should not place undue emphasis on the choice of words; and
>
> (g) if there is little or no documentary evidence, the court will nevertheless examine the precise factual matrix to ascertain if there is an oral agreement concluded between the parties.

12.18 These principles, premised as they are on an objective approach, will undoubtedly be useful pointers in the situation where the existence of an oral contract needs to be ascertained.

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Terms of the contract

Interpretation of terms

General principles

12.19 The law on the interpretation of contractual terms in Singapore is largely settled. The Court of Appeal decisions of *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 ("*Sembcorp Marine*") and *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 ("*Zurich Insurance*") – described by the same court in *Y.E.S. F&B Group Pte Ltd v Soup Restaurant Singapore Pte Ltd* [2015] 5 SLR 1187 ("*Y.E.S.*") (at [41]) as the "lodestars" in the Singapore law on contractual interpretation – now provide for the relevant principles of contractual interpretation here. Together, *Sembcorp Marine* and *Zurich Insurance* established a two-step framework for the interpretation of contracts. First, the extrinsic evidence that is admissible must be ascertained and secondly, the contract is then interpreted contextually with the admitted extrinsic evidence in mind.

12.20 While the general approach is not in doubt, two decisions in 2015 provided valuable guidance on the understanding of the relevant principles. In so far as *general* principles are concerned, Vinodh Coomaraswamy J in *HSBC Trustee (Singapore) Ltd v Lucky Realty Co Pte Ltd* [2015] 3 SLR 885 ("*HSBC Trustee*") (overturned on appeal in *Lucky Realty Co Pte Ltd v HSBC Trustee (Singapore) Ltd* [2016] 1 SLR 1069, but not on the law) undertook a comprehensive restatement of those principles after a detailed study of the authorities. Although his Honour's restatement does not change the law – and there is no reason to given the certainty already provided for by *Sembcorp Marine* and *Zurich Insurance* – it does provide another way with which to understand the relevant principles.

12.21 Most broadly, Coomaraswamy J extracted four important points from *Zurich Insurance*, namely:

(a) First, the goal of construing a contract was to determine and give effect to the intention of the parties, objectively ascertained. As such, the parties' subjective intentions were ordinarily immaterial to construing their contract.

(b) Secondly, the purpose of construing a contract was to give the contract a meaning that fairly represented the parties' objective ascertained intention. It was certainly not to achieve a result that was just and fair in all the circumstances of the case.

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(c) Thirdly, the construction exercise had to ascribe to the words and phrases chosen by the parties in their contract *some* legitimate meaning. It was thus wrong to give those words a meaning beyond the contours of their penumbral meaning, or no meaning at all.

(d) Fourthly, the contextual approach obliged the court to have regard to the evidence extrinsic to the words used by the parties. However, the evidence must satisfy the *Zurich Insurance* criteria.

12.22 In turn, the learned judge opined that *Sembcorp Marine* supplemented *Zurich Insurance* in three ways, namely:

(a) First, *Sembcorp Marine* distinguished between "interpretation" and "construction" of a contract.

(b) Secondly, *Sembcorp Marine* emphasised the distinction between the substantive law of contract and the adjectival law of evidence.

(c) Thirdly, *Sembcorp Marine* identified legal and pragmatic factors that militated against taking an overly robust approach to the use of extrinsic evidence as an aid to construction. These constraints justified the criteria imposed by *Zurich Insurance*, and also their cautious application.

12.23 It is difficult to disagree with much of Coomaraswamy J's restatement of the applicable law. Indeed, much of the learned judge's restatement had been similarly covered in academic writings which attempted to explain the effect that *Sembcorp Marine* had on *Zurich Insurance*, as well as the state of the law after these two pivotal cases (see, *eg*, Goh Yihan, "The New Contractual Interpretation in Singapore: From *Zurich Insurance* to *Sembcorp Marine*" [2013] Sing JLS 301). A minor point might be made of the learned judge's use of the word "construction" in the course of his judgment, even when referring to situations clearly involving "interpretation", in accordance with the definition made in *Sembcorp Marine* that "construction" refers to a composite process encompassing interpretation, *as well as* implication and rectification. Indeed, this was a point the learned judge himself recognised in *HSBC Trustee* (at [38]). As such, and with respect, it might have been clearer if the word "interpretation" had been used when what was being referred to was really the process of giving meaning to express words. Notwithstanding this very minor point, however, the learned judge's restatement of the relevant principles is very much welcome, and now provides a focal point from which future analysis may be undertaken.

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12.24 Coomaraswamy J's second point in *HSBC Trustee* about *Zurich Insurance*, that it is not the purpose of contractual interpretation to achieve a result that was just and fair in all the circumstances of the case, was further explained by the Court of Appeal in *Y.E.S.* (above, para 12.19). The court considered that the context can never be used by a court to *rewrite* the terms of the contract according to the court's subjective view of what it thinks is the correct result in a particular case. Thus, while it might be commercially sensible to avoid an absurd result, the court has no choice but to give effect to such a result "if the objective evidence clearly bears out a ***causative connection*** between the absurd result or consequences on the one hand and the intention of the parties at the time they entered into the contract on the other" [emphasis in original]: *Y.E.S.* at [32]. Put another way, the court must ascertain the parties' intention at the time they entered into the contract based on all the relevant objective evidence, give effect to that, and do no more.

12.25 More broadly, the Court of Appeal also emphasised the interaction between both text and context in every case, even as the text ought always to be the first port of call for the court. Thus, what might at first glance appear to be plain and unambiguous text may not in fact be so, once the court has examined the relevant context. Indeed, where the text is ambiguous, the relevant context will become of signal importance to the court in ascertaining the parties' objective intention in the circumstances. In the end, as the Court of Appeal put it aptly, there is "no magic formula or legal silver bullet" and that "[c]ontractual interpretation is (often at least) hard work, centring on a meticulous and nuanced (yet practically-oriented) analysis of the relevant text and context": *Y.E.S.* at [35].

12.26 The Court of Appeal's guidance on the need to give effect to an absurd result as revealed by the objective evidence of the parties' intention is very much welcome. It leads to three points of practical application:

> (a) First, if, after a careful examination of the admissible evidence, the court comes to the conclusion that the parties did intend an absurd result, then the court has to give effect to it. This was a point emphasised not only at length by the Court of Appeal in *Y.E.S.*, but also referred to by Coomaraswamy J in *HSBC Trustee*. This is also consistent with the UK Supreme Court's approach in *Arnold v Britton* [2015] 2 WLR 1593 ("*Arnold*"), in which Lord Neuberger PSC (with whom Lord Sumption and Lord Hughes JJSC agreed) said (at [19]) that "while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural

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meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed".

(b) Secondly, if, however, after a careful examination of the admissible evidence, the court is presented with two equally possible interpretations, then it should prefer the one that is more commercially sensible. This is the approach advocated by the Court of Appeal in *Y.E.S.*, as well as the earlier decision of *Master Marine AS v Labory Offshore Ltd* [2012] 3 SLR 125. It also accords with the approach adopted by the UK Supreme Court in *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900, in which Lord Clarke JSC stated (at [30]) that "where a term of a contract is open to more than one interpretation, it [is] generally appropriate to adopt the interpretation which is most consistent with business common sense". It must be stressed, however, that this presumption in favour of a commercially sensible interpretation would be displaced by evidence that the parties in fact intended an interpretation that is *not* commercially sensible, or even absurd.

(c) Thirdly, and more broadly, the starting point of interpretation is the *text* of the contract. Thus, as Coomaraswamy J suggested in *HSBC Trustee*, the courts cannot stray too far from the penumbral meaning of the words used by the parties. However, as the Court of Appeal explained (at [47]) in *Y.E.S.*, this does not mean that, where the parties have used unambiguous language, the court must apply those words without utilising the relevant context to assist in the process of contractual interpretation. This is entirely in line with the Court of Appeal's sentiment that the text and context interact with one another in the interpretative exercise. It also gives effect to an often-missed point that the determination of words as "unambiguous" is itself an interpretative exercise, that takes place against the relevant context, be it the internal context of the document, or the relevant background information, however broad. This was so demonstrated by the Court of Appeal's analysis of *Arnold* in *Y.E.S.*: the majority in *Arnold* applied the plain meaning of the clear and unambiguous words only because it was consistent with its contextual meaning.

12.27 These general principles underlie the two-step framework that informs contractual interpretation in Singapore. In some ways, they are mandated by provisions of the Evidence Act (Cap 97, 1997 Rev Ed) ("EA"), which governs the admissible evidence, and to which we now turn.

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Admissible evidence

Types of extrinsic evidence

12.28 In *HSBC Trustee*, Coomaraswamy J provided a helpful overview of how the EA affected what his Honour categorised as the four broad types of extrinsic evidence:

> (a) First, evidence of the circumstances surrounding the contract can be admitted without restriction, by virtue of proviso (*f*) to s 94 of the EA. According to the learned judge, the "legal and practical constraints to receiving this type of extrinsic evidence as an aid to construction were significantly lower than for the other three types of extrinsic evidence" and the law of evidence "admits evidence of this type without restriction": *HSBC Trustee* at [44] and [45].
>
> (b) Secondly, evidence of the parties' subjective intentions can only be admitted as an aid to construction, but only if there is an ambiguity in the contract, and even then, only if the ambiguity is latent: *HSBC Trustee* at [48]. This is given effect to by ss 94–100 of the EA.
>
> (c) Thirdly and fourthly, prior negotiations and subsequent conduct can respectively be admitted if, "like all extrinsic evidence … [they] satisfy the three *Zurich* [*Insurance*] criteria": *HSBC Trustee* at [50].

12.29 While Coomaraswamy J's identification of the four broad categories of extrinsic evidence lends some clarity towards understanding the cases, it might be asked whether there is a need to distinguish the different types of extrinsic evidence in this manner. First of all, as has been argued for in academic literature (see, *eg*, Goh Yihan, "The Case for Departing From the Exclusionary Rule Against Prior Negotiations in the Interpretation of Contracts in Singapore" (2013) 25 SAcLJ 182), the EA does not itself distinguish between the extrinsic evidence in the manner adopted by the learned judge. If the law of evidence governs the type of evidence that can be considered by the courts in the interpretative exercise, then how the EA classifies extrinsic evidence should be determinative of how they should be legally distinguished. In the EA, there is no separate treatment accorded to "prior negotiations" and "subsequent conduct". The only distinction drawn by ss 93–100 of the EA is that between the parties' subjective intention and other extrinsic evidence. Thus, if a distinction is to be drawn, it is respectfully suggested that it should perhaps be along the learned judge's first and second categories only.

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12.30 In defence of Coomaraswamy J's approach, the English courts have consistently treated prior negotiations and subsequent conduct as separate classes of extrinsic evidence of their own. Whether this is correct substantively or is a mere incident of history is debatable, the fact remains that the Singapore courts have been influenced by this and do in fact, single these type of extrinsic evidence out for special treatment. Thus, viewed in this light, Coomaraswamy J was certainly not wrong, and may in fact have been bound, to consider prior negotiations and subsequent conduct as separate classes of extrinsic evidence. Indeed, in *Sembcorp Marine*, the Court of Appeal left open the question of whether prior negotiations should be admissible, thereby in the process singling such evidence out. In fact, several decisions from 2015 weighed in on the admissibility of prior negotiations and subsequent conduct.

Admissibility of prior negotiations and subsequent conduct

12.31 The most significant of these decisions is that of *Xia Zhengyan v Geng Changqing* [2015] 3 SLR 732 ("*Xia Zhengyan*"), from the Court of Appeal. The case concerned the interpretation of a sale and purchase agreement between the parties. As part of their cases in favour of competing interpretations of the agreement, both parties tendered various drafts of the agreement concerned. However, as the court rightly noted, the parties did not address the *legal* question of whether these drafts, which are properly prior negotiations, are admissible and relevant for the purposes of contractual interpretation. It was in this context that the court considered whether prior negotiations should indeed be admissible for this purpose.

12.32 The Court of Appeal commenced by noting that it had left the issue expressly open in *Sembcorp Marine*. The court also noted that it had in *Zurich Insurance* laid down the three criteria of relevancy, reasonable availability, and relation to a clear and obvious context before any extrinsic evidence can be admitted for the purposes of contractual interpretation. Without deciding whether there was a blanket prohibition against prior negotiations generally, the court held that such evidence would not usually satisfy the third *Zurich Insurance* criterion in any event. Indeed, as the court noted (at [65]), the reliance on draft agreements cannot normally amount to a clear and obvious context as "the court is very much left in the dark with regard to the actual bargaining process undertaken by the contracting parties in the course of negotiations". Thus, on that reason alone, prior negotiations would not be admissible.

12.33 However, the Court of Appeal also made it clear that not *all* prior negotiations would fall foul of the criterion of a clear and obvious context. It raised the example of *Inglis v John Buttery & Co* (1878)

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3 App Cas 552 ("*Inglis*"), in which there was a contract for works on a ship for a fixed sum of £17,250. In the course of negotiations between the parties, the agent for the shipowners proposed that a deletion be effected on the draft agreement such as any new plating required before the ship could be classed would be paid for by the shipbuilder. The shipbuilder agreed to the proposed deletion. Eventually, there was a dispute as to who should pay for new plating that turned out to be necessary. The House of Lords refused to admit the prior drafts which contained the deletions. However, as V K Rajah JA has written extra-judicially (see V K Rajah, "Redrawing the Boundaries of Contractual Interpretation" (2010) 22 SAcLJ 513), and as the Court of Appeal accepted in *Xia Zhengyan*, the prior negotiations in *Inglis* would plainly have satisfied the three *Zurich Insurance* criteria and easily resolved the dispute there. This is therefore a good example of prior negotiations that would have been admitted, if such admissibility is only predicated on the three *Zurich Insurance* criteria.

12.34 In the end, the Court of Appeal in *Xia Zhengyan* emphasised that whether prior negotiations ought to be generally admissible is still an open legal question that remains to be worked out in a future case. Thus, notwithstanding the court's demonstration of how some prior negotiations could satisfy the *Zurich Insurance* criteria, the position remains that they are not *generally* admissible on that basis until resolved in a subsequent Court of Appeal decision. In light of this pronouncement, the High Court's approach in *HSBC Trustee* that treated the admissibility of prior negotiations as being governed by the same rules that govern all other extrinsic evidence, should now be doubted. While a potential argument can be made that the EA was never meant to import the English exclusionary rule against prior negotiations into Singapore, the fact remains that the Court of Appeal has expressly left the issue open. Therefore, as a matter of precedent, the legal position in Singapore must be that, until the Court of Appeal itself resolves the issue one way or the other, there remains a blanket prohibition against the admission of prior negotiations in Singapore. It would not be useful to say that there is at present a "cautious" approach against the admissibility of prior negotiations, because that does not spell out clearly the requirements for admission: ought the three *Zurich Insurance* criteria be applied "more strictly", and if so, how much "more strictly"; or are there additional, more stringent, requirements on top of those criteria?

12.35 The same approach appears to apply for the admissibility of subsequent conduct for the purposes of contractual interpretation. Indeed, in *Xia Zhengyan*, the Court of Appeal referred to *Zurich Insurance*, in which the court observed that "the relevance of subsequent conduct remains a controversial and evolving topic that will require more extensive scrutiny … at a more appropriate juncture":

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Zurich Insurance at [132(d)]. Thus, a series of High Court decisions that have used subsequent conduct to aid in contractual interpretation must now be reconsidered. First, the High Court's approach in *HSBC Trustee* that the admissibility of subsequent conduct as being governed by the same rules that govern all other extrinsic evidence must now be doubted. Secondly, the High Court's statement in *Leong Hin Chuee v Citra Group Pte Ltd* [2015] 2 SLR 603 ("*Leong Hin Chuee*") (at [91]) that "the parties' subsequent conduct … can be considered if evidentially probative" must also be doubted. Finally, the High Court's use of subsequent conduct in *Tienrui Design & Construction Pte Ltd v G & Y Trading and Manufacturing Pte Ltd* [2015] 5 SLR 852 (at [49]) on the basis that it was "an appropriate case" to do so must certainly be treated with caution.

12.36 In all of these cases, the High Court considered that subsequent conduct could be admitted for the purposes of contractual interpretation either on the basis that they satisfied the three *Zurich Insurance* criteria, or that they were "evidentially probative". However, it is clear from the Court of Appeal's pronouncement in *Xia Zhengyan* that the position in relation to the admissibility of subsequent conduct is very much open. Thus, it would be dangerous to conclude, in the absence of any pronouncement from the Court of Appeal, that such evidence is generally admissible. Until the Court of Appeal says otherwise, the safer view is that there is presently a prohibition against subsequent conduct for contractual interpretation under Singapore law. This accords with the more cautious approach taken by Quentin Loh J in the High Court decision of *ARS* (above, para 12.16), where his Honour (at [90]) expressed doubt about the use of subsequent conduct to prove the existence of a contract.

12.37 Indeed, there seems to be another problem with admitting subsequent conduct even on a general basis. Even accepting that there is no blanket prohibition against subsequent conduct, and that the admissibility of such evidence is only governed by the *Zurich Insurance* criteria, Prakash J in the High Court decision of *Ding Pei Zhen v Yap Son On* [2015] 5 SLR 911 ("*Ding Pei Zhen*") suggested that the application of those criteria would *always* result in the non-admissibility of subsequent conduct. In the learned judge's view, the requirement of reasonable availability to all contracting parties in *Zurich Insurance* appears to refer to the extrinsic evidence being so available *at the time of contracting*. Similarly, the learned judge also pointed out that the requirement that there was a clear and obvious context seemingly refers to the context in which the contract was made. Thus, if correct, Prakash J thought that this meant that subsequent conduct could *never* satisfy the *Zurich Insurance* criteria and hence *always* be inadmissible. However, her Honour then thought that it is arguable that these

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requirements are not intended to be "limited temporally": *Ding Pei Zhen* at [95].

12.38 The admissibility of prior negotiations and subsequent conduct for the purposes of contractual interpretation continues to trouble the Singapore courts. It is suggested that the Singapore courts need to consider if there is any rationale that accounts for a *blanket* prohibition of both prior negotiations and subsequent conduct. It seems that the Court of Appeal in *Xia Zhengyan* did not think so: it acknowledged that prior negotiations, at least, can at times be useful and other times not so useful. The English decision of *Inglis* is a good example of when prior negotiations can at times be useful. If that is the case, then there is no good reason why there should be a blanket prohibition on the admissibility of such extrinsic evidence. Indeed, given that these evidence have not been taken out for special treatment within the EA, it has been argued that any blanket prohibition would actually be inconsistent with the terms of the EA and therefore void (see Goh Yihan, "The Case for Departing From the Exclusionary Rule Against Prior Negotiations in the Interpretation of Contracts in Singapore" (2013) 25 SAcLJ 182). The better view, it is submitted, is to treat prior negotiations and subsequent conduct just like any extrinsic evidence, subject to the three *Zurich Insurance* criteria and other common conditions for admission. It may be that their nature means that they will not be admissible in most cases, but that alone cannot justify a blanket prohibition against them. It may also be that, as pointed out by Prakash J in *Ding Pei Zhen*, that the *Zurich Insurance* criteria need to be adjusted so that they make sense in relation to subsequent conduct. Ultimately, in a time when the contextual approach towards contractual interpretation holds sway, it would be difficult to justify the exclusion of prior negotiations and subsequent conduct, which have been acknowledged to be useful in at least *some* contexts, based on their nature alone.

Summary of the admissible evidence

12.39 In light of the Singapore courts' extensive discussion of the relevant admissible evidence for the purposes of contractual interpretation in 2015, it may be apposite to summarise the relevant principles. Broadly summarised, under Singapore law, extrinsic evidence that satisfy the four requirements of civil procedure in *Sembcorp Marine* and the three criteria in *Zurich Insurance*, and which are not prior negotiations or subsequent conduct, are admissible pursuant to proviso (*f*) to s 94 of the EA.

12.40 The scope of proviso (*f*) to s 94 of the EA is restricted by ss 95–99 of the same Act. As was noted in *Zurich Insurance* (at [75]), these sections "embody the scope and limitation of proviso (*f*)".

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Sembcorp Marine expressed the same sentiment (at [50]), and regarded ss 93–100 as embodying a "strict" view on the admissibility of extrinsic evidence to influence the interpretation of a written document (which includes a contract). Thus, depending on the type of ambiguity identified by the extrinsic evidence admitted in the first instance, ss 95–99 operate to restrict the admissible extrinsic evidence used to discern a meaning other than the plain meaning of the contractual language:

(a) The effect of s 95 is that, in the instances where patent ambiguity arises after the first consideration of the extrinsic evidence – either by the language used being obviously uncertain (though intelligible), or so defective as to be meaningless – no evidence may be given to cure the ambiguity.

(b) Section 96, known as the "plain language provision", is concerned with outward clarity, which arises because of the "plainness" of the language when *applied* to existing facts. In such cases, no evidence may be admitted to explain that the contractual language was not meant to apply to such facts.

(c) Sections 97–99 concern latent ambiguity and provide instances where such ambiguity may be present. Latent ambiguity is one that "arise[s]… extrinsically in the application of an instrument of clear and definite intrinsic meaning to doubtful subject-matter" (see Thomas Starkie, *A Practical Treatise on the Law of Evidence, and Digest of Proofs in Civil and Criminal Proceedings* vol 3 (Stevens & Norton, 3rd Ed, 1842) at pp 755 and 768).

12.41 There is some debate as to the type of extrinsic evidence that may be admitted under ss 97–99. *Sembcorp Marine* took the view that this could only be the drafter's subjective declaration of intention. After an analysis of the prevailing case law at the time the Indian Evidence Act was drafted, it held that "extrinsic evidence in the form of parol evidence of the drafter's intentions is generally inadmissible unless it can in some way be brought within the exceptions in ss 97 to 100": *Sembcorp Marine* at [65(d)]. *Zurich Insurance*, on the other hand, did not take such a narrow view.

Interpretative approach

12.42 It is clear from *Y.E.S.* (above, para 12.19) and *HSBC Trustee* (above, para 12.20), among many other cases, that the interpretative approach to be adopted in Singapore is an *objective* one. In the High Court decision of *Huationg (Asia) Pte Ltd v Lonpac Insurance Bhd* [2015] SGHC 326 ("*Huationg (Asia)*"), George Wei J held (at [43]) that a contract is to be interpreted objectively and not by reference to the

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subjective intentions of the parties. The process of interpretation, according to the learned judge, "is to identify and give effect to the parties' intentions, objectively ascertained": *Huationg (Asia)* at [44].

12.43 The interpretative approach is also a *contextual* one. This is, in many ways, informed by the general principles already discussed above (at paras 12.19–12.27 above). More specifically, Vinodh Coomaraswamy J's comparison in *HSBC Trustee* of the context of a contract to a series of concentric circles of meaning is very helpful in understanding the essence of the contextual approach.

12.44 In the learned judge's view, the contextual approach starts with the innermost of the concentric circles of meaning: the natural and ordinary meaning of the words, phrases and sentences chosen by the parties to express their contractual intention in the document. But the interpretative exercise did not necessarily end there. The contextual approach could legitimately transition from the internal context to the external context if the extrinsic evidence was admissible. This must be read in the context of the Court of Appeal's reminder in *Y.E.S.* that the text and context interact with one another. If, however, no extrinsic aids to construction were available, the court would be left with nothing but the words the parties themselves chose. This largely reproduces the effect of ss 95–99 of the EA, which places primacy on the plain meaning of the contractual words such that departure is only permissible in the presence of latent ambiguity.

12.45 An example of the context-sensitive nature of the interpretative approach can be seen in *Ding Pei Zhen* (above, para 12.37). The contract sought to be interpreted in that case was not a formal document; it was, instead, "scribbled in Chinese on a page from another document immediately after a discussion between laypersons": *Ding Pei Zhen* at [41]. In these circumstances, Judith Prakash J rightly regarded that it was important, in accordance with the guidance provided for by the Court of Appeal in *Xia Zhengyan* (above, para 12.31), to pay heed to the context in which the agreement had been made. A "common-sense" approach must be taken to interpretation in cases where persons whose first language is not English drafted the contract. As such, Prakash J in *Ding Pei Zhen* regarded that she had to consider the reasonable and probable expectations of the parties at the time the contract was made. This meant a deeper investigation into the background of the contract and not just the immediate context in which it was made.

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Implication of terms

Implication of terms in fact

12.46 It is trite law that any implied term must not be inconsistent with the express terms of a contract. This was aptly demonstrated in the Court of Appeal decision of *The One Suites Pte Ltd v Pacific Motor Credit (Pte) Ltd* [2015] 3 SLR 695 ("*The One Suites*"). As was discussed in last year's edition of the present work (see (2014) 15 SAL Ann Rev 217 at 229–230, paras 12.46–12.49), *The One Suites* concerned the sale and purchase of the remainder of the lease over a property. On 27 July 2012, the appellant exercised the option to purchase ("OTP"), having already paid a total sum of $1.68m to the respondent as deposit. However, the property could not change hands as it was sold subject to the "existing approved use". Moreover, its sale was also subject to the written approval of the Housing and Development Board ("HDB"). In the event that HDB refuse to approve the sale of the property, then according to an express term of the OTP, "the sale … shall be rescinded and all moneys paid to account of the purchase price herein shall be refunded free of interest compensation".

12.47 The appellant sought HDB's approval for the sale after the OTP was exercised. In addition, it also sought the approvals of other relevant authorities, such as the National Environment Agency ("NEA"). The NEA replied on 21 August 2012 that it was unable to support the proposed sale as the appellant's proposed use did not conform with the long-term land use plan for the site on which the property sat. On 24 September 2012, HDB also replied to say that it was "unable to grant in-principle approval" because the "NEA's consent has not been obtained".

12.48 The appellant then wrote to the respondent, saying that, following HDB's rejection, the sale of the property had been "rescinded" and claimed for the refund of its $1.68m deposit. The respondent rejected this, saying that the appellant should appeal against NEA's decision after revising its proposed use. When the appellant refused to do this, the respondent unilaterally wrote to the NEA asking it to reverse its earlier decision on the basis that there would be no change to the "existing use" of the property. The NEA approved the sale. However, when the appellant heard about this, it renounced the respondent's unilateral appeal on its behalf and insisted on the refund of $1.68m on the basis that the transaction had been cancelled following HDB's rejection.

12.49 The legal issue was whether the appellant owed (and subsequently breached) a contractual duty to use all reasonable endeavours to secure HDB's approval *after* HDB's initial rejection. The

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respondent argued that the appellant should have appealed against NEA's rejection and then reapplied to HDB for approval. The appellant succeeded before the Court of Appeal. The court found that the HDB had in fact refused to approve the sale of the property on 24 September 2012. Thus, the question was whether, following the HDB's rejection, the appellant was under any *further* obligation to take further steps to obtain HDB's approval, such as by lodging an appeal against HDB's decision, or that of related entities (in this case, the NEA).

12.50 While the court had no issue with there *generally* being an implied obligation to use reasonable endeavours to obtain the requisite approvals of relevant authorities, it did not think that this obligation should extend to taking *further* steps after any approval had been refused. This is especially true where there is an express term ending the contract following the initial rejection, as was the case in *The One Suites*. The OTP plainly provided that the sale shall be rescinded in the event the HDB refuses to approve the sale. Thus, once HDB refused to approve the sale, the OTP came to an end and the appellant came under no further obligation. There was thus certainly no implied term to take further steps, given that the express terms clearly went against any such term.

12.51 Indeed, the result that no term should be implied is also reached by the application of the Court of Appeal's three-step test for the implication of terms in fact laid down in *Sembcorp Marine* (above, para 12.19). Applying the first step would show that there was no gap in the contract to be filled since the parties had provided for when the contract was to come to an end. The second step would also not be satisfied as it was clearly not necessary in the business sense to imply a term as the parties had already provided for when the contract is to end by way of an express term. Another example of how the three-step test is to be applied can be found in *Yeo Boong Hua v Turf Club Auto Emporium Pte Ltd* [2015] 5 SLR 268 at [159]–[169].

Implied obligation to use reasonable obligations

12.52 While the result in *The One Suites* could be explained by the inconsistency of the implied with the express terms of the contract, the Court of Appeal also held more broadly that there is no general obligation for a party to take further steps after an initial rejection. The court did not think that such a proposition was laid down in the High Court decision of *Tan Soo Leng David v Wee, Satku & Kumar Pte Ltd* [1997] 3 SLR(R) 257. Instead, it thought that the court in that case was simply saying that whether there was a duty to use reasonable endeavours after consent had been refused depended on the precise facts of each case. It may well be appropriate for a court to consider the

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steps taken after initial refusal where very little was done before the refusal. This would also be appropriate when it may be implied that parties have stipulated for such an obligation after rejection. However, even then this must yield to an express term.

Implied term to co-operate

12.53 Given the Court of Appeal's decision as outlined above, there was no need to consider the respondent's argument that there should be an implied duty of co-operation in the OTP. The court declined to express any definitive view on the permissibility of such an implied duty but it saw the potential relationship between such a duty and the doctrine of good faith. It regarded the doctrine of good faith to be a rather uncertain doctrine. As such, whether there is an implied duty to co-operate in law remains to be decided on another occasion, although it is clear that any argument on its permissibility would also have to address the permissibility of a wider doctrine of good faith than that which is currently accepted under Singapore contract law.

12.54 Subsequently in the High Court decision of *Tan Chin Hoon v Tan Choo Suan* [2016] 1 SLR 1150, Coomaraswamy J accepted that the courts may imply a duty to co-operate into a contract where the object of the contract can be achieved only with the co-operation of both parties to the contract, citing *Chitty on Contracts* (Hugh G Beale gen ed) vol 1 (Sweet & Maxwell, 31st Ed, 2012) at para 13-012. The learned judge also recognised the "prevention principle", which allows the courts to imply a term that a party will not do an act which, if done, would prevent the fulfilment of a condition on which the contract is predicated. Together, these principles will oblige a party to do what is reasonable in the circumstances to avoid the performance of the contract.

12.55 Although the learned judge did not consider the Court of Appeal's caution in *The One Suites* (above, para 12.46) regarding an implied term to co-operate, it is clear that his Honour was dealing with such an implied term on the facts of the case, rather than a general term implied by law, as was the case in *The One Suites*. Indeed, Vinodh Coomaraswamy J referenced *Sembcorp Marine* (above, para 12.19), which concerned terms implied in fact, and also quickly applied what seems to be the three-step framework prescribed in that case.

Implied term of good faith

12.56 Indeed, the position in Singapore, following *Ng Giap Hon v Westcomb Securities Pte Ltd* [2009] 3 SLR(R) 518 ("*Ng Giap Hon*"), is that there is no implied duty of good faith based on an implied term in law, although it might be possible for such a duty to be implied in fact.

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This was accepted by the High Court in *AREIF (Singapore I) Pte Ltd v NTUC Fairprice Co-operative Ltd* [2015] 2 SLR 630, in which Coomaraswamy J held that AREIF did not owe any general contractual duty of good faith to NTUC.

12.57 However, the learned judge did note that a more specific type of good faith clause is enforceable in Singapore. His Honour alluded to *HSBC Institutional Trust Services (Singapore) Ltd v Toshin Development Singapore Pte Ltd* [2012] 4 SLR 738 ("*HSBC Institutional Trust*"), in which the Court of Appeal considered that a rent review clause that expressly required the parties "in good faith [to] endeavour to agree" was valid (discussed in (2012) 13 SAL Ann Rev 195 at 203–205, paras 12.33–12.38). It is nonetheless important to note, as the learned judge did, that the facts in *HSBC Institutional Trust* concerned a clause that obliged the parties to negotiate in good faith in the context of an existing contractual relationship. Indeed, where there is no existing contractual relationship, then the concept of a duty to carry out negotiations in good faith is inherently repugnant to the adversarial position of the parties involved in negotiations (see *Walford v Miles* [1992] 2 AC 128 at 138).

Implied term of mutual trust and confidence on discretionary bonus clauses

12.58 In *Leong Hin Chuee* (above, para 12.35), two of the relevant issues were the construction of a discretionary bonus clause, and the effect that an implied term of mutual trust and confidence had on such a clause. As for the first issue, Tan Siong Thye J held (at [145]) that the construction of such clauses was carried out mainly through the processes of interpretation and implication. In so far as interpretation is concerned, that was carried out with regard to the context, There is therefore no absolute legal rule about how that discretion is to be exercised – it could be exercised in accordance with a general guidance, or it could be exercised unfettered. It all depended on the parties' intention as objectively determined in the light of all the relevant circumstances. This should come as no surprise as discretionary bonus clauses, being an example of a contractual clause, should be interpreted in the same manner as other clauses, that is, contextually (as was discussed above).

12.59 In so far as the effect of an implied term of mutual trust and confidence is concerned, Tan J accepted that such a term would be implied by law in Singapore, subject to express terms or the circumstances suggesting otherwise (see *Cheah Peng Hock v Luzhou Bio-Chem Technology Ltd* [2013] 2 SLR 577 at [59]). Such an implied term could affect the employer's exercise of his discretion under a discretionary bonus clause, but whether this was the case, and if so, the

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effect, all depended on the circumstances of the case. Thus, if the discretionary bonus clause, properly interpreted, reserved an "absolute" discretion to the employer, then an implied term of mutual trust and confidence will have little effect on the employer's exercise of discretion. Otherwise, the effect of the implied term may be to oblige the employer to exercise his discretion in a *bona fide* and rational manner.

Regulation of terms of the contract at common law

12.60 Notwithstanding the general freedom of contracting parties to contract on terms that both have agreed to, the courts have at times seen it necessary to step in to regulate the terms of the contract. Nowhere is this more evident than the regulation of exception clauses. The courts' regulation can be effected by the common law or by statute, specifically the Unfair Contract Terms Act (Cap 396, 1994 Rev Ed) ("UCTA").

"Red hand" rule

12.61 It is established law that a person who signs a written document, knowing it to be a contract which governs the relations between him and the other party, will be bound by all its terms, including exception clauses. This will be the case even though the person concerned was, for some reason or other, ignorant of the contents of the document itself. Apart from the well-established exceptions premised on either fraud or misrepresentation (see, *eg*, *Press Automation Technology Pte Ltd v Trans-Link Exhibition Forwarding Pte Ltd* [2003] 1 SLR(R) 712 ("*Press Automation*")), there is a line of Canadian authorities that have held that onerous and unusual conditions cannot be incorporated by signature unless the attention of the party sought to be bound has been specifically drawn to them (see, *eg*, *Trident Holdings Ltd v Danand Investments Ltd* (1987) 21 CLR 240 and, on appeal (1988) 39 BLR 296; (1988) 49 DLR (4th) 1 and *Tilden Rent-A-Car Co v Clendenning* [1978] 83 DLR 3d).

12.62 More than a decade ago, the High Court in *Press Automation* rejected the Canadian line of cases. It held (at [40]) instead that where a party has signed a contract after having been given notice, by way of a clear incorporating clause, that party cannot afterwards assert that it is not bound by some of the terms on the ground that the same are onerous and unusual and had not been drawn specifically to its attention. This holding has now been reaffirmed in *Huationg (Asia)* (above, para 12.42), where George Wei J said (at [72]) that there "is no scope for the application of the red hand rule where there is a signed contract with an explicit incorporating clause" and that "[i]f the contracting parties do not ascertain their own legal positions before signing a contract, they will be bound by those terms except to the

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extent that the Unfair Contract Terms Act (Cap 396, 1994 Rev Ed) offers them relief".

Contra proferentem rule

12.63 It is a canon of interpretation that doubt about the meaning of a contract is to be construed against the person who put them forward. This is the *contra proferentem* rule. As a general matter, Tan Siong Thye J in *Leong Hin Chuee* (above, para 12.35) clarified that the *contra proferentem* rule serves to protect weaker parties from an inequality of bargaining power, or who have no opportunity to negotiate the terms of an agreement. Similarly in *Corinna Chin Shu Hwa v Hewlett-Packard Singapore (Sales) Pte Ltd* [2015] SGHC 204 ("*Corinna Chin*"), Edmund Leow JC accepted that the rule would apply where the "justice of the case demands it", citing Kim Lewison, *The Interpretation of Contracts* (Sweet & Maxwell, 5th Ed, 2011) at p 367.

12.64 These views accord with the general sentiments expressed in the recent English Court of Appeal decision of *Compania Sud Americana de Vapores SA v Hin-Pro International Logistics Ltd* [2015] EWCA Civ 401 (at [71]), where Christopher Clarke LJ adopted the rationale provided by Lord Mustill in *Tam Wing Chuen v Bank of Credit and Commerce Hong Kong Ltd* [1996] BCC 388 for the rule, as follows: "the basis of the *contra proferentem* principle is that a person, who puts forward the wording of a proposed agreement may be assumed to have looked after his own interests, so that if the words leave room for doubt about whether he is intended to have a particular benefit there is reason to suppose that he is not".

12.65 Under Singapore law, two questions must be considered when applying the *contra proferentem* rule: (a) was there any ambiguity in the contract; and (b) if so, who was the party against whom the clauses were to be interpreted against: see *LTT Global Consultants v BMC Academy Pte Ltd* [2011] 3 SLR 903 ("*LTT Global*") at [56]–[57]. In relation to the first question, Leow JC in *Corinna Chin* cautioned that the rule must not be used to create a doubt or magnify an ambiguity. Where there is no difficulty in interpreting the contract, the *contra proferentem* rule should not be used by a court to prefer a particular interpretation; it is a canon of interpretation of "last resort": *Corinna Chin* at [57]. Indeed, in *Corinna Chin*, Leow JC went through the interpretative process applicable in Singapore but still could not arrive at an appropriate interpretation of the words "new end user customer". It was only then did his Honour turn to the *contra proferentem* rule.

12.66 In relation to the second question, Tan J in *Leong Hin Chuee* held that it would not apply to a party to a bilaterally negotiated contract. The rule would also not apply to commercial men who have

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the ability to protect their own interests. This therefore follows the approach taken by the High Court in *LTT Global*. It was held in that case that the *proferens* could either be the person who seeks to rely on the term or the person who proposed the term for inclusion in the contract. However, the court added that if the contract were bilaterally negotiated, then the *contra proferentem* rule would not apply. The court based this proposition on the English case of *Levison v Farin* [1978] 2 All ER 1149, which held that the *contra proferentem* rule is irrelevant where the clause "emerged as a result of joint efforts" (at p 1156). The court also relied on *Kleinwort Benson v Malaysian Mining Corp Berhad* [1988] 1 WLR 799, which agreed with *Levison v Farin* that the *contra proferentem* rule did not apply to a joint drafting effort.

12.67 The High Court's application of the *contra proferentem* rule in both *Leong Hin Chuee* and *Corinna Chin* therefore present no real problem under Singapore law.

Regulation of terms of the contract under the Unfair Contract Terms Act

Koh Lin Yee *and contracting out of the right of set-off*

12.68 The Court of Appeal in *Koh Lin Yee v Terrestrial Pte Ltd* [2015] 2 SLR 497 ("*Koh Lin Yee*") ruled that a contractual clause excluding a right of set-off is subject to the requirement of reasonableness in UCTA. In doing so, it also laid down some general guiding principles relating to the application of UCTA, namely, when a party is considered to be dealing "as consumer" under s 12(1), when a contract contains standard terms of business under s 3(1), and the application of the requirement of reasonableness. Each of these points will be considered below.

12.69 The appellants in the two appeals before the Court of Appeal in *Koh Lin Yee* were Koh Lin Yee and Allgo Marine Pte Ltd, and the respondent was Terrestrial Pte Ltd. Koh is the sole director and owner of a single share in Allgo. On 25 May 2009, Allgo agreed to sell a flat top barge to Terrestrial for $1.2m. Although Terrestrial paid Allgo in full, Allgo failed to deliver the barge as it had itself failed to pay the barge builder an outstanding balance of $350,000. To facilitate the building of the barge, Terrestrial agreed to make two short-term loans to Allgo on 3 January 2011. Koh also agreed unconditionally to guarantee Allgo's obligations to repay these loans. Terrestrial later agreed to make another loan to Allgo. Allgo failed to make repayment of any of the loans by the stipulated due dates. Terrestrial thereafter demanded repayment from both Allgo, as well as Koh as guarantor of the loans.

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12.70 In their defence against Terrestrial's application for summary judgment, Koh and Allgo argued that Terrestrial had failed to pay moneys owed under a separate contract with Allgo for the purchase of a tug. This in turn rendered Koh and Allgo unable to repay their outstanding loans to Terrestrial. As such, Koh and Allgo argued that they were entitled to set-off the moneys due under their loans to Terrestrial against the sum owed to them for the tug. The difficulty with the possibility of a set-off was clause 12.2 of the loan agreements between Allgo and Terrestrial, which read as follows:

> "All payments to be made by [Allgo or Koh] under the [loan agreements] shall be made without set-off, counterclaim or condition …"

12.71 The Court of Appeal thus had to consider whether clause 12.2 explicitly excluded Koh's and Allgo's right to raise a set-off or counterclaim through the words "without set-off". And if clause 12.2 did have this effect, the follow-up issue was whether it is an unfair contract term within the meaning of UCTA and therefore subject to the requirement of reasonableness prescribed by that Act.

12.72 In respect of the interpretation of clause 12.2, the Court of Appeal held that, in accordance with the freedom of contract, parties can agree to contract out of the right of set-off if clearly expressed. It is a matter of interpretation whether the words used in the contract sufficiently evince an intention to exclude the right to set-off. Applying these principles to the facts, the Court of Appeal found that the words "without set-off" effectively excluded all forms of set-off, with no distinction between legal and equitable set-offs.

Dealing "as consumer" and "standard terms of business"

12.73 The Court of Appeal consequently had to consider ss 3 and 12 of UCTA, which are reproduced below for easy reference:

> **Liability arising in contract**
>
> **3.**—(1) This section applies as between contracting parties where one of them deals as consumer or on the other's written standard terms of business.
>
> (2) As against that party, the other cannot by reference to any contract term —
>
> > (*a*) when himself in breach of contract, exclude or restrict any liability of his in respect of the breach; or
> >
> > (*b*) claim to be entitled —

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(i) to render a contractual performance substantially different from that which was reasonably expected of him; or

(ii) in respect of the whole or any part of his contractual obligation, to render no performance at all,

except in so far as (in any of the cases mentioned in this subsection) the contract term satisfies the requirement of reasonableness.

…

Dealing as consumer

12.—(1) A party to a contract "deals as consumer" in relation to another party if —

(*a*) he neither makes the contract in the course of a business nor holds himself out as doing so;

(*b*) the other party does make the contract in the course of a business; and

(*c*) in the case of a contract governed by the law of sale of goods or hire-purchase, or by section 7, the goods passing under or in pursuance of the contract are of a type ordinarily supplied for private use or consumption.

(2) But on a sale by auction or by competitive tender the buyer is not in any circumstances to be regarded as dealing as consumer.

(3) Subject to this, it is for those claiming that a party does not deal as consumer to show that he does not.

12.74 As can be seen, in order for s 3 to apply, it has first to be shown either that one of the contracting parties "deals as consumer" or that one of the contracting parties deals "on the other's written standard terms of business". And if, either one (or both) of the two threshold requirements is satisfied, in order to bring the exception clause within the scope of s 3, it has to be proved that the clause concerned falls within at least one of the following categories, which are found in ss 3(2)(*a*), 3(2)(*b*)(i) and 3(2)(*b*)(ii) respectively, and such a clause would be inoperative only if it did not satisfy the "requirement of reasonableness".

12.75 The appellants argued that s 3 applied to clause 12.2 and that clause 12.2 was unreasonable and thereby inoperative. In order to do so, Allgo and Koh first had to show that either of the threshold requirements was met in order to invoke s 3.

12.76 First, Allgo and Koh submitted that they were dealing "as consumer" as they were not represented at the time the loan agreements were signed and Terrestrial was engaged in financing or lending money to them. In response, the Court of Appeal pointed out that the

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requirements in ss 12(1)(*a*) and 12(1)(*b*) are cumulative. The starting point is the English Court of Appeal decision of *R & B Customs Brokers Co Ltd v United Dominions Trust Ltd* [1988] 1 WLR 321, in which Dillon LJ read the phrase "in the course of business" under ss 12(1)(*a*) and 12(1)(*b*) to mean that the transaction in question was a "clearly integral" part of the company's business, as opposed to being merely incidental to such business. In addition, a "degree of regularity" is needed before a particular transaction could be regarded a "clearly integral" part of the business.

12.77 Applying this definition to the facts, the Court of Appeal found that Allgo's obtaining of a loan was merely incidental to its carrying out of its business. Although Terrestrial adduced evidence that Allgo had intended to obtain financing from banks, there was no evidence pointing to the regularity required to constitute a course of business. Hence, Allgo was *not* contracting in the course of business and fulfilled the requirement under s 12(1)(*a*).

12.78 However, this was not the end of the matter as s 12(1)(*b*) required Terrestrial to have contracted in the course of a business. This the Court of Appeal did not find satisfied as Terrestrial could not be said to have made the loans in the course of a business; in other words, the loans were not integral to Terrestrial's business, which was certainly not to make loans.

12.79 Because the requirements under ss 12(1)(*a*) and 12(1)(*b*) are cumulative, and s 12(1)(*b*) was not satisfied, Allgo failed to prove that it had dealt "as consumer" under UCTA. The result is that s 3 could not be invoked. As a practical matter, this part of the Court of Appeal's judgment now provides very clear guidance in the context of Singapore law as to the application of ss 12(1)(*a*) and 12(1)(*b*).

Standard terms of business

12.80 Alternatively, the Court of Appeal also considered that the loan agreements did not contain any standard terms of business within the meaning of s 3(1). The starting point is the English High Court decision of *Hadley Design Associates v Westminster* [2003] EWHC 1617 (TCC). In that case, Judge Richard Seymour QC considered that the phrase "standard terms of business" means a set of terms in the written form existing prior to the making of the agreement, which was intended to be adopted more or less automatically in respect of transactions of a particular type without any significant opportunity for negotiations. This was not the case on the facts since the loan agreements were drawn up *specifically* to deal with certain circumstances that had arisen, that is, Allgo could not pay for the construction of the barge.

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12.81 Again, because the alternative threshold requirement under s 3 was not satisfied, s 3 could not be invoked. Nonetheless, for completeness, the Court of Appeal went on to consider, on assumption that either (or both) threshold requirements was satisfied, whether s 3 could apply to clause 12.2, being a contractual clause excluding a right of set-off.

Application of s 3 of UCTA to a clause excluding right of set-off

12.82 The Court of Appeal held that s 3 of UCTA could apply to a contractual clause excluding the right of set-off which, in this case, was clause 12.2.

12.83 There are two opposing views on this issue. On the one hand, it has been considered that clauses such as clause 12.2 merely define the contractual obligation between the parties and therefore fell outside the ambit of UCTA. On the other hand, as accepted by the Court of Appeal, such clauses are considered to restrict the rights and remedies of the party who would otherwise have been entitled to rely on the set-off and therefore fell within the ambit of UCTA. In preferring the second view, the Court of Appeal accepted the reasoning of the English Court of Appeal in *Stewart Gill Ltd v Horatio Myer & Co Ltd* [1992] 1 QB 600 ("*Stewart Gill*"), which dealt with the following clause:

> The customer shall not be entitled to withhold payment of any amount due to the company under the contract by reason of any payment credit set off counterclaim allegation of incorrect or defective goods or for any other reason whatsoever which the customer may allege excuses him from performing his obligations hereunder.

12.84 Lord Donaldson MR held that this clause came within s 3 of the UK Unfair Contract Terms Act 1977 (c 50) because it came within the varieties of exemption clauses set out in s 13 covered by s 3. Section 13 of the UK Unfair Contract Terms Act 1977 (c 50), which is *in pari materia* with s 13 of UCTA, reads as follows:

> **Varieties of exemption clause**
>
> 13.—(1) To the extent that this Part prevents the exclusion or restriction of any liability it also prevents —
>
> (*a*) making the liability or its enforcement subject to restrictive or onerous conditions;
>
> (*b*) excluding or restricting any right or remedy in respect of the liability, or subjecting a person to any prejudice in consequence of his pursuing any such right or remedy;
>
> (*c*) excluding or restricting rules of evidence or procedure,

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> and (to that extent) sections 2 and 5 to 7 also prevent excluding or restricting liability by reference to terms and notices which exclude or restrict the relevant obligation or duty.

12.85 Thus, according to Lord Donaldson MR, and pursuant to the terms of s 13(1)(*b*), the clause in *Stewart Gill* excluded the defendants' "right" to set off their claims against the plaintiffs' claim and further excluded the "remedy" which they otherwise would have been able to bring by means of a set-off. Furthermore, this clause also excluded or restricted the procedural rules as to set-off pursuant to the terms of s 13(1)(*c*). Thus, on either account, the clause, or indeed, any clause excluding the right of set-off, would come within s 3 of UCTA, being a variety of exemption clause caught by UCTA. The Court of Appeal in *Koh Lin Yee* (above, para 12.68) accepted this reasoning as correct. This, with respect, must be correct. On a plain reading of the section, it is clear that clauses that exclude the right of set-off would come within its ambit. To construe it otherwise would be to ignore the clear meaning and (more importantly) the purpose of the section.

12.86 The Court of Appeal also accepted that the reasoning in *Stewart Gill* did not affect the rights of parties to agree to include no set-off clauses in that contract that cover specific circumstances. Whether they have such an effect and whether they attract the application of UCTA is a wholly separate matter.

Application of the requirement of reasonableness to clauses that exclude right of set-off

12.87 As to the relevant factors to determining the reasonableness of clauses that exclude the right of set-off, the Court of Appeal considered that such clauses have a clear rationale, namely, that it may be important for cash flow reasons that a party should receive payment in full under a contract so that the counterparty should be required to seek its right of a set-off in separate proceedings. From this starting point, the relevant factors are those enunciated in Second Sched of UCTA, even though the Act provides that they only apply to ss 6 and 7 of the Act.

12.88 In relation to the relative bargaining strength of the parties, whether or not the party impugning the exception clause concerned is experienced is a significant factor that the courts will take into account. The guiding principle seems to be that an experienced commercial party would not be taken advantage of and hence any exception clause entered into by it is likely to be reasonable. Also, whether the clause concerned is well known or accepted in commercial circles will be an important factor. Finally, the availability of legal advice would be important.

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12.89 On the assumption that s 3 covered clause 12.2 in the present case, the Court of Appeal considered that it was reasonable since the parties were of relatively equal bargaining positions, and since it was a common provision in the context of a loan facility.

Unresolved issue

12.90 The Court of Appeal expressly left unresolved the issue of whether a clause excluding the right of set-off would be considered in full or in part when subjected to the requirement of reasonableness. In other words, would the part of the clause excluding the right of set-off be severed and assessed separately, or would the entire clause be assessed altogether? The answer to this question had practical consequences in *Stewart Gill* (above, para 12.83). In deciding to subject the *whole* of the affected clause to the requirement of reasonableness, the English Court of Appeal made it much harder for the clause to be found reasonable. This was because the rest of the clause was couched very extensively, regardless of whether the exclusion of the right of set-off itself was phrased as extensively. It is conceivable that had the exclusion of the right of set-off be severed and assessed separately, it might have been found to be reasonable.

12.91 It is perhaps understandable why the Court of Appeal elected to leave this issue open since the parties did not argue it. However, it might be thought that the rationale behind the doctrine of severance might apply to govern this issue, that is, if severance does not alter the meaning of the clause, then there is no reason why the exception clause cannot be assessed only on its exclusion or restriction part.

Vitiating factors

Misrepresentation

12.92 Although a party alleging fraud in a civil suit needs only to prove the same on a balance of probabilities, the burden of proof is nevertheless an onerous one given the particular gravity of the charge as well as the more liberal measure of damages it entails: see *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve* [2013] 3 SLR 801 at [30]–[31]. It is therefore unsurprising that a plea of fraudulent misrepresentation may often fail for want of evidence. In *Goldrich Venture Pte Ltd v Halcyon Offshore Pte Ltd* [2015] 3 SLR 990, the plaintiffs were "resident contractors" who had entered into various labour supply contracts with the defendant. Purportedly acting pursuant to these contracts, the plaintiffs brought in more than 600 foreign workers but failed to deploy them in any project. The matter was eventually investigated by the Ministry of Manpower, which led to Lee's (the plaintiffs' shareholder and

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sole director) conviction for multiple offences under the relevant employment statutes. In the present suit, the plaintiffs sought to recover substantial damages from the defendant on the ground that they had entered into the labour supply agreements in reliance on the fraudulent misrepresentations of the defendant's agent, Choo. These representations were first, that the defendant had secured large marine projects for 2008; second, each worker would be deployed in their projects upon payment of a "service fee"; and third, that they (the plaintiffs) should continue to bring the workers to Singapore so they could start work as soon as the projects became available.

12.93 At trial, Steven Chong J found (at [104]) that none of the representations were made out as there was "a complete paucity of documentary evidence or corroborative testimony" and Lee's evidence was riddled with both internal and external inconsistencies. Importantly, Chong J also observed (at [78]) that a plaintiff's burden of proof is not discharged simply by demonstrating the implausibility of the defendant's case. This is particularly so if there was a third explanation in addition to those raised by the parties, so that a rejection of the defendant's case does not inexorably lead to the conclusion that the plaintiff's case is true. In this case, Chong J thought it probable that Lee had together with Choo and Ong (the defendant's "labour consultant") devised a scheme to profit from bringing foreign workers to Singapore. Their plan was to share among themselves the service fees paid by the workers, and then reap further profits when they are deployed in the marine sector. However, the scheme imploded when the financial crisis erupted in 2008. The plaintiffs were then left stranded with more than 600 workers to house and feed but no project for which they could be deployed. On this postulation, the weaknesses of the defendant's case were not a sufficient basis for accepting the plaintiffs' account.

12.94 Fraudulent misrepresentation was also unsuccessfully pleaded in *Xia Zhengyan* (above, para 12.31). We have already considered this case in connection with contractual interpretation (see paras 12.31–12.38 above). Apart from alleging breach of contract, the appellant in this case also sought to recover damages on the ground that the sale and purchase contract was induced by the respondent's fraudulent representations. For this purpose, she identified no less than 22 (allegedly) false statements, all of which the trial judge found to be non-actionable. The Court of Appeal affirmed this holding (though not without some reservation as to its correctness in respect of two particular statements) but also took the opportunity to caution (*Xia Zhengyan* at [100]) against the "scatter-shot or kitchen-sink" approach of pleading a long and indiscriminate list of allegedly false representations in the mistaken belief that one's prospect of success increases in tandem with the number of claims or allegations that one

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makes. The plaintiff might have been guilty of this when she included in her pleadings various representations of a trifling nature.

12.95 In *Tiong Swee Eng v Yeo Khee Siang* [2015] 3 SLR 1141 ("*Tiong Swee Eng*"), the High Court clarified that settlement agreements made in contemplation of divorce are merely a species of contracts to which the general contractual principles apply. Judith Prakash J saw no reason why a different treatment ought to be accorded to such agreements. In this case, the plaintiff wife and defendant husband had entered into an agreement to settle their matrimonial assets. However, the plaintiff developed misgivings soon after, and the parties subsequently discovered that some matrimonial assets had been omitted from the agreement. The plaintiff then brought proceedings to rescind the agreement on the grounds, *inter alia*, that the defendant had misrepresented the list of assets included in the agreement ("Asset List") as a *complete* list of their matrimonial assets, as well as the failure to disclose "facts and circumstances [that] would have been likely to influence a prudent person in entering into a transaction or requiring an amendment of the terms, or simply 'given him pause'" (the "non-disclosure argument"): *Tiong Swee Eng* at [52]. At the conclusion of the trial, Prakash J found that the representation as to the Asset List was in fact false as it had omitted a property held in their joint names. However, this was not a deliberate omission as both parties had honestly forgotten about the property at the time of the negotiation. Satisfied that the plaintiff had relied on the misrepresentation, the court went on to consider the appropriate remedy. Exercising the discretion conferred by s 2(2) of the Misrepresentation Act (Cap 390, 1994 Rev Ed), the learned judge declined to order rescission as it would be a disproportionate response on the facts. Though actionable, the misrepresentation in question was not one that went to the heart of the agreement because the property made up only slightly more than 1% of the total assets settled and more importantly, the plaintiff had not suffered any harm as her interests as a joint owner remained intact. On the other hand, there was little advantage to be gained through rescission as the parties would then be thrown back into litigation with scant likelihood that a better outcome could be achieved. As there was no evidence that she would personally benefit had the property been included in the settlement, the plaintiff was awarded only nominal damages in lieu of rescission. This aspect of the judgement serves as a rare but important illustration of the circumstances in which a court would decline to order rescission under s 2(2) of the Misrepresentation Act.

12.96 In the course of her reasoning, Prakash J also made a number of other useful observations. First, her Honour confirmed that an operative representation may arise even if it has only been conveyed to the representee's agent. So long as the representation was made to the agent

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in circumstances where it is clear that it is meant to be relied upon by the principal, the representor must be taken to have represented to the principal. Thus, the learned judge found in *Tiong Swee Eng* that the defendant could be said to have represented the Asset List to be complete even though this representation was made only to the plaintiff's solicitor. Secondly, precisely what evidence is needed to establish the making of a representation must be determined by the substance of that representation. In this case, Prakash J held it was not necessary for the plaintiff to prove that the individual items on the list had been communicated to her. Since the essence of the representation was that the list comprised (to the best of the defendant's knowledge and belief) their matrimonial assets at that time, all that has to be proved is the fact that the *veracity* of the list was communicated to her. Thirdly, Prakash J exposed the fallacy of the non-disclosure argument, which presupposes that a contracting party owes a general duty to disclose any information relevant to the counter party's decision to contract. Such a suggestion is clearly antithetical to the principle of *caveat emptor* in contract law. While a legal duty to disclose may be imposed in exceptional circumstances, Prakash J found that the settlement agreement did not fall into any of these excepted categories. It is also true that a positive duty to disclose may be justified in novel circumstances to protect parties with particular vulnerabilities. But it seems reasonably clear that Prakash J did not think that a settlement made in contemplation of divorce involves any such novel interests. Instead, her Honour thought (at [62]) that such a duty would be highly unrealistic in the context of divorce, where the parties are "adversaries, each of whom is seeking their own advantage".

Mistake

12.97 Ordinarily, a person who signed a contract is bound even if he has not read or did not understand it. To this, the plea of *non est factum* provides a limited exception. It allows a person who has signed a document to deny his signature if the document is, through no fault of his, radically different from what he believed it to be. In the early authorities, the doctrine was applied mainly in favour of illiterate or blind parties but has in modern times been extended to other forms of incapacity. Notwithstanding that, it is clear that the doctrine has to be kept within narrow bounds, for intolerable uncertainty would ensue if contracting parties should be allowed to escape their contractual commitments simply by asserting that they had not understood what was signed. For this reason, the application of the defence is subject to strict conditions, the stringency of which would normally preclude reliance by persons who are adult and literate.

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12.98 Against that backdrop, the Court of Appeal's readiness to set aside a deed on the ground of *non est factum* in *Mahidon Nichiar bte Mohd Ali v Dawood Sultan Kamaldin* [2015] 5 SLR 62 ("*Mahidon (CA)*") is both noteworthy and exceptional. In this case, the appellants were three siblings who had signed a deed (the "RBI Deed") renouncing their beneficial interests in their father's estate in favour of their mother and brother (Dawood). On the basis of this deed, the family home ("the Property") was transferred to the joint names of mother and Dawood in 2005. However, the appellants were apparently unaware of this development until 2011, whereupon they promptly lodged a caveat against the Property. Subsequently, in 2013, they commenced proceedings against Dawood to set aside the transfer and to rectify the land register. Their case was that they had agreed only to renounce their interests in favour of their mother and had signed the RBI Deed in the (mistaken) belief that that was its effect. Dawood, on the other hand, argued that the appellants had agreed to waive their interests to benefit both mother and himself as joint tenants.

12.99 In the High Court, the judge found that neither the appellants nor Dawood had proven their version of the pre-deed agreement: *Mahidon Nichiar bte Mohd Ali v Dawood Sultan Kamaldin* [2014] 4 SLR 1309. That being the case, the appellants' argument that the RBI Deed was a breach of their prior agreement failed, and the issue that remained was whether there was some other ground for setting aside the RBI Deed. The judge concluded there was none. In particular, his Honour rejected *non est factum* and unilateral mistake as possible bases for vitiating the RBI Deed as he had found that the appellants, having had the effects of the deed explained to them, was not mistaken as to the nature and effects of the document.

12.100 Critically, however, this last-mentioned finding was reversed on appeal. The Court of Appeal found, instead, that the appellants had executed the RBI Deed in the mistaken belief that it sought only to appoint Dawood as the sole administrator of their father's estate. In its view, this was the more probable explanation since there was no other convincing reason why the appellants would have renounced their interests in favour of Dawood. Importantly, the court found that the appellants' error was engendered by their inability to understand the complex documents they were signing. While such deficiency would ordinarily be cured by obtaining proper legal advice, the appellants did not have the benefit of such advice as the solicitors acting for them were concurrently acting for Dawood and was oblivious to the potential conflicts of interests between them. Consequently, they took instructions only from Dawood without verifying with the appellants and did not at any point draw the appellants' attention time to the adverse effects of the deed. Overall, the Court of Appeal found that the

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solicitors failed spectacularly in the discharge of their duties to the appellants.

12.101 To the extent those findings established the appellants' mistaken state of mind when executing the RBI Deed, they appear to justify its avoidance on the basis of an operative unilateral mistake (unilateral in the sense that the appellants' mistake was known to Dawood, who stood to benefit under the deed). However, the Court of Appeal (at [80]) did not predicate its decision on the ground of mistake alone, but on the distinct principle that:

> [Where], in a given matter, a solicitor acts for multiple clients (or groups of clients) with conflicting interests, and where one client (or group of clients) enters into a transaction *which prejudices him and benefits the conflicting interests of another client (or group of clients) who is also represented by the same solicitor*, that transaction will be regarded as suspect and will be liable to be set aside in the absence of clear evidence that the solicitor did in fact fully advise the client (or group of clients) who was prejudiced as to the terms and effect of the transaction. [emphasis in original]

12.102 Although this passage may, at first blush, suggest that deficient legal advice in the context of concurrent legal representation is *per se* a sufficient vitiating factor, it is submitted that the better view is to understand it as an instance where the failure of legal advice confirmed the appellants' error as an operative mistake (rendering the RBI Deed *void ab initio*) or that the lawyers' omission was a breach of fiduciary duty or a misrepresentation of which Dawood had actual or constructive notice, thereby justifying the rescission of the RBI Deed. Some support for these explanations can indeed be found in the authorities cited by Sundaresh Menon CJ in support of this principle, *viz*, *Sturge v Sturge* (1849) 1 Beav 229 and *Bank of Montreal v Jane Jacques Stuart* [1911] AC 120, both concerned with undue influence, and *Willis v Barron* [1902] AC 271, a case involving an operative mistake.

12.103 More interestingly, perhaps, the Court of Appeal also held in the alternative that the appellants could also have succeeded on the ground of *non est factum*. Affirming the traditional conditions for the doctrine's application, the court found that there was a radical difference between what the appellants thought they were signing (renouncing their rights to administer their father's estate in favour of Dawood) and what they in fact signed (renouncing their beneficial interests in the estate in favour of Dawood). In addition, the court was also satisfied that the appellants had not been negligent, since it was entirely reasonable for the appellants – "a group of lay and unsophisticated clients" – to have relied on their solicitors for advice when executing documents forming part of a complicated arrangement: *Mahidon (CA)* at [122].

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12.104 On this reasoning, the Court of Appeal was plainly attempting to do no more than apply *non est factum* in its conventionally narrow form. However, the court's finding that the appellants had exercised due care by relying on their solicitors may signify a departure from the orthodox view that a plaintiff who has done no more than rely on a trusted person or legal advisor would not usually succeed in a plea of *non est factum*. This is because ordinarily, a plaintiff who is literate and otherwise of normal capacity is expected to take *some steps* to ascertain the meaning and effects of what he is about to sign. The point is cogently made by Lord Reid in *Saunders v Anglia Building Society* [1970] 3 WLR 1078 at 1082, where his Lordship observed:

> The plea [of non est factum] cannot be available to anyone who was content to sign without taking the trouble to try to find out at least the general effect of the document. Many people do frequently sign documents put before them for signature by their solicitor or other trusted advisers without making any inquiry as to their purpose or effect. But the essence of the plea of non est factum is that the person signing believed that the document he signed had one character or one effect whereas in fact its character or effect was quite different. *He could not have such a belief unless he had taken steps or been given information which gave him some grounds for his belief.* The amount of information he must have and the sufficiency of the particularity of his belief must depend on the circumstances of each case. [emphasis added]

12.105 Because the Court of Appeal in *Mahidon (CA)* (above, para 12.98) was largely focused on what the solicitors ought to have done (and in the event failed to do) when acting for multiple clients, there was little consideration of what steps the appellants took to verify the purpose and effects of the RBI Deed. As a result, there is considerable uncertainty as to whether the applicants had taken any step at all in that direction. On the assumption that that they were completely passive, it would seem that *Mahidon (CA)* might have lowered the threshold for the application of the *non est factum* doctrine, so that in cases involving lay clients, the validity of complex transactions may ultimately turn on the quality of the legal advice they received.

12.106 Fortunately, however, the expansionary effects just surmised need not follow once it is appreciated that *Mahidon (CA)* is not in fact a paradigm case for the application of *non est factum*. Traditionally, the doctrine is only of significance in contexts where a mistakenly signed document has been relied on by unsuspecting third parties. A classic example would be where *A* misleads *B* to sign a document, which *A* then uses to obtain an advantage from *C*. In a suit between *B* and *C*, the question would arise as to whether *B* may disown his signature on the ground of *non est factum*. Significantly, the requirement for due care on the part of the mistaken signor was developed in such

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contexts to reflect the policy that as between two innocent parties, the signor is in a better position than the third party to guard against the risk of fraud or error. Where, however, no innocent third party is affected, this policy is not engaged so the requirement for due care on the part of the signor is not strictly relevant: see *Petelin v Cullen* (1975) 132 CLR 355.

12.107 *Mahidon (CA)* was not a case where the RBI Deed had been relied on by an innocent third party to his detriment. Instead, the appellants were seeking to set aside the deed against Dawood, who was at all times privy to the appellants' error. In such circumstance, the appellants would ordinarily be entitled to relief on the ground of misrepresentation or mistake. Perhaps owing to evidential or difficulties not made explicit in the judgment, the appellants had chosen instead to plead *non est factum*. This is by no means impermissible, but it is important then to bear in mind that its application in such context may differ from, and should not be extended to, that which involves innocent third parties.

Illegality

12.108 The doctrine of maintenance and champerty is a settled feature of the common law but its application has evolved significantly over time. Hostility towards contracts that maintain or assist with litigation has abated in tandem with growing recognition of their importance as a means to promote wider access to justice. Indeed, third party litigation funding is now a thriving industry in Australia and is also gaining acceptance in the UK.

12.109 Against that backdrop, the High Court's confirmation in *Re Vanguard Energy Pte Ltd* [2015] 4 SLR 597 ("*Vanguard Energy*") that an agreement assigning the fruits of a legal action is not void for champerty is of undoubted significance. In this case, the shareholders of an insolvent company, Vanguard Energy Pte Ltd, had agreed to fund the company's various actions for breach of contract. For this purpose, the liquidators entered into an agreement ("the Assignment Agreement") with the shareholder-funders, pursuant to which the latter agreed to fund part of the litigation cost in exchange for an assignment of a part of the recovery equal in amount to the funds so provided. On the liquidators' application, Chua Lee Meng JC confirmed that the agreement did not offend the doctrine of maintenance and champerty. This was because the proceeds of litigation constituted corporate "property" that the liquidators were empowered to dispose of under s 272(2)(*c*) of the Companies Act (Cap 50, 2006 Rev Ed). Since such a disposal was statutorily authorised, there could be no question

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that it offended the common law rule against maintenance and champerty.

12.110 Though that was sufficient to dispose of the application, Chua JC went on to consider whether the Assignment Agreement would otherwise be struck down as champertous at common law and concluded it would not. In deciding this issue, Chua JC found (at [43]) that the authorities validated the assignment of a bare cause of action (or the fruits of such action) if:

> (a) it is incidental to a transfer of property; or
>
> (b) the assignee has a legitimate interest in the outcome of the litigation; or
>
> (c) there is no realistic possibility that the administration of justice may suffer as a result of the assignment.

12.111 Chua JC observed (at [43]) that while (a) and (b) are well established exceptions to the general rule, (c) embraces a broader approach that requires the court to weigh the relevant and competing policy concerns, namely:

> (a) whether the assignment conflicts with existing public policy that is directed to protecting the purity of justice or the due administration of justice, and the interests of vulnerable litigants; and
>
> (b) the policy in favour of ensuring access to justice.

12.112 Applying this last test to the facts, Chua JC found that there was nothing in the Assignment Agreement that rendered it objectionable on policy grounds. In particular, there was no risk of compromising the purity of justice or the interests of the claimant since the liquidators retained full control of the proceedings and the funders' consent was only required for the choice of solicitors and the settlement or discontinuance of claims. At the same time, the agreement entails clear benefits: the company would be able to pursue various claims which it could not otherwise do, and the recovery (not being illusory) would augment the assets distributable to creditors. The fact that the funders would recover no more than what they had actually expended, and only after the company has been repaid for the amount it co-funded, was another factor that weighed in favour of upholding the agreement. Clearly, therefore, the Assignment Agreement would materially enhance the company's access to justice with little or no adverse effect on the course of justice. In addition, Chua JC was also prepared to uphold the agreement on the more traditional ground that the funders, not being disinterested third parties but shareholders and residual owners of the

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company's assets, would undoubtedly have legitimate interests in the successful prosecution of the company's claims.

12.113 *Vanguard Energy* is, in one sense, a straightforward case because the assignment in question was made in the context of corporate insolvency. The benefits of litigation funding in this context are particularly well-recognised: any risk of abuse or exploitation is minimised through the mediation of insolvency practitioners who are not only well-versed in legal issues but are also legally obliged, as fiduciaries, to negotiate for such terms as would best promote the company's (*ie*, creditors') interests. Indeed, it is for these reasons that even third party litigation funding for insolvent companies is uncontroversial in leading jurisdictions such as UK and Australia. Seen against this background, the result in *Vanguard Energy* appears unremarkable: it did no more than affirm a settled practice.

12.114 What is less clear, and more pertinent for present purposes, is whether Chua JC's observations also signified the dawn of a more flexible policy-based approach in the general application of the doctrine. To recall, Chua JC had expounded the balancing of competing policies as one test for determining whether an agreement savoured of maintenance and/or champerty. However, his Honour's exposition of this approach suggests that it is an overriding, rather than merely an alternative, test. That would mean, for instance, that it is not always sufficient to establish that the funder has legitimate interests in the claims being pursued. Even if such interests exist, it may sometimes still be necessary to ask whether the agreement does in fact conflict with the policy concerns underlying the doctrine of maintenance and champerty. This may be demonstrated, as Chua JC did, by the facts of *R (Factortame Ltd) v Secretary of State for Transport, Local Government and the Regions (No 8)* [2003] QB 381. There, a firm of accountants agreed to fund its clients' legal suits when the latter could no longer afford to do so. As these clients owed the firm unpaid accounting fees, the firm, as a substantial creditor, clearly had legitimate interests in the successful prosecution of the legal suits. Nevertheless, this was not a factor that aided its case, since those same interests may also tempt it to influence the outcome of the litigation. Instead, it was on the basis of other evidence that the English Court of Appeal concluded that the funding agreements would not tempt the accountants to interfere in the legal proceedings improperly or dishonestly.

12.115 A more significant implication of the policy-balancing approach as endorsed by Chua JC is that it may enlarge the range of permissible funding agreements. For while previously the doctrine of maintenance and champerty operated to void all funding agreements unless they fall within the limited proprietary or legitimate interest exceptions, the new approach may justify such agreements even in the absence of such

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interests. This would be so if it is established that the agreement is struck on terms that would effectively increase the claimant's access to justice without also threatening to sully the purity of justice. Whether or not *Vanguard Energy* has indeed paved the way for such development remains to be seen. It is worth noting that the Court of Appeal's policy-focused analysis in the earlier decision of *Lim Lie Hoa v Ong Jane Rebecca* [1997] 1 SLR(R) 775 would lend some oblique support for such a development.

12.116 Another category of contracts that may be rendered illegal and unenforceable for offending public policy is those seeking to oust the court's jurisdiction. However, an attempt to avoid a contractual restraint on this ground failed in *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd* [2015] 3 SLR 1041 ("*CKR*"). Here, the Court of Appeal held that a contractual provision excluding a contractor's right to restrain a beneficiary from calling on a performance bond on the ground of unconscionability was *not* an ouster clause and could not therefore be invalidated on this ground. The significance of this decision for banking practice in Singapore has already been incisively discussed in last year's review (see (2014) 15 SAL Ann Rev 73 at 91–95, paras 5.36–5.43). What remains to be noted here is the court's cautionary reminder that this category of illegality is of a narrow ambit so it would be a rare and exceptional case where the plea would succeed. For that reason, the court would also be slow to construe limitations on rights and remedies as ousters of the court's jurisdictions. Such provisions are, in the court's view, more appropriately analysed as exclusion or limitation clauses, which may attract scrutiny under UCTA.

12.117 In deciding whether the no injunction clause was an exclusion rather than an ouster clause, the Court of Appeal drew a distinction between a clause that merely restricts or excludes a common law remedy, and one that denies *access* to the courts: *CKR* at [19]. A restriction on a claimant's right to injunctive reliefs is of the former characterisation because it did not in fact deny his access to the court. This analysis may suggest that an exclusion of a secondary (*ie*, remedial) right will rarely, if ever, constitute an ouster clause. In reality, however, this distinction between primary and secondary rights may not always be obvious or helpful. If a contractor had also agreed not to seek injunction on the ground of fraud, would such a restriction still qualify as an (relatively benign) exclusion clause? Ultimately, it would seem that a value judgment of the right given up by the constrained party cannot be avoided. In *CKR*, the Court of Appeal was clearly influenced (at [31]) by the fact that performance bonds are often intended to be "good as cash". This factor militates against a construction that would shackle the holder's right to call on the bond. However, a different result may be obtained in a case where the remedy constrained relates to a more fundamental right or interest, such as damages for injury to bodily

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integrity. It is also conceivable that clever drafting can dress an ouster as an exclusion clause, the effects of which is no different from a denial of access to the courts.

12.118 The case of *Lim Beng Cheng* (above, para 12.1) has already been considered in connection with the formation of contracts (see paras 12.1–12.5 above). Illegality was also raised in this case as the defendant had argued that the agreement in question – which originated from a sale and buy-back of an option granted over a property ("the April 2008 Option") – was in fact a disguised loan amounting to an illegal moneylending contract under the Moneylenders Act (Cap 188, 2010 Rev Ed) ("MLA"). This would suggest that the transactions between the parties were in truth a *sham*, so that what appeared as a sale and purchase was in fact a loan. Judith Prakash J categorically rejected this argument. Her Honour approached the issue by first considering whether the agreement (or more accurately, the transactions culminating in the agreement) was even a loan to begin with, for obviously there can be no moneylending without lending. For this purpose, Prakash J identified the applicable principles to be:

> (a) The proper approach in determining the true nature of the transaction is to look at the substance, as opposed to the form (*Lim Beng Cheng* at [64], citing *E C Investment Holding Pte Ltd v Ridout Residence Pte Ltd* [2012] 1 SLR 32 ("*E C Investment*") at [61]).
>
> (b) This may require the court to go beyond the documents and examine the parties' position and relationship in the context of the entire factual matrix (*Lim Beng Cheng* at [66], citing *City Hardware Pte Ltd v Kenrich Electronics Pte Ltd* [2005] 1 SLR(R) 733 at [24]).
>
> (c) However, the transaction generally reflects its substance so "there is a very strong presumption that parties intend to be bound by the provisions of agreements which they enter into" (*Lim Beng Cheng* at [65], citing *Chng Bee Kheng v Chng Eng Chye* [2013] 2 SLR 715 at [51]).
>
> (d) For that reason, the court would not normally look past the form unless there is cogent evidence to suggest the transaction was a sham (*Lim Beng Cheng* at [65], citing *Sheagar s/o TM Veloo v Belfield International (Hong Kong) Ltd* [2014] 3 SLR 524 ("*Sheagar*") at [81]).

12.119 Applying these principles, Prakash J found that the agreement in question was not tainted by illegality because the April 2008 Option was not a disguised loan but a genuine sale and buyback. Constraint of space does not permit a detailed account of the learned judge's

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reasoning, but what may be usefully noted are those features held not to constitute sufficient evidence of a sham. These include:

(a) the fact that the market price exceeded the purchase price;

(b) the unusually high option price; and

(c) the fact that the option holder was guaranteed a gain.

Significantly, Prakash J also drew support for her conclusion from an examination of the surrounding circumstances including the parties' post-contractual conduct. For example, the fact that the parties had subsequently negotiated for the plaintiff to waive his rights under the option, and entered into an agreement to that effect, was good evidence that they had always regarded the April 2008 Option to be genuine. At first blush, this reliance on post-contractual conduct may appear to conflict with the general principle that contracts are to be construed at the time when they were made and not thereafter (though this principle is by no means completely settled: see discussion in paras 12.35–12.38 above). However, Prakash J's approach is consistent with that adopted by the Court of Appeal in *E C Investment*. The reference to post-contractual evidence in this context may, exceptionally, be justified because where a *sham* is alleged, the most cogent evidence of the parties' true intention is usually found outside the agreement. Hence, if an agreement is, on its face, structured as a sale, the only way to prove it is a loan would be to examine the circumstantial evidence, including the parties' post-transaction conduct. (For a helpful analysis of the intricacies of re-characterisation, see Hans Tjio, "When is an Elephant a Bird?" (2006) 18 SAcLJ 473.)

12.120 The finding that no lending was involved effectively disposed of the arguments concerning MLA. However, Prakash J went on to consider the application of MLA in the interest of completeness. Although the plaintiff did not qualify as an excluded moneylender (since he had transacted in his personal capacity and not in the course of his business), the learned judge found he has not in any event contravened MLA since he was not, as a matter of *fact*, carrying on the business of a moneylender. This was because (applying the test laid down by Belinda Ang Saw Ean J in *Mak Chik Lun v Loh Kim Her* [2003] 4 SLR(R) 338) there was no evidence of any system and continuity in the transactions, or that he was lending to all and sundry so long as he regarded them to be eligible. Quite the contrary, the plaintiff was engaged in a full-time business unrelated to moneylending, and the defendant was the only person with whom he had any financing relations.

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12.121 *Lim Beng Cheng* adds to an important body of cases confirming our courts' pragmatic approach to arguments founded on MLA. While they recognise the undisputed public interests in policing exploitative conduct of unlicensed moneylenders, they are also alert to the risk of the Act being utilised as a means to escape improvident bargains. As the Court of Appeal cautioned in *Sheagar* at [81], "[the] MLA must not be seen by desperate defendants as a 'legal panacea' to stave off their financial woes". Thus, in a case such as *Lim Beng Cheng*, where the parties were seasoned businessmen with access to legal advice, it would be extremely arduous to convince the court to re-characterise the transactions so as to bring them within the remit of MLA. The presumption that form coincides with substance would in such an instance be especially difficult to displace.

12.122 In the context of restraints of trade, it is well established that the unreasonable part(s) of the covenant may sometimes be severed by applying the "blue pencil test" so as to preserve the enforceability of the non-offending portion(s). It is, however, uncertain whether this doctrine applies only to restrictive covenants, or generally to all forms of illegality. In *Choo Liang Haw v Chua Seet Mui* [2015] 2 SLR 931, the High Court applied this doctrine to strike out certain clauses (the "Objectionable Clauses") of a collective sale agreement that sought to impose penal obligations on subsidiary proprietors ("SPs") who did not agree to a proposed collective sale. Although the court also cited s 84A(5A) of the Land Titles (Strata) Act (Cap 158, 2009 Rev Ed) ("LTSA") as an alternative source of authority for striking down the Objectionable Clauses, the court clearly assumed that the blue pencil doctrine was of general application.

12.123 In *Lim Li Ming Dominic v Ching Png Sim Sally* [2015] 5 SLR 989 ("*Lim Li Ming Dominic*"), the Court of Appeal disagreed with the lower court as to the precise effects of the impugned clauses. In its view, these clauses, being objectively unfair and prejudicial to the non-consenting SPs, effectively tainted the transaction with bad faith. That being the case, the court was obliged to refuse the collective sale application. It has no discretion, whether under s 84A(5A) of LTSA or at common law, to "cure" the bad faith by purging or "blue-penciling" the offending clauses. In respect of the common law doctrine, the court noted it has traditionally been applied mainly in the sphere of restraint of trade, and uncertainty remains as to whether it could also be applied to other forms of illegality. Possibly, the doctrine only applies to those forms of unlawful conduct (*eg*, restraints of trade) that rank low on the scale of illegality. In any event, there was, in the court's view, no possibility of applying the blue pencil test to the present context. This was presumably because the statutory context has clearly precluded such application.

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12.124 *Lim Li Ming Dominic* thus leaves open the question as to the precise scope of the blue pencil doctrine. Nevertheless, the generally cautious tenor of the court's observations, together with their previous hesitance in endorsing "notional severance", would suggest that our courts would be slow to extend the doctrine to novel contexts. The desire to uphold bargains need always to be judiciously balanced against the risk of rewriting the terms of such bargains.

Discharge by breach of contract

Elective theory of discharge as applied to employment contracts

12.125 In 2012, the UK Supreme Court handed down its decision in *Societe Generale v Geys* [2013] 1 AC 523 ("*Geys*") in which the majority clarified that, where an employment contract is breached by one of the parties thereto, discharge by reason of such breach arises at the election of the other party to that contract, just as it is in all other kinds of contract. Therefore, even an extremely serious breach does not bring the contract to an end automatically – it is always open to the other party to keep the contract on foot, at least in principle.

12.126 In its decision in *Schonk Antonius Martinus Mattheus v Enholco Pte Ltd* [2015] SGCA 65 ("*Schonk (CA)*"), though it makes no reference to *Geys*, it would appear that the Court of Appeal has reached a similar conclusion. This case involved massive breaches of the duties of fidelity and loyalty owed by an employee ("Mattheus") to his employer ("EPL").

12.127 In this case, it was established at first instance that Mattheus had, whilst employed by EPL, diverted business opportunities away from EPL to a company he had set up himself and which he controlled: see *Enholco Pte Ltd v Schonk, Antonius Martinus Mattheus* [2015] SGHC 20. At first instance, however, the trial judge had disallowed a counterclaim by Mattheus in respect of unpaid salary totalling $60,000. The trial judge had also awarded a conventional sum of $50,000 in respect of EPL's claim for damages for loss of future profits it would have earned, but for Mattheus's diversionary activities: see [2015] SGHC 108. Both Mattheus and EPL appealed against the trial judge's decisions on these points.

12.128 On appeal, the Court of Appeal held (at [24]–[26]) that the trial judge need not have limited EPL's claim for loss of future profits to a conventional figure of $50,000.

12.129 More interestingly in the present context, however, the Court of Appeal also allowed Mattheus's appeal against the decision in the court below not to allow his counterclaim for unpaid salary. Thus (at [15]):

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> In our judgment, an employer may claim damages for any breach of duty by its employee but such a breach will not by itself disentitle the employee to his or her salary. Rather, the employer may make a deduction from the salary in respect of such loss as it proves it has suffered by reason of the employee's breach (*Sagar v H Ridehalgh and Son, Limited* [1931] 1 Ch 310 at 325).

12.130 The Court of Appeal upheld (at [8]) the finding in the court below that Mattheus remained employed by EPL until 24 August 2012 when his employment was "terminated"; although the precise basis for this termination, *eg*, whether it was pursuant to a contractual provision allowing for unilateral termination of employment by the employer with notice or for cause, was not made clear in any of the grounds of decision either at first instance or on appeal.

12.131 The Court of Appeal appears, however, to have accepted (at [16]) Mattheus's contention that such action by EPL amounted to a repudiatory breach on its part. Further, the Court of Appeal found (at [16]) that Mattheus had accepted this repudiatory breach on the part of EPL from June 2012 onwards, which was when, "he, by his own admission, state[d] that he ceased to regard himself as an employee [of EPL]".

12.132 While the details as to whether and how such acceptance of repudiation had been communicated to EPL are not clearly explained in the report (perhaps owing to the grounds of decision having been handed down *ex tempore* by the Chief Justice), what seems relatively clear is that this decision cannot be consistent with the view that, exceptionally, an employer's repudiatory breach of an employment contract automatically discharges it (as Lord Sumption, the dissentient in *Geys* (above, para 12.125), sought to argue). Rather, the Court of Appeal's decision is more consistent with the majority position in *Geys*. Accordingly, though some doubts may remain on the facts of this case as to questions of communication of the employee's election to accept a repudiatory breach (leading to its discharge) or to reject it (therefore keeping it on foot), *Schonk (CA)* (above, para 12.126) may stand for the proposition that employment contracts are to be treated no differently from others in so far as discharge for repudiatory breach remains a matter of election on the part of the party on the receiving end of the repudiation.

Anticipatory repudiatory breach where the party not in breach has no outstanding duties to perform under the terms of the contract

12.133 In *The STX Mumbai* [2014] 3 SLR 1116, the High Court questioned whether a contracting party who has no outstanding duties to perform under that contract may discharge that contract by reason of

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an anticipatory repudiatory breach by the counter-party. Judgment in the appeal from that decision has now been handed down: *The STX Mumbai* [2015] 5 SLR 1 ("*STX Mumbai (CA)*").

12.134 The doubts raised by the High Court were discussed at length in last year's review, (2014) 15 SAL Ann Rev 217 at 257–260, paras 12.117–12.130, and the facts of the case were set out at paras 12.115–12.116, so it is not necessary to go over them here.

12.135 The Court of Appeal rationalised the doctrine of anticipatory repudiatory breach as being, in essence, an *actual* breach: "[i]f it is the case that the defendant has evinced a clear intention that it will not perform its obligations under the contract, then we see little reason why this very fact might not itself form the basis for holding that, in principle and logic, an actual breach has, in substance, occurred – notwithstanding that the time for the defendant's performance has yet to arrive under the contract." Consequently, "it would not matter whether the contract was executed or executory" [emphasis in original omitted]: *STX Mumbai (CA)* at [51]

12.136 For present purposes, it is sufficient to note that the Court of Appeal has largely rejected the concerns raised in the High Court and has concluded that the doctrine of anticipatory repudiatory breach may be relied on by a party who has no outstanding duties to perform under that contract. Consequently, the Court of Appeal has confirmed that "the doctrine of anticipatory breach applies to both executed and executory contracts" and, for the avoidance of doubt, the Court of Appeal also stated (at [63]) that in principle, the doctrine also applies to unilateral contracts, as well.

12.137 In so doing, the Court of Appeal cited with approval the analysis in Qiao Liu, *Anticipatory Breach* (Hart Publishing, 2011) on the applicability of the anticipatory breach doctrine to both executed and executory contracts, as well as that in John W Carter, "The Breach of Unilateral Contracts" (1982) 11 Anglo-American L Rev 169, as to the applicability of the anticipatory breach doctrine to unilateral contracts.

12.138 Whilst recognising that it was possible to view an anticipatory breach as amounting to a breach of an implied term in law that the parties are not to act in such a way as would render the other's performance of its obligations towards completion of the contract an exercise in futility (at [45]), the Court of Appeal (at [48]) was concerned that this approach could be criticised as being somewhat artificial. If so, by way of alternative, the Court of Appeal reasoned (at [51]) as follows:

> If it is the case that ***the defendant*** *has* ***evinced a clear intention that it will <u>not</u> perform its obligations under the contract***, then we see little

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> reason why ***this very fact*** might not ***itself*** form ***the basis for holding that, in principle and logic, an <u>actual</u> breach has, in <u>substance,</u> occurred – <u>notwithstanding</u> the fact that the time for the defendant's performance has yet to arrive under the contract***. The *defendant* is *not prejudiced* simply because its conduct clearly signals that it would not be performing its obligations under the contract. … If … there is … *no prejudice* involved, then there is … nothing preventing the court (in both principle and logic) from utilising ***<u>the defendant's conduct</u>*** as itself evincing ***a present (*ie*, actual) breach of its obligations under the contract – albeit notified in advance to the plaintiff***. This seems to us to be a ***<u>much less convoluted way</u>*** of understanding the basis underlying the doctrine of anticipatory breach, whilst simultaneously avoiding the artificiality surrounding the use of the device of the implied promise. [emphasis in original]

12.139 The above analysis appears to provide a short-cut to avoid the need to resort to the imposition of an appropriate implied term to rationalise how "anticipatory breaches" operate. Though presented as a simpler and less artificial way of rationalising the outcome in a case where a party who has no outstanding obligations under a contract seeks to prematurely determine the contract on account of the counter-party's repudiation of its outstanding contractual obligations by recasting the counter-party's repudiation as an actual, present breach by reason of that repudiation in and of itself, a puzzle remains: in such circumstances, what has the counter-party *presently* breached by such repudiation?

12.140 If *A* has promised *B* that he will start painting *B*'s house in a fortnight's time, and complete the work one week thereafter, when *A* informs *B* in no uncertain terms the following day that under no circumstance will he start painting *B*'s house as had been promised, what has *A breached* at the time of the repudiation? The act of commencing work still lies in the future, as does the act of completing works – so there cannot be any non-performance of those acts whose performance is only due sometime in the future. Yet the Court of Appeal assures us that the present repudiation amounts to a present breach – but what of? It seems that what is breached is the *promise* to so act in the future, and that is enough to generate liability for breach of contract.

12.141 The point of a promise is that the promisor undertakes to ensure that that which it has promised *will* come about, that the promised state of affairs *will* ensue. Almost invariably, in order for that state of affairs to ensue, it will be necessary that the promisor act, and refrain from acting, in certain ways in the interim. For example, the promisor must *not* act in such a way in the meantime as would *prevent* that promised state of affairs from arising – for to do so would be to act in a way that would lead to a breach of its promise. On a more traditional analysis, it follows that every express promissory term in a

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contract logically entails within it an implicit promise that the promisor will *not* act in such a way *in the meantime* as would prevent that promised state of affairs from arising.

12.142 Thus, precisely as was held in *Hochster v De La Tour* (1853) 2 El & Bl 678 at 689; 118 ER 922 at 926, the genesis of the doctrine of anticipatory breach:

> [W]here there is a contract to do an act on a future day, there is a relation constituted between the parties in the meantime by the contract, and that they impliedly promise that in the meantime neither will do anything to the prejudice of the other inconsistent with that relation … [F]rom the day of hiring till the day when the employment was to being, [the plaintiff and defendant] were engaged to each other; and it seems to be a breach of an implied contract if either of them renounces the engagement.

12.143 It may be, therefore, that the two alternative grounds set out by the Court of Appeal for its decision are, perhaps, merely two different ways of saying precisely the same thing. In any event, it is clear that the end-results of the two approaches, the traditional "implied term" approach and the alternative "breach of promise" approach proposed by the Court of Appeal lead to the same conclusion: an anticipatory breach *is* an actual, present breach.

12.144 Notwithstanding the above, the Court of Appeal ultimately concluded that the court below ought not to have struck out the appellant's action for repudiatory breach by the respondent by reason of the insolvency of a company related to it. The Court of Appeal agreed with the court below that, in principle, the onset of insolvency in and of itself could not amount to an anticipatory breach. However, the onset of insolvency within certain factual contexts could lead to situations where a contractual promisor would be disabled from performing its part of the contractual bargain. Therefore, it was not completely unarguable that the insolvency of a company related to the respondent would lead to its being unable to make timely payments under its bunker contracts with the appellant. Accordingly, the Court of Appeal (at [79]–[89]) reversed the decision in the court below to strike out the appellant's claim based on anticipatory breach as being legally unsustainable.

Remedies

Basis for assessing damages for breach of contract for sale of goods

12.145 In *Gimpex Ltd v Unity Holdings Business Ltd* [2015] 2 SLR 686 ("*Gimpex v Unity*"), the Court of Appeal had to consider what the

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appropriate basis for assessing damages for losses arising from breach of warranty in a sale of goods contract should be.

12.146 In this case, the respondent ("Gimpex") had contracted to purchase 41,150 metric tonnes of high quality coal from the first appellant ("Unity") for delivery in Karachi at a contract price of US$66 per metric tonne ("the Contract Price"). In May 2012, Gimpex rejected the coal on delivery, contending that it was of much lower quality than that contractually specified, and then launched legal proceedings against Unity for, *inter alia*, breach of contract.

12.147 At first instance, the trial judge held that Gimpex had established that the coal supplied by Unity was of much lower quality than that specified in the contract of sale, and ordered damages for such breach of warranty by Unity to be assessed by the Registrar.

12.148 On appeal, the Court of Appeal upheld the finding below as to Unity's breach of warranty. It then proceeded to assess the damages payable to Gimpex as both parties had adduced evidence and made submissions on this issue in the court below, instead of remitting it to the Registrar: *Gimpex v Unity* at [194].

12.149 The complication in this case was that in reliance on its contract with Unity, Gimpex had contracted to sell 41,150 metric tonnes of coal of the same quality as it had contracted to purchase from Unity to a subsidiary corporation controlled by a third party ("Awan") at a price of US$68 per metric tonne. This was less than the market price of the contracted-for quality of coal upon its delivery in May 2012 (which the Court of Appeal held was US$83 per metric tonne): *Gimpex v Unity* at [221].

12.150 Relying on s 51(3) of the Sale of Goods Act (Cap 393, 1999 Rev Ed) ("SOGA"), Gimpex submitted that its damages should be quantified by reference to the difference between the market price of the contracted-for quality of coal and the Contract Price.

12.151 However, relying on the fact that Gimpex had failed to perform its obligations to Awan's subsidiary and so, had not been able to earn the US$68 per metric tonne that would have been payable under that contract, and also on the fact that no legal proceedings had been brought against Gimpex in respect of its breach of that contract, Unity contended that damages ought to be awarded simply by reference to Gimpex's loss arising from its inability to fulfill that contract, coupled with an indemnity should legal proceedings be brought against Gimpex in respect of that breach.

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12.152 The Court of Appeal rejected Unity's submission and followed the position set out in the House of Lords decision in *Williams Brothers v Ed T Agius, Limited* [1914] AC 510. In particular, reliance was placed on Lord Dunedin's speech (at pp 522–523):

> [W]hen there is no delivery of the goods the position is quite a different one. The buyer never gets them, and he is entitled to be put in the position in which he would have stood if he had got them at the due date. That position is the position of a man who has goods at the market price of the day — and barring special circumstances, *the defaulting seller is neither mulct in damages for the extra profit which the buyer would have got owing to a forward resale at over the market price (Great Western Ry Co v Redmayne), nor can he take benefit of the fact that the buyer has made a forward resale at under the market price.* [emphasis added]

12.153 The Court of Appeal noted that matters could be different, had Gimpex and Unity understood at the time of contracting that Gimpex had bought the coal specifically to fulfill its contractual commitment to Awan's subsidiary to provide coal of the same quantity and quality, and if the contract between them had provided for sub-sales down the line. But on the facts, the contract between Gimpex and Unity made no reference to sub-sales, and Unity only came to know of the terms of the contract between Gimpex and Awan's subsidiary some time afterwards. So there was no basis for Unity's contention: *Gimpex v Unity* at [216].

12.154 Absent such circumstances, the *prima facie* position set out in s 51(3) of SOGA prevailed. In short (at [215]):

> Gimpex should be put in the position as if the defendants did not breach the Contract. That means that Gimpex should have obtained the coal of the quality specified in the Contract, and if there is an increase in the market value of the coal from the time of contracting and the time of delivery, then Gimpex must be compensated on the basis of the coal having a higher value. As it is undisputed that there is a market for the coal at the time of the breach, it should be clear that the measure of damages should be the difference between the Contract price and the market price of the coal at the time the coal ought to have been delivered.

12.155 This being the case, it was unnecessary for the Court to address the question as to whether an indemnity might be ordered in respect of such liability as Awan or Awan's subsidiary might bring against Gimpex. The propriety of such orders of indemnity was, however, examined by the Court of Appeal in *Freight Connect (S) Pte Ltd v Paragon Shipping Pte Ltd* [2015] 5 SLR 178 ("*Freight v Paragon*").

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Orders of indemnity for potential liability to third parties arising out of the defendant's breach of contract

12.156 In *Freight v Paragon*, the appellant ("Freight Connect") had contracted the respondent ("Paragon Shipping") to provide a vessel to ship cargo from Nanwei to Singapore. Ultimately, it was agreed that the "AAL Dampier" would be supplied for this purpose.

12.157 In reliance on this, the respondent entered into an agreement with FLS Thailand Co, Ltd ("FLS") to charter the AAL Dampier (whose vessel it was) on terms similar to those agreed between the respondent and the appellant save for the freight and amounts payable per day *pro rata* for detention, the respondent's margin on these two back-to-back charterparties being US$6,000 on the freight and US$5,000 per day *pro rata* for detention.

12.158 Due to the appellant's failure to provide certain shipping and customs documents to the port authorities, the AAL Dampier lost its berth booking at Nanwei Port and the intended cargo could not be loaded on her: that cargo was ultimately loaded on another vessel. The respondent then brought legal proceedings against the appellant claiming damages in the sum of US$236,000 comprising US$161,000 for freight and US$75,000 for detention. The respondent also sought an order for the appellant to indemnify it against any liability it might face *vis-à-vis* FLS.

12.159 At first instance, the trial judge awarded the respondent US$6,000 being the net profit it would have earned on the back-to-back charterparties, and US$75,000 in detention charges. The learned judge also granted the order of indemnity sought by the respondent: see *Paragon Shipping Pte Ltd v Freight Connect Pte Ltd* [2014] 4 SLR 574. The appellant then appealed against the whole of the trial judge's decision.

12.160 On appeal, the court upheld the trial judge's decision on the quantum of damages to be paid by the appellant to the respondent for loss of profit (at [36]) and in respect of the detention charges (at [37]–[44]). However, it held that on these facts, it was inappropriate for the trial judge to have made the order of indemnity given that there was nothing to indicate that *any* claim might or would be made by FLS against the respondent as at the time of trial.

12.161 The Court of Appeal noted (at [53]) that the issue as to whether an indemnity might be ordered on facts such as these had been decided by the Federal Court decision of *Eastern Oceanic Corp Ltd v Orchard Furnishing House Building Co* [1965–1967] SLR(R) 25 ("*Eastern Oceanic*"), being an appeal to the Federal Court from

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Singapore. In that case, the Federal Court examined the English position as set out in *Trans Trust SPRL v Danubian Trading Co Ltd* [1952] 2 QB 297 ("*Trans Trust*") where the English Court of Appeal disapproved of the decision of Lewis J in *Household Machines Limited v Cosmos Exporters Limited* [1947] KB 217 ("*Household Machines*"). Ultimately, the Federal Court agreed with the English Court of Appeal, stating (at [18]):

> In that case [*ie*, *Trans Trust*], Somervell LJ and Denning LJ disapproved a declaration of indemnity in respect of a possible claim by a third party who had not at that juncture made a claim. Somervell LJ pointed out that, when the stage was reached when a precise claim could be made by the plaintiff against the defendant, *difficult questions might arise depending on differences in the contracts between plaintiff and defendant as compared with those made between the plaintiff and the third party (a relevant consideration in the present case) and on such questions as the obligation of the third party to mitigate damages*. Logic is on the side of the views expressed by Somervell LJ and Denning LJ that *the issue should be reserved with liberty to apply for directions when the real issues can be determined and damages quantified*. The order of the High Court should therefore stand. Presumably, the situation in regard to claims by third parties should soon be clarified once the work to be completed by the appellant has been done. [emphasis added]

12.162 The Federal Court explained (at [17]) that the outcome in *Household Machines* (in which an indemnity was ordered by Lewis J) could be rationalised because "the third party [in *Household Machines*] had already made a claim, but the amount was liable to be increased because of possible claims on the third party by subpurchasers". In cases where no claims had yet to be made, in light of the difficulties identified by Somervell and Denning LJJ in *Trans Trust*, the more appropriate order would be to reserve the damages that the claimant might have to pay third parties.

12.163 The Court of Appeal recognised that since the principle in *Eastern Oceanic* had stood for many years (and the principle in *Trans Trust* had stood for even longer as a matter of English law), it would not reverse that position. Accordingly, it held that the trial judge had erred in granting the order of indemnity since, on the facts as were before the court, FLS had yet to make any claim against the respondent. Indeed, the Court of Appeal observed (at [55]) that it might not even have been appropriate to reserve the question of damages (as had been suggested by the Federal Court in *Household Machines*) noting:

> In the present case, we do not think that a reservation is necessary. It is not necessary for any action by FLS to be heard before the Judge. No claim has been made. If and when FLS brings an action against the

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Respondent, it will no doubt join the Appellant as a third party to the proceedings.

What is lost when a contract is breached?

12.164 The difficult case of *ACB v Thomson Medical Pte Ltd* [2015] 2 SLR 218 involving a breach of a contract to provide in-vitro fertilisation services was heard by the High Court in the early part of 2015. Part of the dispute related to a breach of contract by the third defendant, the plaintiff's embryologist, who had contracted to fertilise the plaintiff's egg with her husband's sperm. The breach arose when, due to a mix-up, the third defendant fertilised the plaintiff's egg with the sperm of an unrelated stranger. The mistakenly fertilised egg was carried to term by the plaintiff who gave birth to a healthy child ("Baby P") some time later. The error was only realised afterwards when tests were conducted to understand why Baby P's skin tone and hair colour were different from that of the plaintiff, her husband, and their other child (who had also been conceived using a similar in-vitro fertilisation procedure).

12.165 It was clear that the third defendant had committed a breach of her contractual obligations to the plaintiff. The primary issue before the court, however, was whether, as a matter of public policy, damages quantified by reference to the cost of reasonable upkeep of Baby P ought to be permitted. The High Court concluded not.

12.166 The appeal from the decision of the High Court was heard by the Court of Appeal in August 2015, but judgment has yet to be handed down. In its absence, any analysis of the complex questions of public policy and private law doctrine would certainly be premature. Accordingly, comment on this matter will be reserved until the Court of Appeal hands down its judgment.

Contracts involving conveyance of interests in land and the remedy of specific performance

12.167 In *E C Investment* (above, para 12.118), following Canadian and New Zealand authority, Quentin Loh J questioned whether damages were invariably inadequate as a remedy for breaches of contractual obligations to convey an interest in land. In that case, Loh J concluded that that was not so, and that on the facts of that case, damages were an adequate remedy even though the contract breached was a contract for the sale of land. Consequently, Loh J held that it was not appropriate to grant the remedy of specific performance (at [109]) and awarded damages, instead.

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12.168 When the matter went on appeal, the Court of Appeal left the question open, holding that it was not necessary to decide the matter on this point: *E C Investment* at [103].

12.169 The issue has resurfaced in the case of *Lim Beng Cheng* (above, para 12.1), some aspects of which were discussed above in connection with the formation of contracts (see paras 12.1–12.5) and also illegality (see paras 12.118–12.121). As mentioned above, the case concerned an agreement under which the defendant promised to transfer a 46.5% stake in a property to the plaintiff. To be specific, in consideration for the forgiveness of a debt of $279,352 owing due to the plaintiff by the defendant, the defendant would pay the plaintiff a cash amount of $79,352, and the balance of $200,000 would be "converted into [a] 46.5% share of the property at Blk 803 King George's Ave #02-160": *Lim Beng Cheng* at [46].

12.170 As mentioned above (at para 12.1), Judith Prakash J rejected the defendant's contention that this agreement was just a proposal: it was a binding contract as the plaintiff had furnished good consideration in exchange for the defendant's promise to cause the plaintiff to be vested with a share in the legal title of the King George Avenue property. Accordingly, the defendant breached the contract when he failed to give effect to his promise. The question therefore arose as to whether an order of specific performance ought to be issued to compel him to perform his promise, or whether damages might be the more appropriate remedy.

12.171 After noting the positions that had previously been adopted in cases like *E C Investment* by Loh J and the other Singaporean, Canadian and New Zealand authorities that had been referred to in that decision, Prakash J noted (at [104]) that the Court of Appeal had left the question open, and then set out the following view:

> Post-*E C Investment*, the status of the more restrictive approach in Canada and New Zealand in Singapore is not entirely clear. The Court of Appeal certainly did not rule out the possibility that Singapore law may follow the jurisprudence of Canada and New Zealand and it was careful not to express a positive view either way on the preference shown by Chan J, Lee JC and Loh J for the Canadian and New Zealand approach. From academic analysis of Canadian decisions (see Robert J Sharpe, *Injunctions and Specific Performance* (Canada Law Book, Looseleaf Ed, November 2014 release)), it appears that the Canadian authorities view uniqueness as a matter of degree. Even where the purchaser's interest is purely commercial, an inquiry is undertaken as to whether the uniqueness of a property makes an assessment of its income-producing qualities difficult. In my view, in modern conditions of huge high-rise developments accompanied by a substantial market for the acquisition of investment property, this is a more sensible and nuanced approach than the unquestioning

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> assumption underlying the traditional English and Australian approach that land is unique such that damages will almost invariably be an inadequate remedy.

12.172 On the facts, Prakash J noted (at [107]) that the plaintiff himself had acknowledged that his interest in the unit was, "primarily monetary in the form of an investment and from that perspective damages should be an adequate remedy" and that "[a]ltogether the plaintiff agree[d] that in the circumstances of this case damages in lieu of specific performance may be the more equitable and practical remedy". The learned judge also noted that there would be prejudice to third parties if an order of specific performance were ordered (since a third party, one NC Tan, also held a small percentage interest in the legal title to the subject property). And so (at [112]):

> Ordering specific performance would, therefore, force three hostile parties to work together and this would likely end up in stalemate and further resort to the court to solve disagreements amongst them. This is therefore another important factor in favour of [*sic*] granting specific performance.

(From the context, it would appear that the phrase "in favour of" may have been erroneously inserted instead of the word "against").

12.173 Ultimately, Prakash J decided (at [119]) that specific performance ought *not* to be ordered:

> On the basis that damages are an adequate remedy and that an order of specific performance would lead to a stalemate between three hostile parties, I order damages in lieu of specific performance.

Consequently, Prakash J awarded (at [127]) the plaintiff "damages in lieu of specific performance", and held that such damages were to be assessed "as at the date of judgment" (at [124]) and not the date of breach (for reasons outlined at [120]–[124]).

12.174 It is significant that Prakash J's order was for damages in lieu of specific performance, and *not* damages at common law. Notwithstanding Prakash J's recognition that damages at common law might well be an adequate remedy, and so would preclude access to the court's concurrent equitable jurisdiction over contract, Prakash J's order tells us that she must have been of the opinion that the court's equitable jurisdiction *had* been engaged, even so. Had the court's equitable jurisdiction not been engaged *at all*, no damages *in lieu* of specific performance could have been ordered pursuant to s 18(2), read with the First Sched, para 14, Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed).

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12.175 As explained in *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) at para 23.175:

> [I]n England, courts of equity have long been statutorily empowered to award damages in lieu of or in addition to a decree for specific performance or injunction, in cases where the dispute *would* have fallen within the equitable jurisdiction of the court, but where the remedy was refused on discretionary grounds. [emphasis in original]

12.176 The statutory power of a Singapore court to make a similar order appears to be derived from the same basis. If so, by ordering damages in lieu of specific performance, the learned judge must have concluded that the court's equitable jurisdiction *had* been engaged, notwithstanding contract damages being a perfectly adequate remedy. The question, therefore, is where such jurisdiction might be founded?

12.177 In this connection, it may be apposite to highlight certain distinctions within the law which were not brought to the learned judge's attention by counsel. For one, it may be helpful to consider more carefully what *kind* of "specific performance" a purchaser of an interest in land may be seeking.

12.178 Denis Browne, the editor of *Ashburner's Principles of Equity* (Butterworths, 2nd Ed, 1933) ("*Ashburner*"), noted that the principle that equity regards that as done which ought to be done as applied to contracts entails not one, but two conceptions of specific performance: a "strict" or "narrow" sense, and another, "broader" usage.

12.179 The distinction is explained in *Ashburner* (at p 258) as follows:

> If A agrees to sell land to B, either of the parties can come into a court of equity for a specific performance [in the narrow sense] of the contract; and the court specifically performs it, either by ordering A, to convey the land on payment of the purchase-money, or by ordering B to pay the purchase-money on having the conveyance of the land. *If* B *in the case supposed has paid the purchase price, he acquires by payment a proprietary right over the land, the subject-matter of the contract*; and he can enforce his proprietary right by any equitable remedy which his case may require, such as the sale of the land under the order of the court, the appointment of a receiver of the rents and profits, *or the grant of an injunction to restrain* A *from interfering with his enjoyment*. Such relief may be called specific, in the sense that it applies to a specific subject-matter, but it is totally unconnected with the relief given in an action for specific performance in the strict sense. The court is not prevented *where the consideration is executed*, from giving equitable relief, by the fact that specific performance in the strict sense, is impossible. [emphasis added]

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12.180 *Ashburner* finds authority for the proposition that a court may issue an *injunction* to restrain a vendor from "interfering with the enjoyment" of the purchaser *once the purchase price had been paid* so as to vindicate the purchaser's equitable proprietary interest in the subject-matter of the contract of sale in a trio of cases, namely *Frederick v Frederick* (1721) 1 P Wms 710, 24 ER 582 (Ch); (1731) 1 Bro 253, 1 ER 549 (HL); *Coventry v Coventry* (1724) 2 P Wms 222, 24 ER 707 (arguments) (Ch); 1 Stra 596, 93 ER 722 (judgments) (Ch) and *Simultaneous Colour Printing Syndicate v Foweraker* (1901) 1 QB 771. He also makes reference to the Appendix to Richard Francis, *Maxims of Equity* (London: Henry Lintot, 3rd Ed, 1746).

12.181 Presumably, the reference is to the report of the arguments of Lord Cottenham LC, Sir Joseph Jekyll MR, Sir Robert Price and Sir Jefery Gilbert, both Barons of the Exchequer, concerning the defective execution of powers in *The Earl of Coventry's Case* (1667) 1 Eq Ca Abr 349, 21 ER 1094; (1721) Gilb Rep 160, 25 ER 112 (Ch); (1721) 10 Mod 463, 88 ER 811 (Ch); (1722) 9 Mod 12, 88 ER 284 (Ch) which are reproduced towards the end of the book.

12.182 The problem before the court in *The Earl of Coventry's Case* was as follows: the late Earl of Coventry had, on the occasion of his marriage to Anne, the daughter of Sir Strensham Masters, covenanted with Sir Strensham and with Anne that, in consideration of intended marriage and of £10,000 (which was actually paid by Sir Strensham) as Anne's marriage-portion, that he would settle a legal estate on Anne, sufficient to generate an annual income of £500, possession to commence immediately after his death, if she survived him. The particular parcel of land as would be settled for the purpose was not ascertained until some time after the marriage, but due to a series of accidents, the Earl did not manage to settle that parcel on trusts for the benefit of Anne before his death. The issue, therefore, was whether Anne, his widow, had an equitable interest in the said lands as would justify the grant of an equitable remedy to compel the Earl's heir and successor-in-title to convey the legal title in that parcel of land to her (so as to allow her to have possession of the same) in accordance with the covenant in the marriage settlement, or if she should be restricted to a remedy at law for breach of the covenant.

12.183 The court concluded that the facts were such that an equitable remedy should issue. (The facts of the case are probably best summarised in the report in (1721) 10 Mod 463, 88 ER 811 (Ch), although reference to the reports in (1721) Gilb Rep 160, 25 ER 112 (Ch) and (1722) 9 Mod 12, 88 ER 284 (Ch) are useful as they make it plain that the parcel of land in question was held by the Earl of Coventry in fee, and not in fee tail: if the estate in question was entailed,

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the dispute would have been moot as it would not have been possible for the Earl to deal with that estate without first breaking the entail, and the procedure to do so does not appear to have been applied on the reported facts of the case).

12.184 The reasoning of the court, however, is difficult to divine from the nominate reports of *The Earl of Coventry's Case* which have been listed above as they do not reproduce, in particular, the judgments of Baron Gilbert or Baron Price. These are only to be found in the appendix to Francis's *Maxims of Equity*, and so, it is to that that *Ashburner* turns.

12.185 The following extracts from Francis's account of the case are of particular relevance in the present context. First, Baron Gilbert noted (at p 4) as follows:

> Where there is a price paid, and there comes a subsequent marriage, which are the consideration of marriage-articles, I look upon the jointress to be, *eo instanti* that the price is paid, and the articles executed, a purchaser for a valuable consideration. In all cases, where an agreement is entered into in contemplation of a valuable consideration, when *that* is performed, it is but justice and conscience, that the purchaser should have an immediate right and ownership, in what he hath so purchased: And therefore a court of equity, before the execution of any legal conveyance, looks upon the party to be in immediate possession of such estate, and to have a power of devising and giving it away[.] [emphasis in original]

And Baron Price observed (at p 7):

> Now, if notwithstanding any defect in the non-observance of circumstances, the legal estate should not be conveyed in virtue of this power; yet as she paid a valuable consideration, for what was intended to be passed under this power; there is the same foundation for considering her as a *cestuy que trust*, as the other a trustee[.]

12.186 For both Baron Gilbert and Baron Price, the reason for allowing the remedy in equity was because the Earl's widow had furnished *executed* consideration in respect of the covenant by marrying the Earl (and in the eyes of equity, the marriage-consideration was good consideration). Consequently, having had the benefit of such marriage, it would have been unconscionable for the Earl not to perform that which he had covenanted to do. Thus, the equitable jurisdiction would be engaged, and an equitable remedy would have been available to his wife to compel him to perform that which he had covenanted to do during his lifetime, notwithstanding that she might have been able to obtain a remedy at law in damages by way as an alternative. And if that was the case *vis-à-vis* the Earl, then so too his heir: as a volunteer successor-in-title, the Earl's heir could take no better interest that the

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Earl himself would have done. Consequently, it would follow that the Earl's widow was entitled to equitable relief against the Earl's heir, notwithstanding the availability of a remedy at law for breach of covenant.

12.187 For present purposes, it is also helpful to reproduce *Ashburner's* summary of *Frederick v Frederick* which reads as follows:

> In *Frederick v Frederick*, A agreed with the Court of Aldermen in consideration of B marrying him, to take up his freedom of the city within one year. A died after the year without taking up his freedom. It was held, first by Lord Macclesfield, and then by the House of Lords, that A's personal estate was distributable in favour of B and the issue of the marriage as if he had been a freeman at his death. Lord Macclesfield said: 'Where one for valuable consideration agrees to do a thing, such executory contract is to be taken as done, and the man who made the agreement shall not be in a better case than if he had fairly and honestly performed what he agreed to'.

12.188 *Ashburner* emphasises, however, that in *Frederick v Frederick*, *A had* married *B*: the executory consideration which he had given in exchange for the Court of Aldermen's promise to grant him the status of a freeman had become *executed* by the time of his death. The point is most plainly explained (at para 3-235) by the editors of *Meagher, Gummow and Lehane's Equity: Doctrine & Remedies* (LexisNexis Butterworths, 5th Ed, 2015):

> *Ashburner* demonstrated that even the proposition that the right to invoke the remedy [of treating that as done that which ought to be done] in contractual cases depends on the availability of specific performance is true only if 'specific performance is understood to connote that remedy in either its primary or its secondary sense': that is, as a remedy to enforce either a wholly executory or a partly executed contract. For example, the contract in *Frederick v Frederick* … was not specifically performable in the 'primary sense' of that term. The promisor could not be ordered to take up his freedom because by the time of the suit he was dead. Yet the maxim [that equity deems as done that which ought to be done] applied.

12.189 As noted above, in *Lim Beng Cheng* (above, para 12.1), the learned judge ordered damages in lieu *of* specific performance. So far as this rests on the statutory power set out in the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) and so far as invocation of that power assumes that the dispute would have fallen within the court's equitable jurisdiction but where the remedy had been refused merely on discretionary grounds, the making of such an order tells us that the court's equitable jurisdiction to grant specific remedies must, somehow, have been triggered.

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12.190 Given the old English cases discussed above, it would appear that such jurisdiction was engaged on the facts of *Lim Beng Cheng* (above, para 12.1) so far as the "price" for the partial interest in the land in question had been paid once the plaintiff released the defendant from the debt of $237,000, and so provided executed consideration under the contract, leading equity to regard the plaintiff as having an equitable interest in the legal title to the realty in question by operation of the maxim "equity deems as done that which ought to be done".

12.191 If so, the plaintiff would be vested with an equitable interest in the land for *that* reason, and the non-availability of specific performance because damages would be an adequate remedy, even if true, would be irrelevant. Consequently, an *injunction* (*ie*, "specific performance" in the "broader" or "secondary" sense noted in *Ashburner*) could have been issued to preclude the defendant from interfering with the plaintiff's said equitable interest in the land (arising by reason of his having "paid" the price), but because of the factors noted by the learned judge (*eg*, the third party interests that would be affected), this was not an appropriate case for the court to exercise its discretion to make such order, though they were appropriate for the court to make an order for damages in lieu of specific performance.

Punitive damages for breach of contract

12.192 Singapore courts have recognised that punitive damages may be awarded in cases of tortious breach of duty: see, *eg*, *Afro-Asia Shipping Company (Pte) Ltd v Da Zhong Investment Pte Ltd* [2004] 2 SLR(R) 117 at [134], accepting that *Rookes v Barnard* [1964] AC 1129 is good law in Singapore. The question as to whether the same may be awarded where there has been a breach of contract, however, has hitherto remained open: see *MFM Restaurants Pte Ltd v Fish & Co Restaurants Pte Ltd* [2011] 1 SLR 150 ("*MFM Restaurants*"), noting at [53] that: "there is an arguable case, in principle, for the award of punitive damages in contract law … [though the question is] still an open one".

12.193 In *Airtrust (Hong Kong) Ltd v PH Hydraulics & Engineering Pte Ltd* [2016] 1 SLR 1060 ("*Airtrust*"), Chan Seng Onn J took the view that Singapore courts have the power to award punitive damages for breach of contract.

12.194 This may be contrasted with the position in England where the House of Lords in *Addis v Gramophone Co* [1909] AC 488 has commonly been understood to stand for the proposition, *inter alia*, that damages for breach of contract should only be awarded to compensate for loss, and therefore exemplary damages awarded for the purpose not of compensating for the plaintiff's loss but to punish the defendant for

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its actions (hence "punitive" damages) may not be awarded for breach of contract. As the UK Law Commission observed in its report on Aggravated, Exemplary and Restitutionary Damages (Law Commission Report No 247 at p 63, para 1.112):

> Exemplary damages are clearly unavailable in a claim for breach of contract. The leading authority is *Addis v Gramophone Co Ltd*. In that case[,] the House of Lords refused to award any damages – including mental distress damages let alone exemplary damages – for the harsh and humiliating manner of the plaintiff's wrongful dismissal.

A similar understanding of *Addis* may also be found in Lord Steyn's speech (at [15]) in *Johnson v Unisys Ltd* [2003] 1 AC 518:

> The speeches in *Addis's* case are not easy to understand. Two of their Lordships spoke in terms of exemplary damages: see Lord James of Hereford, at p 492, and Lord Collins, dissenting, at pp 497 and 500–501. That could not have been an issue. In English law such damages have never and cannot be awarded for breach of any contract.

12.195 Indeed, it would appear that the same was understood to be the case by Chao Hick Tin JA, delivering (at [55]) the judgment of the Court of Appeal in *Teo Siew Har v Lee Kuan Yew* [1999] 3 SLR(R) 410 ("*Teo Siew Har*"):

> We will begin by first looking at the House of Lords' decision in *Addis v Gramophone Co Ltd* [1909] AC 488, which has been taken to stand for the proposition that damages will not generally be awarded for non-pecuniary loss, in particular, mental distress. In that case, the plaintiff was successful in bringing a wrongful dismissal claim against the defendant. *The Law Lords emphasised that damages for breach of contract were in the nature of compensation, not punishment.* This did not include damages for his injured feelings even if he had been dismissed in a harsh and humiliating manner. [emphasis added]

12.196 Admittedly, the Court of Appeal in *Teo Siew Har* was not primarily concerned with the question as to whether punitive damages could be awarded for breach of contract, as the issue before it was whether damages for mental distress *per se* were available for breach of contract. However, its citation of the above passage in *Addis* without qualification suggests that it may have accepted the English view that contract damages may only be compensatory, and thus may never be punitive.

12.197 Making no reference to these English or Singaporean authorities, the learned judge in *Airtrust* took as his starting point certain observations made more recently by the Court of Appeal (at [53]) in *MFM Restaurants*:

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> Although there is an arguable case, in principle, for the award of punitive damages in contract law (see, for example, Ralph Cunnington, 'Should Punitive Damages be Part of the Judicial Arsenal in Contract Cases?' (2006) 26 *Legal Studies* 369 … and Pey-Woan Lee, 'Contract Damages, Corrective Justice and Punishment' (2007) 70 MLR 887; though *cf* Solène Rowan, 'Reflections on the Introduction of Punitive Damages for Breach of Contract' (2010) 30 OJLS 495), the case law is itself inconclusive (see, for example, Andrew Phang and Pey-Woan Lee, 'Restitutionary and Exemplary Damages Revisited' (2003) 19 JCL 1 at 21–31 and *Cunnington* at 389–393). … The position in Singapore is, not surprisingly, still an open one.

These observations were, however, *obiter*. As the Court of Appeal in *MFM Restaurants* noted (at [52]): "[n]o arguments were made in relation to the award of punitive damages". Furthermore, no reference was made in *MFM Restaurants* to *Teo Siew Har*, either. So it cannot be said that *Teo Siew Har* may have been overruled.

12.198 Relying on this *obiter* passage in *MFM Restaurants*, the learned judge in *Airtrust* expressed the view (at [264]) that:

> Unless there is a Court of Appeal decision ruling out the availability of punitive damages for breach of contract, I am inclined to hold that the court has the power in an exceptional case to award punitive damages in the context of a breach of contract, when the defendant's conduct in breach in the contract has been so highly reprehensible, shocking or outrageous that the court finds it necessary to condemn and deter such conduct by imposing punitive damages.

12.199 To further bolster his view that punitive damages were available as a matter of Singapore law to remedy a breach of contract, the learned judge was content to cite (at [263]) with approval the views set out in:

> (a) Andrew Phang and Pey Woan Lee, "Restitutionary and Exemplary Damages Revisited" (2003) 19 CLJ 1 at 39 [*sic*; the reference should be to "19 JCL 1"], suggests that courts should have a residual power to award exemplary damages for breach of contract in "truly exceptional situations when the defendant's conduct has been outrageous"; and
>
> (b) Ralph Cunnington, "Should Punitive Damages be Part of the Judicial Arsenal in Contract Cases?" (2006) 26 *Legal Studies* 369 at 380, that: "Contracts are frequently broken in circumstances that evoke outrage and require deterrence. All too often compensatory damages are inadequate for this purpose. Surely there is a strong argument that, in such cases, punitive damages should be awarded to effect deterrence."

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In concluding that punitive damages could be awarded for the defendant's breach of contract, Chan J also agreed with the Canadian authorities cited by the plaintiff.

12.200 Among others, one difficulty is that *Teo Siew Har* appears not to have been considered by the learned judge, at all. Consequently, though the learned judge's discussion as to the factual criteria which he relied on to ascertain that this was an appropriate case to award damages is helpful (at [264]–[272]), their authority is doubtful given that the complete bar to such damages which is implicit in the Court of Appeal's judgment in *Teo Siew Har* appears not to have been considered.

12.201 Leaving that aside, although the trial was plainly both exhausting and technically challenging, it is also unfortunate that the trial judge's grounds of decision does not explicitly address the legal arguments which had been put forward in either of the academic papers which the learned judge relied on, or the rationale underlying the Canadian position.

12.202 So far as the Canadian position on punitive damages is concerned, a summary may be found in Gerald H L Fridman, *The Law of Contract in Canada* (Carswell: Toronto, 6th Ed, 2011) at p 708:

> In most of the cases since *Vorvis* [*v Insurance Corp of British Columbia* (1989) 58 DLR (4th) 193 (SCC)] in which that decision has been applied, punitive damages were not allowed. However there is no doubt now that if the situation is one in which the conditions for an award of such damages can be met, a court will do so. The conditions under which such damages will be awarded have been restated by the Ontario Court of Appeal, following *Vorvis*, in two cases [namely, *Marshall v Watson Wyatt & Co* (2002) 209 DLR (4th) 411, and *968703 Ontario Ltd v Vernon* (2002) 22 BLR (3d) 161]. They are: (1) the defendant's behavior must be egregious so as to offend the court's sense of decency; (2) the defendant's behavior must have committed an independent actionable wrong against the plaintiff; (3) such damages must serve a rational purpose because the compensatory damages are insufficient to express the court's repugnance at the actions of the defendant and to punish and deter.

12.203 Thus, as has been noted by Solène Rowan (at 30 OJLS 497) in the notorious case of *Whiten v Pilot Insurance Co* [2002] 1 SCR 595 ("*Whiten*"): "[t]he majority of the Supreme Court of Canada found [Pilot Insurance Co] to have breached its contractual obligation to indemnify the appellant against the insured loss *and also its duty to act in good faith*. Punitive damages were awarded on the basis that its conduct in doing so, being calculated to drive the appellant into a position where she had little alternative but to accept a lower settlement, was reprehensible" [emphasis added]. For a similar reading of *Whiten*,

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see Andrew Phang and Pey Woan Lee, "Exemplary Damages — Two Commonwealth Cases" (2003) 62 CLJ 32 at pp 34–35; Gerald H L Fridman, "Punitive Damages for Breach of Contract — A Canadian Innovation" (2003) 119 LQR 20; and Pey Woan Lee, "Contract Damages, Corrective Justice and Punishment" (2007) 70 MLR 886 at p 901.

12.204 So far as the learned judge in *Airtrust* was minded to follow the Canadian authorities, it is somewhat regrettable that he did not take the opportunity to explain more clearly how, on the facts before him, those facts might have been aligned with the three criteria distilled from *Vorvis v Insurance Corp of British Columbia* (1989) 58 DLR (4th) 193 ("*Vorvis*"). Of course, the Canadian position is not binding on Singapore courts – but the reference to the Canadian position without any indication as to whether its finer points were considered to be relevant in *Airtrust* leaves Singapore law in an unsettled state. In particular, it is not clear how it is that the defendant might be said to have committed an *independent* actionable wrong against the plaintiff, apart from its breach of its contractual duty to design and build the contracted-for components in accordance with the contract specifications – there is no clear finding or mention of the same in the learned judge's grounds of decision.

12.205 With regard the learned judge's reliance on the arguments put forward by Andrew Phang and Pey Woan Lee, it is also to be regretted that no attempt was made to engage with the detail of their arguments, either. In particular, though Andrew Phang and Pey Woan Lee *concluded* that, on their analysis, there were good reasons to suggest that the courts *should* have the power to award punitive damages for breach of contract in exceptional situations where "the defendant's conduct has been outrageous" ((2003) 19 JCL 1 at 69), drawing on the Canadian position set out in *Vorvis*, the two authors were also careful to note the role which the concept of good faith appears to play in this context, remarking that, "[n]otwithstanding the fact that, as a substantive vitiating factor, good faith is (in Commonwealth law at least) still in a fledgling state, … there is no reason why [the concept of good faith] cannot be integrated into the process of ascertaining whether or not exemplary damages should be awarded. Indeed, it is submitted that a situation which merits the award of exemplary damages would … probably (dare we say, necessarily) involve a situation of bad faith in any event" ((2003) 19 JCL 1 at 70).

12.206 Elsewhere, the Court of Appeal has accepted that, in principle, a duty of good faith in the performance of one's contractual obligations may be implied in fact (though not in law): *Ng Giap Hon* (above, para 12.56) at [44]–[97]. If a term to such effect *had* been implied in fact on the facts of *Airtrust* (above, para 12.193) (though nothing in the judgment makes this explicit), one may well conclude that breach of

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such an independent duty (to act in good faith) may be enough to justify the imposition of punitive damages, by analogy with what appears to be the Canadian position.

12.207 This is, of course, mere speculation given that the trial judge did not choose to spend any time on these matters. As the Court of Appeal rightly observed in *MFM Restaurants* (above, para 12.192), this area of law remains in a state of flux. *Airtrust* probably represents a step in the journey towards some greater clarity. And certainly, the arguments against such a move are not few, or inconsequential (see, *eg*, Solène Rowan (2010) 30 OJLS 505–516). So there is certainly much more that remains to be done if the long-standing resistance to punitive damages outside of tort is to be overcome.

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