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Doctrinal basis of delay as a bar to equitable rescission of contracts

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DOCTRINAL BASIS OF DELAY AS A BAR TO EQUITABLE RESCISSION OF CONTRACTS

The 2015 EWCA decision of *Salt v Stratstone Specialist Ltd (t/a Stratstone Cadillac Newcastle)* [2015] EWCA Civ 745 casts doubt on the proposition that an inordinate lapse of time alone could operate as a bar to rescission. The court grounded the operation of delay in the doctrine of laches, but as this paper will find, laches is an unsatisfactory explanation for the effect of mere delay on one's powers of rescission, requiring something more than lapse of time alone. Other competing theories like reference to the Limitation Act 1959 by analogy, and the Sale of Goods Act 1979, have been raised by commentators but each of these prove to be deficient in their own way. In light of their shortcomings, the overlaps between the doctrinal bases and requirements of delay and the other bars to rescission, this paper makes the case for the rejection of mere delay as a bar to rescission, should the issue arise in the Singapore courts. More broadly, the issue of delay is also one that is not adequately addressed in the broader statutory scheme, across the Limitation Act 1959, the Misrepresentation Act 1973, and the Sale of Goods Act 1979.

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I. Introduction

1 The rhetoric of the maxim "equity aids the vigilant and not the indolent" provides an enticing explanation as to why a mere delay exists as a bar to equitable rescission. However, equitable maxims act only as "meta-principles", incapable of laying down a specific or definite principle of law.[1] By itself, this equitable maxim does not offer a doctrinal basis for the effect of delay on one's powers of equitable rescission.

2 *Leaf v International Galleries*[2] ("***Leaf***") stands as the most prominent authority for the proposition that the passage of time alone is

[*] The author would like to thank the editorial team of the Singapore Law Journal for their assistance with this piece. The author also wishes to express his gratitude to Assistant Professor Lau Kwan Ho for his guidance and comments. All errors remain my own.
[1] Kevin Gray & Susan Francis Gray, *Elements of Land Law* (Oxford University Press, 5th Ed, 2009) at pp 71–72.
[2] [1950] 2 KB 86.

sufficient to deny a claimant the equitable remedy of rescission,[3] an authority which has since been doubted in the English courts.[4] Although *Leaf* has only been referred to in the context of the sale of goods locally,[5] there is academic suggestion for its continued application in Singapore.[6]

3 This paper therefore seeks to investigate the tenability of the proposition laid down in *Leaf* in Singapore, through an examination of judicial pronouncements and legislative developments. More specifically, after preliminarily clarifying the differences between rescission at common law and equity in **Part II**, the law on delay in Singapore and England will be set out in **Part III**. **Part IV** will then take us through the explanations proffered to ground the operation of delay as a bar to rescission, namely, (**a**) the application of the Singapore Limitation Act 1959 ("**Singapore Limitation Act**"); (**b**) the doctrine of laches; and (**c**) the Singapore Sale of Goods Act 1979 ("**Singapore SOGA**"). As we will find, these doctrines cannot account for the loss of the claimant's equity through mere lapse of time in Singapore. The especial character of rescission means that no appropriate analogy exists under the Singapore Limitation Act, whereas the equitable origins of laches demand an examination of factors in the round, beyond lapse of time alone. As for the Singapore SOGA, it is submitted that the provisions on the deemed acceptance of goods after lapse of a reasonable time are not concerned with claims for equitable rescission. Thereafter, in **Part V**, building on the observation that delay only operates where there is prejudice or as a representation of affirmation, this paper will make a case for the extinction of mere delay as a standalone bar to rescission, and discuss how delay should instead be treated as a factor in establishing the other bars to rescission.

[3] The author recognises that *Leaf* dealt specifically with rescission in equity, but as noted by Dominic O'Sullivan KC, Rafal Zakrzewski & Steven Ballantyne Elliott, *The Law of Rescission* (Oxford University Press, 3rd Ed, 2022) at p 248, delay as a bar to rescission applies to both rescission in common law and equity.

[4] *Salt v Stratstone Specialist Ltd (t/a Stratstone Cadillac Newcastle)* [2015] EWCA Civ 745 at [34].

[5] *Malayan Miners Co (M) Ltd v Lian Hock & Co* [1965-1967] SLR(R) 307; *Eastern Supply Co v Kerr* [1971-1973] SLR(R) 834.

[6] Andrew Phang & Goh Yihan, *Contract Law in Singapore* (Wolters Kluwer, 2nd Ed, 2021) at p 224; *Halsbury's Laws of Singapore* vol 7 (Audrey Tan ed) (LexisNexis, 2023) at para 80.208.

II. Rescission at common law and equity

4 Archaically and quite confusingly, the word "rescission" can refer to the termination of a contract for repudiatory breach,[7] or rescission *ab initio*. However, this confusion has been laid to rest and rescission in Singapore refers to the latter.[8] Therefore, this paper is only concerned with the remedy of equitable rescission of contracts where one of the vitiating factors of misrepresentation, mistake, undue influence, or unconscionability is present,[9] such that there is a defect in one of the parties' consent to its formation. Rescission exists to "avoid or nullify the contract '*ab initio*'", restoring the contracting parties to their original positions and where necessary, making restitution of benefits conferred under the contract.[10]

5 Historically, rescission existed as two separate doctrines in common law and equity.[11] The fusion of the courts of law and equity following the enactment of the Judicature Act 1873 in England and later, the Supreme Court of Judicature Act 1969 in Singapore, is confined to the administration of the separate bodies of law;[12] the substantive principles of rescission at common law and equity remain distinct.[13] Although this paper is strictly concerned with rescission in equity, it is important to set out the differences between the operation of rescission at common law and equity. This difference would be particularly relevant in relation to the subsequent analysis on limitation by analogy and laches in **Part IV** below because these doctrines only apply to *equitable* rescissions.

6 The first difference is that the grounds on which a contract can be rescinded in equity are broader than that of common law.[14] At

[7] Dominic O'Sullivan KC, Rafal Zakrzewski & Steven Ballantyne Elliott, *The Law of Rescission* (Oxford University Press, 3rd Ed, 2022) at p 1; Janet O' Sullivan, "Rescission as a self-help remedy: a critical analysis" (2000) 59(3) *Cambridge Law Journal* 509 at 509–510.
[8] *Ho Chee Kian v Ho Kwek Sin* [2023] SGHC 192 at [47].
[9] Dominic O'Sullivan KC, Rafal Zakrzewski & Steven Ballantyne Elliott, *The Law of Rescission* (Oxford University Press, 3rd Ed, 2022) at p 247.
[10] Janet O' Sullivan, "Rescission as a self-help remedy: a critical analysis" (2000) 59(3) *Cambridge Law Journal* 509 at 509.
[11] Dominic O'Sullivan KC, Rafal Zakrzewski & Steven Ballantyne Elliott, *The Law of Rescission* (Oxford University Press, 3rd Ed, 2022) at p 46.
[12] *Murakami Takako (executrix of the estate of Takashi Murakami Suroso, deceased) v Wiryadi Louise Maria and others* [2009] 1 SLR(R) 508 at [15].
[13] *CDX and another v CDZ and another* [2021] 5 SLR 405 at [52].
[14] *CDX and another v CDZ and another* [2021] 5 SLR 405 at [55].

common law, contracts may be rescinded only for fraudulent misrepresentation,[15] or duress.[16] In equity, several other vitiating factors are recognised as grounds for rescission, namely: non-fraudulent misrepresentation; [17] undue influence; [18] mistake; [19] and the narrow contractual doctrine of unconscionability.[20]

7 The second is that rescission at common law is an automatic remedy, or a "self-help" remedy, meaning that where the vitiating factor is made out, rescission is effected upon election and without the need for a court order, notwithstanding that one is often obtained in practice.[21] Rescission in equity, on the other hand, is a remedy conferred by the courts of Chancery, upon weighing the equities of the parties.[22] This is because a transaction "unimpeachable at law" could only be nullified by a judicial order.[23] It is also important to note that in equity, the presence

[15] *CDX and another v CDZ and another* [2021] 5 SLR 405 at [52]; *The Directors of the Reese Silver Mining Co Ltd and the Liquidators of the Said Company v Joseph Mackrill Smith* (1869) LR 4 HL 64 at 74.
[16] Andrew Phang & Goh Yihan, *Contract Law in Singapore* (Wolters Kluwer, 2nd Ed, 2021) ("***Contract Law in Singapore***") at pp 239 and 242; Nelson Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (Sweet & Maxwell, 3rd Ed, 2023) at pp 1–2; *Halpern and another v Halpern and others (No 2)* [2008] QB 195 at [61].
[17] *CDX and another v CDZ and another* [2021] 5 SLR 405 at [55]; *Redgrave v Hurd* (1881) 20 Ch D 1 at 12.
[18] Nelson Enonchong*, Duress, Undue Influence and Unconscionable Dealing* (Sweet & Maxwell, 3rd Ed, 2023) at pp 1–2; *Henry Williams and others v James Bayley* (1866) LR 1 HL 200 at 216; *Royal Bank of Scotland v Etridge and other appeals* [2001] UKHL 44 at [6]–[7].
[19] *Chwee Kin Keong and others v Digilandmall.com Pte Ltd* [2005] 1 SLR(R) 502 at [60], [69], [74] and [80]. The CA held that the equitable remedy of rescission was available for unilateral mistake, and left the door open on whether common mistake could be a ground for rescinding a contract in equity.
[20] Nelson Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (Sweet & Maxwell, 3rd Ed, 2023) at pp 1–2; Andrew Phang & Goh Yihan*, Contract Law in Singapore* (Wolters Kluwer, 2nd Ed, 2021) at p 298; *BOM v BOK and another appeal* [2019] 1 SLR 349 at [142].
[21] Janet O' Sullivan, "Rescission as a self-help remedy: a critical analysis" (2000) 59(3) *Cambridge Law Journal* 509 at 512.
[22] *Emile Erlanger and others v New Sombrero Phosphate Company and others* (1878) 3 App. Cas. 1218 at 1277–1278; *Spence v Crawford* [1939] 3 All ER 271 at 288; *Cheese v Thomas* [1994] 1 WLR 129 at 137.
[23] Janet O' Sullivan, "Rescission as a self-help remedy: a critical analysis" (2000) 59(3) *Cambridge Law Journal* 509 at 514. See also Dominic O'Sullivan KC, Rafal Zakrzewski & Steven Ballantyne Elliott, *The Law of Rescission* (Oxford University Press, 3rd Ed, 2022) at p 268. *Law of Rescission* at p 270 points out the competing authorities suggesting that equitable rescission is also self-help but their ultimate position is that rescission in equity is to be conferred by the courts. *Cf* Hugh Beale, "Misrepresentation" in *Chitty on Contracts Vol I* (Hugh Beale ed) (Sweet & Maxwell, 35th Ed, 2023) at pp 869–871.

of delay, where unreasonable, may operate to shift the balance of equities in the defendant's favour.[24]

8 Given the discretionary nature of equitable rescission, it is valuable, and is the focus of this paper, to clarify the principles underlying the discretion to grant or deny *equitable* rescission in the event of the claimant's delay in bringing his claim.

III. The law on delay

9 As earlier mentioned, the doctrine of delay as a bar to rescission had its roots in the English decision of *Leaf.* There is a strand of reasoning within *Leaf* that offers support for the proposition that the failure to rescind the contract within a reasonable time would mean that the equitable remedy of rescission is lost.[25] What is unique about this case is that the claimant's right to rescission was lost even without knowledge of the innocent misrepresentation or prejudice to the respondent.[26]

10 In *Leaf*, Mr Leaf purchased from International Galleries a picture of Salisbury Cathedral, which International Galleries had represented was painted by John Constable.[27] Five years later, when Mr Leaf attempted to sell the picture to the auction house Christie's, he was told that it was not a Constable.[28] He returned the picture and asked for a refund, which International Galleries refused, and led to his action seeking rescission of the contract.[29] The English Court of Appeal ("**EWCA**") unanimously upheld the county judge's judgment and held that rescission was not available as a remedy, albeit on different grounds.

11 Jenkins LJ held that rescission was barred on the fact of delay, notwithstanding that the county court judge had not found laches, and found *restitutio in integrum* possible.[30] He said:[31]

[24] I.C.F. Spry, *The Principles of Equitable Remedies* (Sweet & Maxwell, 9th Ed, 2014) at p 233; *Lindsay Petroleum Co Ltd v Hurd* (1874) LR 5 PC 221 at 239–240; *cf Fisher v Brooker and another* [2009] 1 WLR 1764 at [77], where the claimant's delay operated in his favour as it was "of considerable financial benefit to the respondents".
[25] *Leaf v International Galleries* [1950] 2 KB 86 at 92.
[26] *Leaf v International Galleries* [1950] 2 KB 86 at 89.
[27] *Leaf v International Galleries* [1950] 2 KB 86 at 86.
[28] *Leaf v International Galleries* [1950] 2 KB 86 at 86.
[29] *Leaf v International Galleries* [1950] 2 KB 86 at 87.
[30] *Leaf v International Galleries* [1950] 2 KB 86 at 92 and 94.
[31] *Leaf v International Galleries* [1950] 2 KB 86 at 92.

> [C]ontracts such as this cannot be kept open and subject to the possibility of rescission indefinitely. … it behoves the purchaser either to verify or, as the case may be, to disprove the representation within a reasonable time, or else stand or fall by it. If he is allowed to wait five, ten, or twenty years and then reopen the bargain, there can be no finality at all.

12 Setting aside the fact that an unreasonable delay would preclude the intervention of equity, he went on to find that no injustice lay against Mr Leaf, who had a remedy in damages.[32] Unfortunately, Mr Leaf had rejected the county court's suggestion to amend his claim to one for damages and when he finally sought to do so, it was refused for having been made too late.[33]

13 Evershed MR agreed with Jenkins LJ. He expressed concern over the floodgates of claims relating to the attribution of works of art, an already controversial and difficult process, if rescission were allowed.[34] Compounded by the fact that there may be a change in the condition of the contested works of art as to affect *restitutio in integrum*, the rule of equity "may work somewhat capriciously".[35]

14 Denning LJ took a different approach and saw the transaction as one for the sale of goods, bringing it under the ambit of the English Sale of Goods Act 1893[36].[37] Section 35 of the English Sale of Goods Act 1893 states that:[38]

> The buyer is ***deemed to have accepted the goods*** when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or *when after the lapse of a reasonable time, he retains the goods*

[32] *Leaf v International Galleries* [1950] 2 KB 86 at 90–91.
[33] *Leaf v International Galleries* [1950] 2 KB 86 at 87.
[34] *Leaf v International Galleries* [1950] 2 KB 86 at 94.
[35] *Leaf v International Galleries* [1950] 2 KB 86 at 94.
[36] Sale of Goods Act 1893 (c 71) (UK).
[37] *Leaf v International Galleries* [1950] 2 KB 86 at 90.
[38] Sale of Goods Act 1893 (c 71) (UK) s 35 (emphasis added in italics and bold italics).

> *without intimating to the seller that he has rejected them*.

15 The effect of acceptance is found in s 11(1)(c) of the English Sale of Goods Act 1893, which states that a breach of a condition is to be treated as a breach of a warranty and the buyer is confined to a claim for damages.[39] Thus, "if a claim to reject on that account is barred, it seems to me *a fortiori* that a claim to rescission on the ground of innocent misrepresentation [which is less potent] is also barred".[40]

16 However, more recently in English law, *Leaf* is at risk of relegation to the legal graveyard. Most prominently, the EWCA in *Salt v Stratstone Specialist Ltd (t/a Stratstone Cadillac Newcastle)*[41] ("***Salt v Stratstone Specialist***") has explained the decision in *Leaf* on the ground of laches,[42] which would require some form of knowledge of the vitiating factor or prejudice to the defendant.[43] In contrast, the position in Singapore is less clear. No local decision has expressly doubted *Leaf* in a manner similar to the EWCA in *Salt v Stratstone Specialist*,[44] and academic discussion of the case in Singapore while scant, seems to still suggest that the position in Singapore remains that in *Leaf*, *ie*, that the right to rescind in equity can be lost by mere lapse of time.[45]

17 In the sale of goods context, the provisions relied on by Denning LJ, ss 35 and 11(1)(c) of the English Sale of Goods Act 1893, are substantively similar to ss 35(4) and 11(3) of the Singapore SOGA respectively, potentially indicative of a similar position to be taken in Singapore. Moreover, *Leaf* has also been acknowledged locally in the sale of goods context in Singapore,[46] albeit not for the statute's effect on the rules of rescission. With this summary of the law on delay as a bar

[39] *Leaf v International Galleries* [1950] 2 KB 86 at 90.
[40] *Leaf v International Galleries* [1950] 2 KB 86 at 91.
[41] [2015] EWCA Civ 745.
[42] *Salt v Stratstone Specialist Ltd (t/a Stratstone Cadillac Newcastle)* [2015] EWCA Civ 745 at [43], referring to *Leaf v International Galleries* [1950] 2 KB 86.
[43] See below at paras 97–98.
[44] *Leaf v International Galleries* [1950] 2 KB 86; *Salt v Stratstone Specialist Ltd (t/a Stratstone Cadillac Newcastle)* [2015] EWCA Civ 745.
[45] Andrew Phang & Goh Yihan, *Contract Law in Singapore* (Wolters Kluwer, 2nd Ed, 2021) at p 224; *Halsbury's Laws of Singapore* vol 7 (Audrey Tan ed) (LexisNexis, 2023) at para 80.208.
[46] *Malayan Miners Co (M) Ltd v Lian Hock & Co* [1965-1967] SLR(R) 307; *Eastern Supply Co v Kerr* [1971-1973] SLR(R) 834.

to rescission in mind, we will now move on to examine the purported doctrinal explanations for delay.

IV. Doctrinal explanations for delay

18 In Singapore, notwithstanding suggestions that the law on delay as stated in *Leaf* applies in Singapore, there has not, as far as my research has shown, been any authority that explains the legal grounds and principles supporting this doctrine. Nonetheless, a survey of the English scholarship has revealed that three doctrines have been proposed to ground the operation of delay as a bar to rescission,[47] namely, that (**a**) it operates analogously to the statute of limitations; (**b**) the doctrine of laches (under which there is prejudicial and affirmatory laches); and/or (**c**) the English Sale of Goods Act 1893 (and by extension, the Singapore SOGA), which arguably provides for the right of rescission to be lost because a buyer is deemed to have accepted the goods after lapse of a reasonable period of time. It is submitted that all these explanations prove unsatisfactory in supporting the mere lapse of time as a bar to equitable rescission, should such a case arise before the Singapore courts.

A. Reference to the Singapore Limitation Act by analogy

19 In England, it has been suggested that the statute of limitations under the English Limitation Act 1980[48] would have provided sufficient explanatory basis for the right of rescission to be lost purely on the lapse of time.[49] It is only in cases involving fraud or mistake that the statute of limitations postpones the point at which time starts to run (which is not necessarily present in every case where a right to rescind arises).[50] Given that the English Limitation Act 1939 (the predecessor to the English Limitation Act 1980) was the precursor to the Singapore Limitation Act,[51] by parity of reasoning, some might thus argue that the position

[47] Dominic O'Sullivan KC, Rafal Zakrzewski & Steven Ballantyne Elliott, *The Law of Rescission* (Oxford University Press, 3rd Ed, 2022) at pp 512 and 523.
[48] Limitation Act 1980 (c 58) (UK).
[49] *The Lindsay Petroleum Co v Prosper Armstrong Hurd, Abram Farewell and John Kemp* (1874) LR 5 PC 221 at 240; Limitation Act 1980 (c 58) (UK).
[50] *Redgrave v Hurd* (1881) 20 Ch D 1 at 13; *IGE USA (formerly IGE USA Investments) and others v The Commissioners for Her Majesty's Revenue and Customs* [2021] EWCA Civ 534 at [67]–[69].
[51] State of Singapore, *Legislative Assembly Debates, Official Report* (2 September 1959), vol 11 at col 587 (K M Byrne, Minister for Law and Labour); Limitation Act 1939 (c 21) (UK); Limitation Act 1959.

should be no different in Singapore. *Ex hypothesi*, where equitable rescission is claimed, the statute of limitations may be applied by analogy where the equitable claim is similar to a legal one that falls within the statute of limitations.[52] However, as this section will demonstrate, the doctrine of limitation by analogy cannot apply to equitable rescission because it has no common law counterpart that falls within the Singapore Limitation Act.

20 To this end, I will first explain (**a**) how limitation by analogy operates, before arguing against the viability of drawing an analogy to a *cause of action* in (**b**) contract; (**c**) tort; or (**d**) to the *remedy* of common law rescission.

(1) The law on limitation by analogy in Singapore

21 Section 6(1)(*a*) of the Singapore Limitation Act states that "actions founded on a contract or on tort" are time-barred after a period of six years. With regards to equitable claims, s 6(7) of the Singapore Limitation Act states that:[53]

> Subject to sections 22 and 32, this section shall apply to all claims for specific performance of a contract or for an injunction or for other equitable relief whether the same be *founded upon any contract or tort* or upon any trust or other ground in equity.

22 Preliminarily, it bears highlighting that, at first glance, s 6(7) seems to suggest that the doctrine of limitation by analogy no longer applies in Singapore. This is because the applicability of this doctrine is not immediately apparent from s 6(7). This differs from s 36(1) of the English Limitation Act 1980, which makes explicit reference to the doctrine. Section 36(1) of the English Limitation Act 1980 states that: the time bars contained in the causes of action found in ss 2, 4A, 5, 7, 8, 9, and 24 (which are helpfully condensed within s 6(1) of the Singapore Limitation Act):[54]

[52] Charles Mitchell KC, Paul Mitchell & Stephen Watterson, *Goff & Jones: The Law of Unjust Enrichment* (Sweet & Maxwell, 10th Ed, 2022) at pp 883–884; John McGhee KC & Steven Elliott KC, *Snell's Equity* (Sweet and Maxwell, 34th Ed, 2020) at p 100.
[53] Limitation Act 1959 s 6(7) (emphasis added).
[54] Limitation Act 1980 (c 58) (UK) s 36(1) (emphasis added).

> … shall not apply to any claim for specific performance of a contract or for an injunction or for other equitable relief, except in so far as any such time limit may be ***applied by the court by analogy*** in like manner as the corresponding time limit under any enactment repealed by the Limitation Act 1939 was applied before 1st July 1940.

23 However, the Singapore Court of Appeal ("**SGCA**") in *Yong Kheng Leong v Panweld Trading Pte Ltd*[55] ("***Panweld* (CA)**") has authoritatively ruled that the doctrine of limitation periods by analogy remains applicable in Singapore.[56] Although the words "if necessary by analogy" in the Limitation Ordinance[57] were omitted from s 6 of the earlier versions of the Singapore Limitation Act, the omission was made by the Law Revision Commissioners and not an Act of Parliament, which meant that there was no substantive change to the meaning of the provision.[58] Consequently, the statute of limitations continued to apply by analogy to claims where equitable relief was sought.

24 Having established the persistence of the doctrine of limitation periods by analogy, the issue then is whether it applies to *every* case where equitable remedies are sought. In this regard, the court in *Panweld* (CA) has held that the provision only applies to give effect to "an express limitation period [which] has been prescribed for an action at law, which bears the closest correspondence to the relevant claim for equitable relief".[59] Thus, the effect of s 6(7) of the Singapore Limitation Act is that s 6 of the Singapore Limitation Act shall apply to claims for equitable relief only if it can be analogised to a common law claim within the meaning of s 6.

25 To ascertain in what circumstances the doctrine of limitation by analogy applies to equitable claims, a survey of the English jurisprudence (in light of the limited Singapore authorities) reveals that there are two situations where the English Limitation Act 1980 was held

[55] [2013] 1 SLR 173.
[56] *Yong Kheng Leong and another v Panweld Trading Pte Ltd and another* [2013] 1 SLR 173 at [64].
[57] No 57 of 1959.
[58] *Yong Kheng Leong and another v Panweld Trading Pte Ltd and another* [2013] 1 SLR 173 at [65]–[66].
[59] *Yong Kheng Leong and another v Panweld Trading Pte Ltd and another* [2013] 1 SLR 173 at [71].

to apply by analogy: (**a**) where the "suit in equity corresponds with an action at law" ("**Situation A**");[60] (**b**) where the court of equity was giving relief analogous to that in law ("**Situation B**").[61] In Situation A, it would suffice if the facts relied upon for equitable relief were the same as those for a common law action subject to a time-bar.[62] Since the court's focus is really on the "particular facts of a case",[63] and causes of action relate to "the essential factual material that supports a claim',[64] the bulk of the analogies will be drawn to causes of action, *ie*, Situation A. As for Situation B, the court is searching for a common law remedy similar to that sought in equity. At this juncture, two preliminary issues have to be resolved with regard to the aforementioned situations before we can investigate whether equitable rescission falls into Situation A and/or B for limitation by analogy to operate.

26 The first is whether an analogy by limitation would continue to apply even where the court was exercising its exclusive equitable jurisdiction (as opposed to its concurrent jurisdiction), and the view in England is that it does.[65] William Swadling helpfully explains the differences between the court's exclusive and concurrent jurisdiction:[66]

> The 'concurrent' jurisdiction comprises equity's responses to common law claims. An example would be a claim for specific performance of a contract. Another would be an action for an account following a tort, while yet another would be an injunction to restrain a threatened breach of contract or tort. The common feature of these claims is that while the common law recognises the underlying cause of action, it does not give the particular relief sought. …

[60] *P & O Nedlloyd BV v Arab Metals Co and others (No 2) (UB Tiger*) [2007] 1 WLR 2288 at [38].
[61] *Brownlow William Knox v Frederick Gye* (1871) LR 5 HL 656 at 674.
[62] *Cia de Seguros Imperio v Heath (REBX) Ltd and others* [2001] 1 WLR 112 at 124; *IGE USA (formerly IGE USA Investments) and others v The Commissioners for Her Majesty's Revenue and Customs* [2021] EWCA Civ 534 at [60]. *Cf Tito and Others v Waddell and Others (No 2)* [1977] Ch. 106 at 250.
[63] Paul S. Davies, "Section 36 of the Limitation Act 1980" (2023) *Cambridge Law Journal* 1 at 6.
[64] *Multistar Holdings Ltd v Geocon Piling & Engineering Pte Ltd* [2016] 2 SLR 1 at [34].
[65] *Cia de Seguros Imperio v Heath (REBX) Ltd and others* [2001] 1 WLR 112 at 122.
[66] *Yong Kheng Leong and another v Panweld Trading Pte Ltd and another* [2013] 1 SLR 173 at [76], citing William Swadling, "Limitation" in *Breach of Trust* (Peter Birks & Adrianna Pretto eds) (Hart Publishing, 2002) at p 323.

> Within the 'exclusive' jurisdiction fall claims which the common law does not recognise at all. The most obvious is the claim of a beneficiary to enforce a trust. Trusts have never been recognised by the common law, so a beneficiary suing to enforce a trust can only obtain relief from a court of equity. Such claims are therefore said to be within the 'exclusive' jurisdiction of the court.

27 At first glance, s 6(7) of the Singapore Limitation Act states that s 6 shall apply to all claims for equitable relief whether founded upon "any trust or other ground in equity".[67] This suggests that the doctrine of limitation by analogy applies to all equitable claims, including those falling in the court's exclusive jurisdiction. However, the SGCA, in citing William Swadling's definition above,[68] seems to have limited the doctrine of limitation by analogy to claims that fall in the concurrent jurisdiction of the court.[69] The court said:[70]

> For claims that fell within the exclusive jurisdiction of equity, since the plaintiff had no legal claim at all, there was no basis for invoking a statutory limitation. Instead, the equitable doctrine of laches applied, although the courts, in determining the time limit for laches, would usually follow the lead given by the Legislature and adopt the statutory period of limitation (see *Smith v Clay* (1767) 3 Bro CC 639).

28 At this juncture, I note that the High Court in *Lim Ah Leh v Heng Fock Lin*[71] ("***Lim Ah Leh***") had cited *Panweld* (CA) but endorsed the former position. Vinodh Coomaraswamy J held that s 6(2) of the Singapore Limitation Act, read with s 6(7), applies to claims enforcing "the trustee's fiduciary duty to account for the trust property" (which is

[67] Limitation Act 1959 s 6(7); *Lim Ah Leh v Heng Fock Lin* [2018] SGHC 156 at [172].
[68] *Yong Kheng Leong and another v Panweld Trading Pte Ltd and another* [2013] 1 SLR 173 at [76].
[69] *Yong Kheng Leong and another v Panweld Trading Pte Ltd and another* [2013] 1 SLR 173 at [77].
[70] *Yong Kheng Leong and another v Panweld Trading Pte Ltd and another* [2013] 1 SLR 173 at [77] (emphasis in original).
[71] [2018] SGHC 156.

a claim falling within the court's *exclusive* equitable jurisdiction).[72] With due respect, Coomaraswamy J ignored the fact that the SGCA in *Panweld* (CA) had held that the difference between s 6(7) of the Singapore Limitation Act and its predecessor, the Singapore Limitation Ordinance 1959[73], was cosmetic,[74] and that the need to find an analogous common law claim under s 6 remained.[75]

29 In fact, although Coomaraswamy J cited *Panweld* (CA) at [69] for the proposition that s 6 applies to all claims for equitable relief, the SGCA had clarified at [71] that s 6 does not apply to all claims for equitable relief, but only those with a corresponding claim at law: [76]

> …this [application of statutory limitation periods to claims for equitable relief] can only be given effect to by finding the particular provision elsewhere in s 6 by which an express limitation period has been prescribed for an action at law, which bears the closest correspondence to the relevant claim for equitable relief… not every claim to equitable relief will have a corresponding claim in the law such that the relevant limitation period specified for the latter can be readily applied by analogy. …

30 Nonetheless, it should be highlighted that *Lim Ah Leh* concerned a beneficiary's action for an administrative account, for which an analogy would be drawn to s 6(2) of the Limitation Act. Given that s 6(2) is the only provision within s 6 which prescribes a limitation period by reference to a *remedy* and not a cause of action,[77] the only way to reconcile these two conflicting authorities would be for the approach taken by Coomaraswamy J to be confined to actions for an administrative account. To avoid doubt, such actions for an administrative account refer to an "account rendered by a defendant of the administration of property which is under her responsibility", and are

[72] *Lim Ah Leh v Heng Fock Lin* [2018] SGHC 156 at [172]. This decision went on appeal but the issue of analogy via s 6 was not drawn.
[73] No 57 of 1959.
[74] *Lim Ah Leh v Heng Fock Lin* [2018] SGHC 156 at [184].
[75] *Yong Kheng Leong and another v Panweld Trading Pte Ltd and another* [2013] 1 SLR 173 at [75].
[76] *Yong Kheng Leong and another v Panweld Trading Pte Ltd and another* [2013] 1 SLR 173 at [71]–[75].
[77] *Lim Ah Leh v Heng Fock Lin* [2018] SGHC 156 at [171].

distinguishable from "accounts for specific equitable wrongdoing".[78] It forms part of the beneficiary's entitlement by virtue of the fiduciary relationship,[79] allowing the beneficiary to "ascertain the manner which the fund has been administered" so that a consequential order may be sought to make good any discovered deficit or breach of trust.[80] Notwithstanding that there was a breach of trust in *Lim Ah Leh* (theoretically capable of giving rise to a cause of action, and hence falling within the ambit of Situation A), an analogy remains capable of being drawn to the *remedy* of a common law action for account under s 6(2) within the ambit of Situation B (unlike one for "specific equitable wrongdoing").[81] When the latter is done in the context of s 6(2) of the Limitation Act, it is arguably irrelevant that the exclusive jurisdiction of the courts of equity is invoked given that s 6(2)'s unique drafting to prescribe a limitation "by reference to the remedy sought"[82] could be indicative of the draftsman's intention to apply an analogy by Situation B.[83] Thus, outside of actions for an account, strictly equitable causes of action should continue to be time-barred where there is no analogous common law cause of action, in keeping with *Panweld* (CA). In any event, Coomaraswamy J would have been bound by the SGCA decision of *Panweld* (CA).

31 The second point of clarification is that just because the bulk of analogies fall within Situation A does not mean that Situation B is superfluous. Most analogies drawn under Situation A can also be drawn under Situation B because a claim for a particular remedy must be brought under a particular cause of action and this cause of action would seemingly be the corresponding action at law within Situation A. One suggested instance of the overlap is as follows: a claim for equitable

[78] *Lim Ah Leh v Heng Fock Lin* [2018] SGHC 156 at [170].
[79] *Trinity Concept Ltd (In Liq) v Wong Kung Sang* [2022] 1 HKLRD 1388 at [64]–[68].
[80] *Trinity Concept Ltd (In Liq) v Wong Kung Sang* [2022] 1 HKLRD 1388 at [87]–[93].
[81] *Lim Ah Leh v Heng Fock Lin* [2018] SGHC 156 at [184]. This is unlike the English position.
[82] *Lim Ah Leh v Heng Fock Lin* [2018] SGHC 156 at [171].
[83] *Cf* the summary of the English and Hong Kong positions in *Trinity Concept Ltd (In Liq) v Wong Kung Sang* [2022] 1 HKLRD 1388 at [114]–[115], which looks at the nature of the relationship giving rise to the right to an account. This approach, however, is inconsistent with statements from *Coulthard v Disco Mix Club Ltd and another* [2000] 1 WLR 707 at 730; *Cia de Seguros Imperio v Heath (REBX) Ltd and others* [2001] 1 WLR 112 at 121 and 124, where the inquiry into the existence of an analogy extended to the remedies sought, notwithstanding that the causes of action were founded upon breaches of fiduciary duty. I would, however, not go as far as the foregoing English position to say that Situation B readily applies to the remedy sought in all equitable causes of action beyond what is expressly provided for in s 6(2) of the Singapore Limitation Act.

compensation for a breach of fiduciary duty would correspond with a claim for damages (Situation B – analogous remedies), while an *equitable* action for a breach of fiduciary duty by deliberate and dishonest under-accounting is simultaneously founded upon the same factual allegations as a *common law* action in fraud (Situation A – analogous actions).[84] This confusion arises from the fact that the courts have tended to look for correspondence between an action on one hand, and a remedy on the other.[85]

32 However, not every case produces an overlap, and the rescission of contracts is one such instance where a Situation B may exist without a corresponding Situation A. Commonsensically, the remedy analogous to equitable rescission under Situation B is common law rescission, and the cause of action at law which supports common law rescission is a claim in unjust enrichment (to ensure the restitution of benefits conferred). However, a claim of unjust enrichment cannot fall within Situation A. This is because an analogy must be drawn to an action which falls within s 6(1) of the Singapore Limitation Act, but an action in unjust enrichment falls outside of it.[86]

33 Another example that supports the distinction drawn is seen above in s 6(2) of the Singapore Limitation Act, which governs "an action for an account".[87] Although the wording of the provision refers to an "action", an action for an account is more appropriately seen as a remedy and thus can only fall within Situation B, which deals with analogous remedies.[88] With these two preliminary clarifications in mind, we now move on to consider whether equitable rescission can be analogised to Situation A and/or Situation B, so that the doctrine of limitation by analogy might operate to impose a limitation period of six years onto cases where equitable rescission is sought.

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[84] *Coulthard v Disco Mix Club Ltd and another* [2000] 1 WLR 707 at 730. While this was a case involving a breach of fiduciary duty, a Situation A analysis remains justified given that at 728, the court said that the statute of limitations "cannot be sidestepped by describing them [breaches of contract] as claims in breach of fiduciary duty" when based on the same facts. See also *P & O Nedlloyd BV v Arab Metals Co and others (No 2) (UB Tiger*) [2007] 1 WLR 2288 at [45].
[85] James Mather, "Fiduciaries and the law of limitation" (2008) JBL 344 at 351–352.
[86] *Esben Finance Ltd and others v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [48] and [73].
[87] Limitation Act 1959 s 6(2).
[88] *Lim Ah Leh v Heng Fock Lin* [2018] SGHC 156 at [171].

(2) The analogy for rescission (Situation A – analogous actions)

34 This section shall explore the possibility of correspondence between actions founded on "contract and tort" (as expressed in s 6(7) of the Singapore Limitation Act), and equitable rescission.

(a) Action founded on contract

35 Since the vitiating factors relate to contract formation, intuitively, a claim for rescission would be seen as an action founded on a contract. In this regard, it should preliminarily be noted that the position in Singapore appears at first blush to be different from that in England and Malaysia. In Malaysia and England, a narrower definition of the words "founded on contract" has been proposed, suggesting that it only applies to cases consisting of a breach of contract.[89] If this is correct, then the doctrine of limitation by analogy cannot apply to claims for equitable rescission (which is not based upon a breach of contract) because they would be understood to fall outside the scope of s 6(1) Singapore Limitation Act.

36 In contrast, in Singapore, the words "founded on a contract" have, on three occasions, been given a broad reading to include claims beyond breach of contract.[90] Since cases of rescission inevitably also involve a contract, it might arguably follow that an analogy can be drawn and claims for equitable rescission would fall within the meaning of s 6(1) of the Singapore Limitation Act. However, it is doubtful if these cases remain good law.

37 Firstly, in *Ching Mun Fong (executrix of the estate of Tan Geok Tee, deceased) v Liu Cho Chit*[91] ("***Ching Mun Fong***"), the court said in *obiter* that "the words 'founded on a contract' are wide enough to cover claims for the recovery of moneys paid pursuant to a contract where the

[89] *MK Samy a/l Madasamy (suing as public officer for Sri Veeramakaliammandevasthanam) v Koperasi Serbaguna Sungai Gelugor Bhd (previously known as Sykt Berkerjasama-sama Serbaguna Sungei Gelugor Dengan Tanggongan Bhd) and others* [2018] 10 MLJ 76 at [31], citing *Nasri v Mesah* [1971] 1 MLJ 32; see also United Kingdom Law Commission, *Limitation of Actions* (LC270, 2001) at paras 1.8 and 2.2.

[90] *Ching Mun Fong (executrix of the estate of Tan Geok Tee, deceased) v Liu Cho Chit* [2000] 3 SLR(R) 304 at [73]. See also *Low Kin Kok (alias Low Kong Song) and another v Lee Chiow Seng and another* [2014] SGHC 208; *Trans-World (Aluminium) Ltd v Cornelder China (Singapore)* [2003] 3 SLR(R) 501.

[91] [2000] 3 SLR(R) 304.

underlying subject matter of the agreement did not exist or did not materialise [*ie*, a restitutionary claim for failure of consideration]".[92] The logic underlying the court's remarks was that the obligation to make restitution in unjust enrichment was founded on an implied contract.[93] However, the implied contract theory has since been rejected by the SGCA in *Esben Finance Ltd and others v Wong Hou-Lianq Neil*[94] ("***Esben Finance***") and held not to be within the words of the Singapore Limitation Act.[95] The implication of this is that this justification for a broad reading is no longer present in the Singapore context.

38 Separately, the Singapore High Court in *Low Kin Kok (alias Low Kong Song) and another v Lee Chiow Seng and another*[96] stated that a claim for misrepresentation would be caught by s 6(1) of the Singapore Limitation Act.[97] These comments were, however, made in *obiter* as the defendant had not pleaded the statute of limitations as a defence,[98] and this case has not been followed subsequently.

39 Finally, in *Trans-World (Aluminium) Ltd v Cornelder China (Singapore)*[99], Belinda Ang J described a claim for damages in lieu of rescission based on the Misrepresentation Act[100] as an action in contract because a contract must be shown to exist.[101] However, this is not support for the proposition that a claim for equitable rescission falls within the words "founded on a contract". This is because Ang J was not commenting on the remedy of equitable rescission; instead, she was simply making the point that, under s 2 of the Misrepresentation Act[102], the existence of a contract must first be established before the award of damages in lieu of rescission can be made.

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[92] *Ching Mun Fong (executrix of the estate of Tan Geok Tee, deceased) v Liu Cho Chit* [2000] 3 SLR(R) 304 at [73].
[93] Tang Hang Wu, *Principles of the Law of Restitution in Singapore* (Academy Publishing, 2019) at p 4. Under the implied contract theory, where there has been an unjust enrichment at the claimant's expense, "a promise to repay is imputed to the parties regardless of the actual intention of the parties".
[94] [2022] 1 SLR 136.
[95] *Esben Finance Ltd and others v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [57]–[65].
[96] [2014] SGHC 208.
[97] *Low Kin Kok (alias Low Kong Song) and another v Lee Chiow Seng and another* [2014] SGHC 208 at [31].
[98] See Limitation Act 1959 s 4.
[99] [2003] 3 SLR(R) 501.
[100] Cap 390, 1994 Rev Ed.
[101] *Trans-World (Aluminium) Ltd v Cornelder China (Singapore)* [2003] 3 SLR(R) 501 at [124].
[102] Cap 390, 1994 Rev Ed.

40 Beyond the reasons outlined in the preceding three paragraphs, it is submitted that the narrower interpretation adopted in Malaysia and England[103] should be preferred also because it is in line with the legislative history and intention behind the Singapore Limitation Act. This would mean that the doctrine of limitation by analogy cannot explain why delay operates as a bar to rescission.

41 Statutory interpretation in Singapore involves three steps: (**a**) first, ascertaining the possible interpretations based on the text and its context; (**b**) second, ascertaining the legislative object; (**c**) third, comparing the possible interpretations against the legislative object and selecting the reading which best forwards the purpose of the statute (the "***Tan Cheng Bock* framework**").[104]

42 The first step to statutory interpretation involves a determination of the ordinary meaning of its words, and a court may be assisted by the canons of interpretation.[105] Under the *noscitur a sociis* principle, a word must be construed in the context of its surroundings and can be used to "reach a finding that … a restricted or less usual meaning was intended instead of the literal or usual meaning".[106] Applying this principle, since s 6(1)(*a*) of the Singapore Limitation Act is phrased as "founded on a contract ***or tort***", the phrase "founded on a contract" must refer only to actions for breach of contract. This is because, as will be explained immediately below, *whereas* an action for breach of contract is similar to an action in tort, an action for equitable rescission is fundamentally different from an action in tort.

43 Peter Birks' legal taxonomy proves instructive here. To Birks, private law rights arise from four causative events: (**a**) wrongs; (**b**) consent; (**c**) unjust enrichment; and (**d**) other miscellaneous events.[107]

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[103] *MK Samy a/l Madasamy (suing as public officer for Sri Veeramakaliammandevasthanam) v Koperasi Serbaguna Sungai Gelugor Bhd (previously known as Sykt Berkerjasama-sama Serbaguna Sungei Gelugor Dengan Tanggongan Bhd) and others* [2018] 10 MLJ 76 at [31], citing *Nasri v Mesah* [1971] 1 MLJ 32; see also United Kingdom Law Commission, *Limitation of Actions* (LC270, 2001) at paras 1.8 and 2.2.

[104] *Tan Cheng Bock v AG* [2017] 2 SLR 850 at [37].

[105] *Tan Cheng Bock v AG* [2017] 2 SLR 850 at [38].

[106] *PP v Lam Leng Hung and others* [2018] 1 SLR 659 at [110], referring to Oliver Jones, *Bennion on Statutory Interpretation: A Code* (LexisNexis, 6th Ed, 2013) at pp 1102–1104.

[107] Peter Birks, "Equity in the Modern Law: An Exercise in Taxonomy" (1996) 26(1) *University of Western Australia Law Review* 1 at 9.

Causes of actions are a remedial response to allow the enforcement of these rights. Although contractual rights accrue under the causative event of "consent" under this framework, the right to damages for breach of contract is classified as a ***wrong***.[108] The following passage of his helpfully explains his reasoning:[109]

> … a wrong is an infringement of a right or, which is ultimately synonymous, a breach of duty. Every wrong therefore supposes a prior right infringed and duty broken. In relation to that prior right, the rights born of the wrong are secondary and remedial. … The right to claim compensatory damages is a secondary and remedial right arising from the wrong. The obligation to pay such compensatory damages is the same thing, looked at from the other end. The same structure is found in connection with contract. The primary obligation and correlative primary right arises from the contract. Breach of contract is a wrong which in turn gives rise to a secondary obligation and right in category one…

44 Similarly, as tort law operates to provide a remedial response for breaches of obligations imposed by operation of law and outside of contract and unjust enrichment,[110] the causative event which triggers an action for breach of contract is *also* that of ***wrongs***. Hence, the words "founded on a contract" can only relate to claims for breach of contract insofar as s 6(1)(*a*) is concerned with the genus of actions dealing with ***wrongs***, *ie*, contractual claims involving breach. While a contract must subsist for rescission to be granted, cases involving rescission are not, strictly speaking, founded on a contract as they concern the pre-contractual behaviour of the defendant in procuring the contract. Birks has therefore opted to classify claims for rescission as one that arises

[108] Peter Birks, "Rights, Wrongs, and Remedies" (2000) 20(1) *Oxford Journal of Legal Studies* 1 at 27.
[109] Peter Birks, "Equity in the Modern Law: An Exercise in Taxonomy" (1996) 26(1) *University of Western Australia Law Review* 1 at 10–11. At 65, Birks suggest that rescission under the vitiating factors is attributable to the event of 'unjust enrichment' because rescission is a pre-condition to restitution and such restitutionary rights are derived from unjust enrichment. If that is the case, then the analysis of Situation B shall apply.
[110] John Murphy & Christian Witting, *Street on Torts* (Oxford University Press, 15th Ed, 2018) at pp 3–4.

from "***unjust enrichment***".[111] This supports the narrower interpretation of the words "action founded in contract", *ie*, that it is confined to actions founded on breaches of contract.

45 This argument is also supported by other academics. As will be shown below, writing from Lionel Smith, in reliance on Birks' taxonomy, supports the separation between rescission and breach of contract. Unlike Birks, who argues that avoidance of a contract due to the vitiating factors is a matter of unjust enrichment,[112] Smith argues that the law governing unjust enrichment and contract should follow the civilian model and be subsumed under the "law of consent", "which tells us when voluntary legal actions are valid".[113] Thus, the "defective formation of obligations … should be seen as simply part of the law governing the formation of consensual obligations".[114] This stands in contrast with the law governing breaches of contract, which is predicated upon an already-existing contractual obligation. Since the anterior question of formation of obligations would already be settled, an action for breach of contract is better seen as part of the law on "wrongs".

46 Furthermore, similar to Birks, Smith explains that the domain of torts is described as "a concern with secondary obligations arising from the breach of obligations imposed by law".[115] Analogously, when a court is faced with a claim for breach of contract, it is concerned with a secondary obligation to pay damages which arises as a result of the breach of primary obligations arising under contract.[116] In contrast however, rescission remedies the vitiated consent in the creation of contractual obligations. Thus, Smith's writing preserves the distinction between breach and rescission of contract.

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[111] Peter Birks, "Equity in the Modern Law: An Exercise in Taxonomy" (1996) 26(1) *University of Western Australia Law Review* 1 at 13.
[112] Peter Birks, "Equity in the Modern Law: An Exercise in Taxonomy" (1996) 26(1) *University of Western Australia Law Review* 1 at 65.
[113] Lionel Smith, "Unjust Enrichment: Big or Small?" in *Unjust Enrichment in Commercial Law* (Simone Degeling & James Edelman eds) (Lawbook Company, 2008) at pp 39–42.
[114] Lionel Smith, "Unjust Enrichment: Big or Small?" in *Unjust Enrichment in Commercial Law* (Simone Degeling & James Edelman eds) (Lawbook Company, 2008) at pp 44 and 49.
[115] Lionel Smith, "Unjust Enrichment: Big or Small?" in *Unjust Enrichment in Commercial Law* (Simone Degeling & James Edelman eds) (Lawbook Company, 2008) at p 48. See also Gary Chan & Lee Pey Woan, *The Law of Torts in Singapore* (Academy Publishing, 2nd Ed, 2016) at p 2.
[116] *Photo Production Ltd v Securicor Transport Ltd* [1980] 1 AC 827 at 848–849.

47 Regardless of which scholarly view is adopted on the classification of the law on vitiating factors, the common denominator between Birks and Smith is that breach of contract and the vitiating factors are seen as two distinct causative events, and only the former is based upon a causative event similar to that which would give rise to an action in tort. This justifies the narrow reading of "founded on a contract" taken in Malaysia and England.

48 On the other hand, and admittedly, a broad reading of the words "founded on a contract" to encompass claims for rescission of contracts remains a possible interpretation of s 6(1) of the Singapore Limitation Act on a plain reading of it, especially given the semblance of judicial endorsement above.[117] As mentioned above, the existence of a contract in claims for equitable rescission could mean that such claims would be covered by the plain reading of "founded on a contract".

49 Hence, following step 1 of the *Tan Cheng Bock* framework, there will be two possible interpretations of "founded on a contract": that it relates to (**a**) claims for breach of contract; or (**b**) any claim where a contract exists.

50 Moving on to the second step of the *Tan Cheng Bock* framework to statutory interpretation, the legislative purpose of the provision will be ascertained. Use of extrinsic material is allowed at this stage,[118] and in interpreting the Singapore Limitation Act, it would be helpful to refer to the English Limitation Act 1939.[119] This is because the former was adopted from the latter without substantive modifications, and the Singapore Legislative Assembly (as it then was) did not seem to have expressed any concerns with the English counterpart.[120] Although the English Limitation Act 1939 predates Birks and Smith, the background of s 6 of the Singapore Limitation Act also confirms that the

[117] See paras 36–39.
[118] *Tan Cheng Bock v AG* [2017] 2 SLR 850 at [43] and [54(c)(ii)].
[119] For similar references to the foreign predecessor to Singapore legislation, see for example, *Cupid Jewels Pte Ltd v Orchard Central Pte Ltd and another appeal* [2014] 2 SLR 156 and *ARX v Comptroller of Income Tax* [2016] 5 SLR 590. While these cases predate *Tan Cheng Bok*, they demonstrate the permissibility of relying on English predecessor statutes to ascertain the legislative intent of a Singaporean statute under s 9A(3)(*d*) of the Interpretation Act 1965.
[120] State of Singapore, *Legislative Assembly Debates, Official Report* (2 September 1959), vol 11 at col 587 (K M Byrne, Minister for Law and Labour).

legislative intent behind the words "founded on a contract" was a reference only to breaches of contract.

51 Under s 6 of the English Limitation Act 1980, contract and tort continued to be grouped together because historically, the dividing line between the two causes of action was too fine and it would have been impracticable to attempt to differentiate between the two.[121] This is because the old common law forms of action did not make a distinction between contract and tort.[122] The perceived similarity between actions in tort and contract implies that the contractual actions covered under s 6(1)(*a*) concern breaches of obligations and the UK Parliament intended to ensure uniform treatment of actions triggered by breaches of any form, regardless of whether the cause of action lay in contract or tort.

52 Turning back the clock further, both the Singapore Limitation Act and the English Limitation Act of 1939 can be traced back to s 3 of the English Limitation Act of 1623,[123] which prescribes a six-year limitation period for, *inter alia*, "all actions of debt grounded upon any lending or contract without specialty".[124] Section 3 has been understood to refer to all claims of assumpsit (*ie*, promise),[125] which would include a claim for breach of contract (*ie*, special assumpsit) and claims for restitution in implied contract (*ie*, general assumpsit).[126] Therefore, s 3 of the English Limitation Act of 1623 further confirms that Parliament had not intended for s 6(1)(*a*) to cover equitable rescission claims, since they do not involve a promise.[127]

53 In summary, following the second step of the *Tan Cheng Bok* framework, it is clear that Parliament's intention for s 6(1)(*a*) of the Limitation Act was to provide the same limitation period for assumpsit actions because of their similarity to tort.

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[121] United Kingdom, House of Lords, *Parliamentary Debates* (20 May 1954), vol 187 at col 815.
[122] United Kingdom, House of Lords, *Parliamentary Debates* (20 May 1954), vol 187 at col 815.
[123] United Kingdom Law Commission, *Limitation of Actions* (LC270, 2001) at para 1.8.
[124] Limitation Act of 1623 (c 16) (UK) s 3.
[125] Graham Virgo, *The Principles of the Law of Restitution* (Oxford University Press, 3rd Ed, 2015) at p 735.
[126] Dominic O'Sullivan KC, Rafal Zakrzewski & Steven Ballantyne Elliott, *The Law of Rescission* (Oxford University Press, 3rd Ed, 2022) at p 52.
[127] *Esben Finance Ltd and others v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [58]–[60], [66]–[67] and [75].

54 At the final step of the *Tan Cheng Bock* framework, the interpretation which better forwards Parliamentary intent will be adopted. It is submitted that the interpretation that the words "founded on a contract" only encompasses breaches of contract should ultimately be preferred for this reason. Since the English equivalent to s 6(1) was historically applied to actions of assumpsit, and with the repudiation of the implied contract theory (so an action in general assumpsit is no longer within the scope of s 6(1)),[128] this leaves us with an action in special assumpsit (*ie*, breach of contract) as the only claim within the meaning of "founded on a contract". Hence, the contractual action within s 6(1) of the Singapore Limitation Act must be premised on a pre-existing obligation in contract and operates in pursuit of remedies for a wrong, which would be the breach of the contractual promise. This supports the usage of Birks' taxonomy as a form of analysis. A claim for equitable rescission therefore relates to the formation of a contract and is not premised upon a promise, so it should not be seen as an action founded on contract.

55 As the Singapore Parliament's legislative object was based on the English Limitation Act 1939,[129] the intention behind the enactment of s 6(1) Singapore Limitation Act therefore confines the meaning of the words "founded on a contract" to actions for breach of contract.

56 With regard to the broad reading of "founded on a contract" proposed by the Singapore courts, it should be noted that the ability of the court to take an updating construction is constrained by the legislative intent as to the "correct" interpretation at the time of enactment.[130] While the courts can, in limited circumstances, take into account new developments after the enactment of a statute,[131] the courts cannot, through judicial interpretation, alter Parliament's intended meaning in the name of taking into account new developments.[132] Here, Parliament intended for actions "founded on a contract" to be subject to a six-year time bar to homogenise the limitation periods of action of tort

[128] See para 37 above.
[129] State of Singapore, *Legislative Assembly Debates, Official Report* (2 September 1959), vol 11 at col 587 (K M Byrne, Minister for Law and Labour).
[130] *AAG v Estate of AAH, deceased* [2010] 1 SLR 769 at [40].
[131] *AAG v Estate of AAH, deceased* [2010] 1 SLR 769 at [30], citing Francis Alan Roscoe Bennion, *Bennion on Statutory Interpretation – A Code* (LexisNexis, 5th Ed, 2008) at p 889.
[132] *AAG v Estate of AAH, deceased* [2010] 1 SLR 769 at [31].

and contract due to their similarities.[133] Given that a claim for equitable rescission does not involve a breach of obligations (*ie*, it is not founded on the causative event of a ***wrong***), it is not substantially similar to an action in tort, and the need for homogenous treatment as Parliament intended does not apply here. The narrower interpretation of "founded on a contract" would thus be more consistent with legislative intent.

57 At this juncture, it is acknowledged that Mr K M Byrne, Singapore's then Minister for Law and Labour, had stated in Parliament that the broad principle of the Bill is to "make the limitation period for nearly all actions six years", subject to a few exceptions.[134] Claims for rescission were not legislated as one of these exceptions to the six-year limitation period. Some might thus argue that claims for equitable rescission are subject to a six-year time bar.

58 However, it is humbly submitted that even assuming that such silence could lend support to a broader reading of "founded on a contract", Minister Byrne's statement should be read as referring to the act in general, rather than as one making specific reference to s 6 itself. Minister Byrne's reference to the "broad principle of the Bill" can be construed as the general purpose of the statute. While the specific purpose of the provision should be consistent with the statute as a whole,[135] the lack of contemplation for claims of equitable rescission makes it unclear that Parliament had intended to expand the meaning of "founded on a contract". The impetus for reform was to do away with the arbitrary limitation periods across the provisions of the preceding statute,[136] which meant that any revision to the Limitation Act was not intended to expand the suites of actions falling within its ambit, but to homogenise the limitation periods for existing causes of action. The only change to s 6 was the omission of the word "simple" from "founded on simple contract". It is hard to believe that Parliament had a specific intention to include claims for rescission within the ambit of s 6 with this revision. The better justification for this cosmetic change would be that

[133] See para 51.
[134] State of Singapore, *Legislative Assembly Debates, Official Report* (2 September 1959), vol 11 at col 587 (K M Byrne, Minister for Law and Labour).
[135] *Tan Cheng Bock v AG* [2017] 2 SLR 850 at [41].
[136] State of Singapore, *Legislative Assembly Debates, Official Report* (2 September 1959), vol 11 at col 587 (K M Byrne, Minister for Law and Labour).

because Parliament shuns tautology,[137] the word "simple" was omitted insofar as it would have no effect on interpretation.

59 Even if one were to argue that equitable rescission falls within s 6 of the Singapore Limitation Act because s 3 of the English Limitation Act of 1623 encompasses actions for general assumpsit (which traditionally covers claims for unjust enrichment, and is similar to equitable rescission in that they both support the enforcement of restitutionary rights), this is not support for a broad reading of "founded on a contract". This was the position taken in *Ching Mun Fong* above.[138] While an action for general assumpsit is covered by the Limitation Act 1623, the words "founded on a contract" in the words of the Singapore Limitation Act are incapable of encompassing a general assumpsit action. This is because the Singapore courts have held that the purported contract in a general assumpsit claim is based on the implied contract theory, which they have rejected on the basis that it is a legal fiction.[139] We are hence left with a narrow reading of "founded on a contract" to mean breaches of contract, insofar as it is the only interpretation which aligns with legislative intent, and the 6-year time bar is incapable of applying to claims for equitable rescission by analogy on this basis.

(b) Action founded on tort

60 The next line of analysis is whether the right to rescind in equity is time-barred because it is founded on tort. Preliminarily, it is acknowledged that the law as it stands does see some claims of equitable rescission as capable of being analogised to a tort. This occurs where the facts supporting the finding of a vitiating factor (leading to equitable rescission of contract) corresponds with a tort under s 6(1), and so such that the right to rescind can be lost through lapse of time. For instance, in *IGE USA (formerly IGE USA Investments) and others v The Commissioners for Her Majesty's Revenue and Customs*[140] ("***IGE***

[137] *JD Ltd v Comptroller of Income Tax* [2006] 1 SLR 484 at [43].
[138] See para 37.
[139] *Esben Finance Ltd and others v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [58]–[60], [66]–[67] and [75]. The Singaporean approach can be contrasted with the English approach. While the English courts have also rejected the implied contract theory, they have taken a "pragmatic approach", and continued to apply it in order to read a six-year limitation period for unjust enrichment actions into their own version of s 6(1)(*a*). See Tang Hang Wu, "Limitation Period for Unjust Enrichment Claims, at the Claimant's Expense, Lack of Consent, Illegality, and Vindication of Property Rights: *Esben Finance Ltd and Others v Wong Hou-Lianq Neil*" (2022) 33(3) *King's Law Journal* 345 at 346.
[140] [2021] EWCA Civ 534.

USA"), the court found that the claim for equitable rescission on the grounds of fraudulent misrepresentation was analogous to the tort of deceit.[141] Going even further, even if an analogy can be drawn to common law rescission/unjust enrichment (to which no limitation period applies), the court decided that the statute of limitations would continue to apply to bar the claim. This was because the question posed by s 36(1) of the English Limitation Act 1980 was whether an analogy could be drawn to an action for which a limitation period existed.[142] It did not matter if an analogy could be drawn to an alternative action that was not subject to any limitation period.[143]

61 Despite the holding in *IGE USA*, it is submitted that allowing an analogy to be drawn just because equitable rescission is available where the facts support a tortious or contractual action is a source for potential doctrinal incoherence. This is so for two reasons.

62 Firstly, it would be completely arbitrary that only some of the vitiating factors will be caught by a time-bar. It has been observed that some claims for equitable rescission have no corresponding action within the English Limitation Acts, such as where contracts are vitiated for undue influence, the narrow contractual doctrine of unconscionability, or arguably, negligent misrepresentation.[144] Given the continued application of limitation by analogy domestically, it is likely the same arbitrariness would be observed in Singapore.

63 Secondly, if *IGE USA* was applied, the absence of an analogy for other vitiating factors supporting equitable rescission would lead to a situation where the defendant would be better off at common law than

[141] *IGE USA (formerly IGE USA Investments) and others v The Commissioners for Her Majesty's Revenue and Customs* [2021] EWCA Civ 534 at [59]–[60]; *Panatron Pte Ltd and another v Lee Cheow Lee and another* [2001] 2 SLR(R) 435 at [13].
[142] *IGE USA (formerly IGE USA Investments) and others v The Commissioners for Her Majesty's Revenue and Customs* [2021] EWCA Civ 534 at [83].
[143] *IGE USA (formerly IGE USA Investments) and others v The Commissioners for Her Majesty's Revenue and Customs* [2021] EWCA Civ 534 at [83].
[144] For undue influence and unconscionability, see *Humphreys v Humphreys* [2004] EWHC 2201 (Ch) at [99]; *Evans and others v Lloyd and another* [2013] EWHC 1725 at [79]. For negligent misrepresentation, see Paul S. Davies, "Section 36 of the Limitation Act 1980" (2023) *Cambridge Law Journal* 1 at 11–12. Davies notes that based on the wording of the UK Limitation Act, the doctrine of limitation by analogy only applies to analogies that can be drawn before 1940, and the tort of negligent misrepresentation only came into existence subsequently in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465. However, a similar clause is not found in the Singapore Limitation Act or its predecessor, the Limitation Ordinance 1959 (No 57 of 1959).

in equity,[145] and the ability of the defendant to escape from the consequences of his misconduct at common law through the statute of limitations goes against the gravity of the common law vitiating factors. Reusing the example of misrepresentation, unlike a case of fraudulent misrepresentation, no analogy exists in common law for innocent misrepresentation. A claimant who grounds his claim for rescission on the basis of innocent misrepresentation would then be better off than one who grounds his claim for rescission on the basis of fraudulent misrepresentation, because only the latter would be time-barred owing to the fact that an analogy can be drawn between an action for fraudulent misrepresentation and the tort for deceit. This is hardly satisfactory.

64 To resolve this, I argue that all claims for equitable rescission based on the contractual vitiating factors cannot be treated as "founded upon tort", regardless of whether the facts support a claim in tort.[146] Using the example of misrepresentation, this is because the remedy for damages for a *tortious* claim in fraudulent or negligent misrepresentation arises independently of a *contractual* claim for equitable rescission. The former is a tortious remedy while the latter arises only where a contract exists (though not "founded on a contract").[147]

65 At this juncture, I acknowledge that two objections could potentially be raised against my argument. The first was raised in *IGE USE* about the need to ensure parity between the available remedies; it could not stand that the Revenue and Customs Commissioners could rescind in equity and use their statutory powers to claw back a sum equivalent to what they would have been entitled to in damages.[148] The second is that even where equity's exclusive jurisdiction is involved, it operates in tandem with common law and the courts of Chancery will be slow to depart from or produce rules inconsistent with the common law.[149] In effect, these objections turn on a risk that allowing equitable rescission in a tortious action which would otherwise be time-barred

[145] Paul S. Davies, "Section 36 of the Limitation Act 1980" (2023) *Cambridge Law Journal* 1 at 11.
[146] The concern that claims for equitable rescission would be left unchecked is addressed by the operation of laches. See para 83.
[147] Hugh Beale, "Misrepresentation" in *Chitty on Contracts Vol I* (Hugh Beale ed) (Sweet & Maxwell, 35th Ed, 2023) at p 865.
[148] *IGE USA (formerly IGE USA Investments) and others v The Commissioners for Her Majesty's Revenue and Customs* [2021] EWCA Civ 534 at [61].
[149] John McGhee KC & Steven Elliott KC, *Snell's Equity* (Sweet and Maxwell, 34th Ed, 2020) at pp 94–95.

would undermine the statutory regime of the Limitation Act by creating a backdoor route to a remedy.

66 However, it must be remembered that the vitiating factors exist independently of the tortious actions. Even though the courts have viewed fraudulent and negligent misrepresentation as subsets of the torts of deceit and negligence respectively,[150] these classifications of misrepresentation as tortious are misguided. This is because a claimant's entitlement to rescission is not premised upon proving any deceit or negligence, but precisely upon misrepresentation *per se*.[151] Even if all actions for fraudulent and negligent misrepresentation would produce actions in tort, the inability to prove the existence of the elements of deceit and negligence respectively does not automatically bar the claim for rescission. This also explains why an action for innocent misrepresentation would still allow a claimant the remedy of rescission.[152]

67 Indeed, the authors of the leading local contract textbook, *Contract Law in Singapore*, write that: "[T]he equitable remedy of rescission is *always* available, *regardless* of the type or category or operative misrepresentation involved".[153] The implication of this is that misrepresentation is a standalone cause of action that entitles a claimant to rescission, with deceit and negligence to be pleaded in addition to it, to support a claim for damages.[154]

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[150] For fraudulent misrepresentation, see *Panatron Pte Ltd and another v Lee Cheow Lee and another* [2001] 2 SLR(R) 435 at [14]; *Ernest Ferdinand Perez De La Sala v Compania De Navegacion Palomar, SA and other and other appeals* [2018] 1 SLR 894 at [170]. For negligent misrepresentation, see *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 but *cf* Paul S. Davies, "Section 36 of the Limitation Act 1980" (2023) *Cambridge Law Journal* 1 at 11–12 (see note 76 above), where he argues that negligent misrepresentation may not be analogised to negligence.

[151] Andrew Phang & Goh Yihan, *Contract Law in* Singapore (Wolters Kluwer, 2nd Ed, 2021) at p 201.

[152] The availability of rescission for innocent misrepresentation can be seen from *Loh Sze Ti Terence Peter v Gay Choon Ing* [2008] SGHC 31 at [77] and *Eng Hui Cheh David v Opera Gallery Pte Ltd* [2009] SGCA 49 at [11].

[153] Andrew Phang & Goh Yihan, *Contract Law in Singapore* (Wolters Kluwer, 2nd Ed, 2021) at p 222 (emphasis added).

[154] See *Chen Qiming v Huttons Asia Pte Ltd and others* [2024] SGHC 103 at [142], where the claim in negligence was dismissed because it was duplicative of the failed claim in negligent misrepresentation. See also *CDX and another v CDZ and another* [2021] 5 SLR 405 at [57]: "Equity cannot, however, accompany rescission with an award of "damages" *stricto sensu*". If an award of damages cannot accompany a claim for equitable rescission on the grounds as equitable misrepresentation, it stands to reason that negligence and misrepresentation are pleaded as separate causes of action, given the cases where damages have been awarded for "negligent misrepresentation".

68 Moreover, the elements of misrepresentation are also established independently from the tort of deceit and negligent misstatement. Misrepresentation looks at the claimant's impaired intention when entering into the contract, evinced by a change of position following the defendant's false statements.[155] On the other hand, the torts of deceit and negligence focus on the defendant, be it his state of mind or his duty of care.[156] Such defendant-centric considerations are less relevant in establishing an operative misrepresentation insofar as the falsity of a statement is ascertained objectively from the representee's perspective.[157] Instead, the defendant's mental state and the consequential tortious link only goes towards the availability and quantification of damages.[158] Consequently, as causes of action relate to the "essential factual material that supports a claim",[159] a claim for rescission is not predicated upon a tortious cause of action.

69 To further illustrate, consider the counterexample of *Yeow Chern Lean v Neo Kok Eng*[160]. There, the claimant Mr Neo brought a claim against Mr Yeow for converting several cheques made out to a third party and "in the alternative, a claim for moneys had and received".[161] The court held that his claim in conversion failed as he did not possess title to the cheques and was not the proper claimant.[162] His alternative claim in restitution failed because as a claim for restitution for wrongs, it was premised on a "waiver of the tort", where he would be electing for a gain-based rather than a compensatory remedy.[163] Hence, Chao Hick Tin JA wrote:[164] "Since Neo's claim for conversion is unsustainable, it follows that his claim for restitution of the tort also fails. Simply put, he cannot "waive the tort" when there is no tort to waive in the first place." This is unlike a claim for rescission for misrepresentation; if the claimant cannot establish negligence or fraud,

[155] *Raiffeisen Zentralbank Osterreich AG v Archer Daniels Midland Co and others* [2007] 1 SLR(R) 196 at [54].
[156] See *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve (sole executrix of the estate of Ng Hock Seng, deceased) and another* [2013] 3 SLR 801 at [72] for the tort of deceit; *Hai Jiao Ltd and others v Yaw Chee Siew* [2020] 5 SLR 21 at [403] for the tort of negligence.
[157] *Spice Girls Ltd v Aprilia World Services BV* [2002] EWCA Civ 15 at [62].
[158] *Eng Hui Cheh David v Opera Gallery Pte Ltd* [2009] SGCA 49 at [9]–[10]; *Xia Zhengyan v Geng Changqing* [2015] 3 SLR 732 at [97].
[159] *Multistar Holdings Ltd v Geocon Piling & Engineering Pte Ltd* [2016] 2 SLR 1 at [34].
[160] [2009] 3 SLR(R) 1131.
[161] *Yeow Chern Lean v Neo Kok Eng and another* [2009] 3 SLR(R) 1131 at [8].
[162] *Yeow Chern Lean v Neo Kok Eng and another* [2009] 3 SLR(R) 1131 at [50].
[163] *Yeow Chern Lean v Neo Kok Eng and another* [2009] 3 SLR(R) 1131 at [52].
[164] *Yeow Chern Lean v Neo Kok Eng and another* [2009] 3 SLR(R) 1131 at [52].

he can still rescind so long as there is a material misstatement of fact inducing him into the contract.[165]

70 Thus, where an analogous tort can be found, it seems that the court in *IGE USA* and the line of related authorities were too quick to draw an analogy where there was mere factual concurrence to support multiple causes of action. Even if the court's concurrent jurisdiction is engaged, the grant of equitable rescission is not necessarily a response to the common law tort claim and one should examine the underlying principles justifying equitable rescission. If this is done, then the claimant will not be seen to be using equity to circumvent the statute of limitations which the doctrine of limitation by analogy seeks to prevent when equitable rescission is granted.[166]

71 Consequently, claims for equitable rescission cannot be analogised to an action either in contract or tort and so limitation by analogy in Situation A does not provide an explanation as to why delay alone exists as a bar to rescission. The former is so because it falls outside the scope of the Parliamentary intent, the latter is so because of the absence of an analogous tort, or, where an analogous tort exists, the independence of the vitiating factor from the corresponding tort. Hence, we shall move to consider if an analogy can be drawn in Situation B.

(3) The analogy for rescission (Situation B – corresponding remedy)

72 Having established that equitable rescission can never fall into Situation A, I now move on to explain why equitable rescission also cannot fall into Situation B, *ie*, where the *remedy* in equity is analogous to a *remedy* at law that is subject to the statute of limitations. In the case of equitable rescission, this paper doubts that a claim for an analogous remedy exists, and even if there was such an analogous remedy, the cause of action of unjust enrichment which grounds a claim for such a remedy is not subject to any limitation period under the Singapore Limitation Act.

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[165] Andrew Phang & Goh Yihan, *Contract Law in Singapore* (Wolters Kluwer, 2nd Ed, 2021) at p 222.

[166] *Katherine Tang Woon Kiang v Luk King Hung alias Christina King-Hung Luk alias Christina Eu (Sued as the Administrator of the estate of Eu Keng Fai Fred alias Fred Eu Keng Fai alias Fred Eu alias Fred Keng-Fai Eu alias Eu Fred alias Eu, Fred Keng-Fai alias* [1999] SGHC 229.

73 Intuitively, the remedy analogous to equitable rescission would, at first glance, be that of common law rescission. This is because of the substantive similarities between the contractual vitiating factors at common law and equity, of which there are at least two.[167]

74 First, the vitiating factors entitling rescission at law can be described to be a subset of those in equity, as the equitable vitiating factors were conceived as a means to ameliorate the narrowness of those at common law.[168] Second, both forms of rescission are subject to the bar of impossibility of *restitutio in integrum*, though in the case of equity, restitution can be ordered on terms to achieve practical justice.[169] At common law, perfect restitution must be achieved because rescission "takes effect automatically upon notice" and there is "no scope for a discretionary adjustment of benefits".[170]

75 The problem with treating common law rescission as the remedy analogous to equitable rescission is that there is actually no such claim as "common law rescission". Earlier in this paper, common law rescission was framed as a self-help remedy and so, rescission can be effected at will by the rescinding party without the involvement of the courts unless declaratory relief is sought. In other words, there is no claim for common law rescission.[171] Further, even if one argues such a claim exists where declaratory relief is sought,[172] there is no time limit for when one can exercise the right to rescind.[173] Therefore, when an analogy is drawn to common law rescission, one is potentially drawing

[167] See, for example, *Wellmix Organics (International) Pte Ltd v Lau Yu Man* [2006] SGHC 14 at [66]–[71] for the discussion on mistake.
[168] Nelson Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (Sweet & Maxwell, 3rd Ed, 2023) at p 2.
[169] *Emile Erlanger and others v New Sombrero Phosphate Company and others* (1878) 3 App. Cas 1218 at 1278–1279.
[170] Dominic O'Sullivan KC, Rafal Zakrzewski & Steven Ballantyne Elliott, *The Law of Rescission* (Oxford University Press, 3rd Ed, 2022) at pp 398–399.
[171] Janet O' Sullivan, "Rescission as a self-help remedy: a critical analysis" (2000) 59(3) *Cambridge Law Journal* 509 at 517; Hugh Beale, "Rescission" in *Chitty on Contracts Vol I* (Hugh Beale ed) (Sweet & Maxwell, 35th Ed, 2023) at p 2553.
[172] See Dominic O'Sullivan KC, Rafal Zakrzewski & Steven Ballantyne Elliott, *The Law of Rescission* (Oxford University Press, 3rd Ed, 2022) at p 398. The authors argue that the courts can only declare that a contract is rescinded only if there has been *restitutio in integrum*, which indicates that a claim for declaratory relief is predicated also on an action of unjust enrichment.
[173] Dominic O'Sullivan KC, Rafal Zakrzewski & Steven Ballantyne Elliott, *The Law of Rescission* (Oxford University Press, 3rd Ed, 2022) at p 519; *IGE USA (formerly IGE USA Investments) and others v The Commissioners for Her Majesty's Revenue and Customs* [2021] EWCA Civ 534 at [83].

an analogy to an unjust enrichment action, which is not subject to a time bar.[174] The link to unjust enrichment can be drawn in two ways.

76 The first is as a vindication of restitutionary rights in the goods transferred.[175] Burrows describes this as the narrow view of the restitutionary nature of rescission as it can only arise where a contract has been partially executed.[176] After a contract is unequivocally rescinded *at law*, the rescinding party will regain the legal title of the goods he had transferred.[177] Historically, the rescinding party will typically bring an action for trover,[178] or monies had and received.[179] Regardless of which form of action is chosen, the right to restitution post-rescission at common law was based on an implied contract, where a fictional agreement with the defendant to repay the money owed exists.[180] However, following the rejection of the implied contract theory in English law and acceptance of the independence of the law of unjust enrichment,[181] the SGCA in *Esben Finance* opted to ground the common law restitutionary claim, which included actions for monies had and received, in unjust enrichment instead.[182] It follows that under Singapore law, the cause of action to vindicate restitutionary rights following the rescission of a contract would be unjust enrichment.

[174] *Esben Finance Ltd and others v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [48] and [86]. However, the Ministry of Law is currently reviewing the Singapore Limitation Act and looking to include a limitation period for unjust enrichment: see *Singapore Parliamentary Debates*, *Official Report* (2 November 2011) vol 95 (K Shanmugam, Minister for Law and Home Affairs).

[175] Janet O' Sullivan, "Rescission as a self-help remedy: a critical analysis" (2000) 59(3) *Cambridge Law Journal* 509 at 519; Dominic O'Sullivan KC, Rafal Zakrzewski & Steven Ballantyne Elliott, *The Law of Rescission* (Oxford University Press, 3rd Ed, 2022) at p 51.

[176] Andrew Burrows, *The Law of Restitution* (Oxford University Press, 3rd Ed, 2011) at p 17.

[177] *Load v Green* (1846) 153 ER 828 at 830. See also *Esben Finance Ltd and others v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [215]–[251]. The regaining of legal title by the rescinding party may support a concurrent action for vindication of property rights. It is unclear if this action is subject to a time bar. Even if the action in property was time-barred or otherwise unavailable, at [250]–[251], an action in unjust enrichment for lack of consent may be available, returning us to the original analogy to unjust enrichment.

[178] See *Load v Green* (1846) 153 ER 828 at 830.

[179] See *Ching Mun Fong (executrix of the estate of Tan Geok Tee, deceased) v Liu Cho Chit* [2000] 3 SLR(R) 304 at [73].

[180] *Esben Finance Ltd and others v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [58] and [61].

[181] *Esben Finance Ltd and others v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [62]–[65] and [67].

[182] *Esben Finance Ltd and others v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [65].

77 Alternatively, Burrows raises the wider view that rescission is always restitutionary because all instances of rescission involve the reversal of a contractual right that is viewed as a benefit.[183] Given the asymmetric treatment of executed and executory contracts that would result under the narrower view, and the difficulties in distinguishing between the two types of contracts, Burrows argues for the wider view to be adopted.[184]

78 The narrow view is unsatisfactory because the analogy drawn to unjust enrichment under the narrow view is tantamount to putting the cart before the horse. This is because it conveniently ignores the existence of a subsisting contract. In other words, without the equitable rescission of the contract *first* occurring, there can be no unjust enrichment. As Lai Kew Chai J aptly put: "[T]he law of restitution should not be allowed to disturb unrescinded contracts and transactions which have not been set aside at law or in equity".[185] A claim for equitable rescission is a request for the court to set aside the contract, which precedes the unjust enrichment action and cannot be equated with the enforcement of restitutionary rights. It is also possible that an analogy to unjust enrichment is pointless: Even if equitable title revests in the claimant as a result of rescission,[186] *restitutio in integrum* is court-ordered as a form of consequential relief,[187] without the need for a further standalone action to enforce such rights. In other words, at common law, one rescinds and goes to court to obtain restitution; in equity, one goes to court for rescission, and the court as a matter of practical justice orders restitution in addition to the rescission.

79 Thus, if one were to draw an analogy to unjust enrichment, the wider view must be adopted. If that was the case, the Singapore

[183] Andrew Burrows, *The Law of Restitution* (Oxford University Press, 3rd[d] Ed, 2011) at p 17.
[184] Andrew Burrows, *The Law of Restitution* (Oxford University Press, 3rd Ed, 2011) at pp 18–19.
[185] *Info-communications Development Authority of Singapore v Singapore Telecommunications Ltd* [2002] 2 SLR(R) 136 at [89]. This position seems to be taken further in the UK in *Barton v Morris* [2023] UKSC 3 at [96] where the majority took the view that a contract is a complete allocation of risk because the fact that a contract is silent precludes an obligation to make restitution from arising.
[186] *Alati v Kruger* [1956] St R Qd 306 at 317. *Cf* Janet O' Sullivan, "Rescission as a self-help remedy: a critical analysis" (2000) 59(3) *Cambridge Law Journal* 509 at 511 and 539–541; Michael Bridge KC, *Personal Property Law*, (Oxford: Clarendon Press, 4th Ed, 2015) at pp 192–193.
[187] Dominic O'Sullivan KC, Rafal Zakrzewski & Steven Ballantyne Elliott, *The Law of Rescission* (Oxford University Press, 3rd Ed, 2022) at pp 58–59.

Limitation Act at the moment can offer no explanation for why delay operates as a bar to rescission. This is because neither common law rescission nor unjust enrichment is subject to a time bar. Even if a limitation period for unjust enrichment claims was to be subsequently imposed by Parliament (and this is where the distinction between the narrow and broad view is fundamental), time can only begin to run after rescission has occurred,[188] because it is only then when the right to restitution arises. Since no remedy exists as a viable analogy for equitable rescission within the ambit of the Limitation Act, delay as a bar to rescission cannot be explained under Situation B.

(4) Final thoughts

80 The foregoing analysis shows that both Situation A and B cannot support an analogy at law for equitable rescission of a voidable contract pursuant to s 6(7) of the Singapore Limitation Act. Under Situation A, this is because a claim for equitable rescission of a voidable contract exists neither in tort nor contract, and hence cannot be analogised under s 6(1). With regard to the analogy to contract, the legislative history and Birks' taxonomy support the view that s 6(1) refers only to breaches of contract, and not the factors showing vitiated consent in its formation. The Limitation Act was drafted only with breaches of contract in mind, and the placement of actions "founded on a contract" in s 6(1) of the Singapore Limitation Act alongside tortious actions was motivated by the difficulty in differentiating the two. Claims for rescission, which dealt with the formation and not the breach of obligations, would not be caught by this rationale.

81 As for the analogy to torts, the case law indicates that (**a**) not all vitiating factors have an analogy, which results in inconsistent treatment of the vitiating factors; and (**b**) in some circumstances, a party would be better off framing his action on an equitable vitiating factor than a common law one. To resolve these inconsistencies, the better view would be to eschew the existing analogy applicable to certain vitiating factors because they exist *independently* of any analogous torts.

82 The alternative conception would be under Situation B; that such a claim is situated in the realm of unjust enrichment, just like its

[188] Dominic O'Sullivan KC, Rafal Zakrzewski & Steven Ballantyne Elliott, *The Law of Rescission* (Oxford University Press, 3rd Ed, 2022) at p 519.

common law counterpart. The issue, however, is that the remedy of equitable rescission *precedes* that of unjust enrichment; there can be no unjust enrichment without the impugned contract *first* being rescinded. In any event, even if equitable rescission could be analogised to unjust enrichment, there is presently no limitation period for unjust enrichment claims in Singapore. This again rules out the doctrine of statute of limitations by analogy as the explanatory basis of delay as a bar to rescission.

83 In light of the difficulties raised above, the necessity of being able to draw an analogy for rescission is questionable. The risk of a perpetual Sword of Damocles over the defendant's head is also overstated, given that (as will also be explored from paras 86 to 93 below) pursuant to s 32 of the Singapore Limitation Act, all equitable remedies continue to be subject to the doctrine of laches and acquiescence. If there has been a change of position in good faith by the defendant or the impossibility of reasonable *restitutio in integrum* is established, the right to rescind would be lost, even without the intervention of statute.

84 Furthermore, the Singapore Limitation Act is littered with relics of time past. The legislative history of s 6(1) muddies the application of limitation periods, as illustrated by the differences in opinion on the meaning of "contract" across jurisdictions. To compound this, the doctrine of limitation by analogy continues to perplex, as evinced by the divergence in its application in *Panweld* (CA) and *Lim Ah Leh*, and the controversy generated by similar decisions in England.[189] Consistent with my view that it is impossible and unnecessary to draw an analogy for equitable rescission, a potential solution would be to do away with s 6(7) of the Singapore Limitation Act and the mechanism of limitation by analogy, and leave the issue of time bar of equitable remedies to s 32.

85 Since limitation by analogy is inapplicable to claims for equitable rescission, it does not explain why delay operates as a bar to rescission. I shall move on to consider the alternative reasons behind the loss of the right to rescind upon lapse of time: prejudicial and affirmatory laches.

[189] Paul S. Davies, "Section 36 of the Limitation Act 1980" (2023) *Cambridge Law Journal* 1 at 11.

B. Doctrine of laches

86 Although the statute of limitations offers an insufficient explanatory basis for delay as a bar to equitable rescission, the road does not stop here. This is because s 32 of the Singapore Limitation Act also allows the court to "refuse relief on the ground of acquiescence, laches or otherwise".[190] Indeed, it has been suggested that the decision in *Leaf* could potentially be brought under the doctrine of laches,[191] although the lower court had found that there had been no laches.[192] This section will thus examine whether the decision in *Leaf* can be grounded on s 32.

87 In this regard, this section shall first turn to the doctrine of laches. By way of background, although the word "laches" is an old French word for "*slacknesse* or negligence",[193] laches has evolved beyond that to refer to a substantial lapse of time *coupled with "the existence of circumstances that make it inequitable to enforce the claim"*.[194] Indeed, Longmore LJ had noted in *Salt v Stratstone Specialist Ltd* that it is a "misnomer" to say that rescission can be barred by a lapse of time; rather, it is only "the lapse of a reasonable time such that it would be inequitable in all the circumstances to grant rescission which constitutes a bar to the remedy".[195] This is congruent with the definition of laches in Singapore, which is also premised on notions of unconscionability.[196]

88 Although a broad approach is taken to ascertain the equities of the case,[197] generally, laches can be reduced to two cases: (**a**) where a party's conduct and neglect had put the other party in a position where it would not be reasonable to award the remedy; or (**b**) where it would be unjust to award a remedy because a party's conduct has been regarded

[190] Limitation Act 1959 s 32.
[191] Paul S. Davies, "Recission for Misrepresentation" (2016) 75(1) *Cambridge Law Journal* 15 at 17.
[192] *Leaf v International Galleries* [1950] 2 KB 86 at 92.
[193] *Partridge v Partridge* [1854] 1 Ch 351 at 360.
[194] *Re Estate of Tan Kow Quee (alias Tan Kow Kwee)* [2007] 2 SLR(R) 417 at [33] (emphasis added).
[195] *Salt v Stratstone Specialist Ltd (t/a Stratstone Cadillac Newcastle)* [2015] EWCA Civ 745 at [43].
[196] *Re Estate of Tan Kow Quee* [2007] 2 SLR(R) 417 at [33].
[197] *In re Loftus, deceased* [2007] 1 WLR 591 at [42], citing *Patel v Shah* [2005] EWCA Civ 157 at [32]: "The inquiry should require a broad approach, directed to ascertaining whether it would in all the circumstances be unconscionable for a party to be permitted to assert his beneficial right."

as a waiver of the wrong.[198] This section will deal, in turn, with the former type of situation known as "prejudicial laches"; and the latter, known as "affirmatory laches".[199] As will become evident, the difficulty with laches as an explanation for *Leaf* is that it is uncertain that the circumstances in that case rose to the level of unreasonableness to justify a denial of rescission.

(1) Prejudicial laches in Leaf *(or lack thereof)*

89 Although the courts do not take an overly-technical or prescriptive approach towards laches, the factors the court has taken into account include "the period of the delay, the extent to which the defendant's position has been prejudiced by the delay and the extent to which that prejudice was caused by the actions of the plaintiff".[200] To simplify, a finding of prejudicial laches generally requires the combination of unreasonable delay and prejudice.[201] It is precisely the existence of prejudicial acts or omissions that occasions the injustice which shifts the equities in the defendant's favour.[202] Given the affirmation of the lower court's finding of a lack of laches, and the fact that International Galleries could easily have been restored to its original position,[203] it is difficult to conceive of the sort of detriment that occasioned to International Galleries such that Mr Leaf's conduct can be said to have put them in a position where it would be unreasonable to

[198] *The Lindsay Petroleum Co v Prosper Armstrong Hurd, Abram Farewell and John Kemp* (1874) LR 5 PC 221 at 240; *Chng Weng Wah v Goh Bak Heng* [2016] 2 SLR 464 at [44], citing *Cytec Industries Pte Ltd v APP Chemicals International (Mau) Ltd* [2009] 4 SLR(R) 769 at [46]; J D Heydon, MJ Leeming & P G Tuner, *Meagher, Gummow & Lehane's Equity Doctrines & Remedies* (LexisNexis, 5th Ed, 2015) at para 38-010.

[199] The terms "prejudicial laches" and "affirmatory laches" were coined in Dominic O'Sullivan KC, Rafal Zakrzewski & Steven Ballantyne Elliott, *The Law of Rescission* (Oxford University Press, 3rd Ed, 2022) at p 518.

[200] *Nelson v Rye and another* [1996] 1 WLR 1378 at 1392, citing *The Lindsay Petroleum Co v Prosper Armstrong Hurd, Abram Farewell and John Kemp* (1874) LR 5 PC 221 at 239–240 and *Emile Erlanger and others v New Sombrero Phosphate Company and others* (1878) 3 App. Cas. 1218 at 1279–1280.

[201] See generally, I.C.F. Spry, *The Principles of Equitable Remedies* (Sweet & Maxwell, 9th Ed, 2014) at pp 233–243; *Nelson v Rye and other* [1996] 1 WLR 1378 at 1392, citing *The Lindsay Petroleum Co v Prosper Armstrong Hurd, Abram Farewell and John Kemp* (1874) LR 5 PC 221 at 239–240 and *Emile Erlanger and others v New Sombrero Phosphate Company and others* (1878) 3 App. Cas. 1218 at 1279–1280.

[202] I.C.F. Spry, *The Principles of Equitable Remedies* (Sweet & Maxwell, 9th Ed, 2014) at p 233; *The Lindsay Petroleum Co v Prosper Armstrong Hurd, Abram Farewell and John Kemp* (1874) LR 5 PC 221 at 239–240; *Fisher v Brooker and another* [2009] 1 WLR 1764 at [77].

[203] *Leaf v International Galleries* [1950] 2 KB 86 at 89, 92 and 94.

award the remedy. Hence, *Leaf* cannot be justified on the basis of prejudicial laches.

90 More broadly, it is also submitted that it should be almost impossible for delay, without prejudice, to engage the doctrine of laches.[204] As noted above, a finding of laches often demands both an unreasonable delay and prejudice occasioned to the defendant. A defence of laches is ultimately a balancing exercise, and it is hard to foresee how the lapse of time alone can tilt the scales of justice in the defendant's favour.

91 At this juncture, I acknowledge that in *P & O Nedlloyd BV v Arab Metals Co and others (No 2) (UB Tiger*)[205] ("***P & O Nedlloyd***"), the English Court of Appeal stated that it was "unnecessary for present purposes to decide" whether simple delay, in the absence of the defendant's change of position or detrimental reliance, can operate as a defence in equity.[206] In light of the conflicting authorities,[207] the court did not "wish to rule out the possibility that the court would regard it as inequitable to allow a claim to be pursued after a very long period of delay".[208]

92 However, one must first bear in mind that the words used in *P & O Nedlloyd* were "simple delay", and not unreasonable delay. The former is to be distinguished from the latter as the former deals with circumstances where the claimant was still labouring under the effects of the vitiating factor. He could not have been indolent in seeking the aid of the courts of equity to diminish the equity that has accrued in his

[204] *The Lindsay Petroleum Co v Prosper Armstrong Hurd, Abram Farewell and John Kemp* (1874) LR 5 PC 221 at 240; *Rees v De Bernardy* [1896] 2 Ch 437 at 445; *P & O Nedlloyd BV v Arab Metals Co and others (No 2) (UB Tiger*) [2007] 1 WLR 2288 at [61]; *Fisher v Brooker and another* [2009] 1 WLR 1764 at [4] and [68].
[205] [2007] 1 WLR 2288.
[206] *P & O Nedlloyd BV v Arab Metals Co and others (No 2) (UB Tiger*) [2007] 1 WLR 2288 at [61].
[207] The relevant authorities were not referred to in *P & O Nedlloyd BV v Arab Metals Co and others (No 2) (UB Tiger*) [2007] 1 WLR 2288 but the following cases were cited in Charles Mitchell KC, Paul Mitchell & Stephen Watterson, *Goff & Jones: The Law of Unjust Enrichment* (Sweet & Maxwell, 9th Ed, 2016) at p 856: *Hercy v Dinwoody* (1793) 2 Ves. Jun. 87; 30 E.R. 536; *Baker v Read* (1854) 18 Beav. 398; 52 E.R. 157; *Harcourt v White* (1860) 28 Beav. 303; 54 E.R. 382; *Archbold v Scully* (1861) 9 H.L.C. 360 at 383; 11 E.R. 769 at 778; *Brooks v Muckleston* [1909] 2 Ch. 519; *P & O Nedlloyd BV v Arab Metals Co and others (No 2) (UB Tiger*) [2007] 1 WLR 2288 at [61]. See discussion at para 97.
[208] *P & O Nedlloyd BV v Arab Metals Co and others (No 2) (UB Tiger*) [2007] 1 WLR 2288 at [61].

favour due to his vitiated consent. And in circumstances where there is no detriment to the defendant, the inequity of allowing rescission could not have been larger than the claimant's equity. In the absence of prejudice, the period of delay before it is considered unreasonable seems to be pitched at a high bar,[209] which the five-year lapse in *Leaf* falls markedly short of.

93 More broadly, it is therefore submitted that it should be almost impossible for delay, without prejudice, to engage the doctrine of laches.[210] A defence of laches is ultimately a balancing exercise, and it is hard to foresee how the lapse of time alone can tilt the scales of justice in the defendant's favour.

(2) Waiver, or "affirmatory laches" (but not acquiescence)

94 In certain cases, laches also encompass instances of waiver (known as "affirmatory laches"), where the passage of time supports an inference that the claimant has waived the right to take a particular course of action.[211] This sub-section shall first deal with matters of terminology, *ie*, why such cases of delay are a form of laches, but not "acquiescence", which is also spoken of together with laches in s 32 of the Singapore Limitation Act. Obviously, the difference seems semantic but since this paper seeks to pinpoint the doctrinal basis of delay, taxonomical accuracy is imperative. This section then discusses the requirement of knowledge for affirmatory laches to operate. Ultimately, this section will show that affirmatory laches do not provide the explanatory basis for delay as a bar to rescission.

[209] John Mason Lightwood, *The Time Limit on Actions* (Butterworths, 1909) at p 256; *Burroughes v Abbott* [1921] All ER Rep 709 at 713, where a delay of 12 years did not preclude equitable rectification of the mistake in a deed); *Weld-Blundell v Petre* [1929] 1 Ch 33 at 54: "But I know of no case where mere delay of less than twenty years has of itself been held a sufficient ground for refusing relief to a mortgagor of personal estate claiming to redeem the mortgage."; *Schulman v Hewson and others* [2002] EWHC 855 (Ch) at [55], where laches was successfully pleaded in relation to events occurring about 15 years earlier, and no mention of prejudice was made by the courts.

[210] *The Lindsay Petroleum Co v Prosper Armstrong Hurd, Abram Farewell and John Kemp* (1874) LR 5 PC 221 at 240; *Rees v De Bernardy* [1896] 2 Ch 437 at 445; *P & O Nedlloyd BV v Arab Metals Co and others (No 2) (UB Tiger*) [2007] 1 WLR 2288 at [61]; *Fisher v Brooker and another* [2009] 1 WLR 1764 at [4] and [68].

[211] *CSDS Aircraft Sales & Leasing Inc v Singapore Airlines Ltd* [2022] 1 SLR 284 at [24], citing *Motor Oil Hellas (Corinth) Refineries S.A. v Shipping Corporation of India* [1990] 1 Lloyd's Rep 391 at 398.

(a) Not acquiescence

95 The conflation of laches and acquiescence has engendered much confusion because of how they have been used interchangeably.[212] However, acquiescence is inapplicable in the present context of delay in seeking rescission. The strict doctrine of acquiescence is described as "the contemporaneous and informed (knowing) acceptance or standing by which is treated by equity as "assent" (*ie*, consent) to what would otherwise be an infringement of rights".[213] Therefore, strict acquiescence must be *contemporaneous* to the wrongful act.[214] Both the Singapore Court of Appeal and the Appellate Division of the High Court have both affirmed this definition of acquiescence, because by requiring the claimant to be in a position to "object to or prevent such conduct [which it complains of]",[215] the claimant must have known about the defendant's conduct before or as it occurred.

96 Instead, if one was referring to mere delay in bringing the claim after the violation has occurred, then one would be dealing with a narrow definition of laches (encompassing both prejudicial and affirmatory laches): "the period during which there was inaction or standing by in the face of a challenge to rights or an assertion of adverse rights".[216] Such affirmatory laches involve a *retrospective* assent to the vitiating conduct, extrapolated from his failure to seek redress in a timely manner, which is interpreted as a form of waiver. With that in mind, I will now move on to explain why affirmatory laches requires knowledge of the facts giving rise to rescission.

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[212] *De Bussche v Alt* (1877) 8 ChD 286 at 314; *Goldsworthy v Brickell and another* [1987] Ch. 378 at 410; *Salaya Kalairani (legal representative of the estate of Tey Siew Choon, deceased) and another v Appangam Govindhasamy (legal representative of the estate of T Govindasamy, deceased) and others and another appeal* [2023] SGHC(A) 40 at [56].
[213] *Orr v Ford and another* (1989) 84 ALR 146 at 157–158; *Tan Yong San v Neo Kok Eng and others* [2011] SGHC 30 at [114]. See also Dominic O'Sullivan KC, Rafal Zakrzewski & Steven Ballantyne Elliott, *The Law of Rescission* (Oxford University Press, 3rd Ed, 2022) at p 514.
[214] *Tan Yong San v Neo Kok Eng and others* [2011] SGHC 30 at [112].
[215] *Ho Yew Kong v Sakae Holdings Ltd and other appeals and other matters* [2018] 2 SLR 333 at [188]; *Salaya Kalairani (legal representative of the estate of Tey Siew Choon, deceased) and another v Appangam Govindhasamy (legal representative of the estate of T Govindasamy, deceased) and others and another appeal* [2023] SGHC(A) 40 at [56].
[216] *Orr v Ford and another* (1989) 84 ALR 146 at 159.

(b) Role of knowledge

97 It is typically required for the party seeking relief to know of the facts entitling him to rescission before rescission is barred by laches or delay.[217] Mere delay therefore cannot be a sufficient explanation for denying equitable rescission. A series of opposing authorities were raised by the authors of an earlier edition of *Goff & Jones: The Law of Unjust Enrichment* ("***Goff & Jones***") that may support the position that laches can be engaged by mere delay. However, these are mostly of considerable vintage dating back to the 18th and 19th Century, and the only modern authority it cites, the EWCA case of *P & O Nedlloyd* expresses an equivocal view.[218] Further, the latest edition of *Goff & Jones* has since acknowledged that "mere delay alone will almost never suffice [for laches to apply] …".[219]

98 A similar requirement of knowledge has been adopted in Singapore. The SGCA in *Straits Colonies Pte Ltd v SMRT Alpha Pte Ltd*[220] ("***Straits Colonies***") has held that a voidable contract can be affirmed once the misrepresentee knows of the facts giving rise to the right of rescission.[221] Although *Straits Colonies* dealt with the affirmation of a contract, I argue that the same should apply to affirmatory laches, given that affirmatory laches have the same effect as an election to affirm a contract. This is because affirmatory laches operate as a form of waiver,[222] which refers to the abandonment of the right to rescind.[223] Analogously, when a party irrevocably elects to

[217] *The Lindsay Petroleum Co v Prosper Armstrong Hurd, Abram Farewell and John Kemp* (1874) LR 5 PC 221 at 241. See also *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 at [110]. This case concerned the grant of an anti-suit injunction and because of its equitable origins, the court made a similar statement on the role of knowledge where delay is pleaded: "Without knowledge, there can be no dilatoriness that would make the applicant's conduct inequitable or unconscionable."

[218] Charles Mitchell KC, Paul Mitchell & Stephen Watterson, *Goff & Jones: The Law of Unjust Enrichment* (Sweet & Maxwell, 9th Ed, 2016) at p 856, referring to *Hercy v Dinwoody* (1793) 2 Ves. Jun. 87; 30 E.R. 536; *Baker v Read* (1854) 18 Beav. 398; 52 E.R. 157; *Harcourt v White* (1860) 28 Beav. 303; 54 E.R. 382; *Archbold v Scully* (1861) 9 H.L.C. 360 at 383; 11 E.R. 769 at 778; *Brooks v Muckleston* [1909] 2 Ch. 519; *P & O Nedlloyd BV v Arab Metals Co and others (No 2) (UB Tiger*) [2007] 1 WLR 2288 at [61].

[219] Charles Mitchell KC, Paul Mitchell & Stephen Watterson, *Goff & Jones: The Law of Unjust Enrichment* (Sweet & Maxwell, 10th Ed, 2022) at p 885.

[220] [2018] 2 SLR 441.

[221] *Straits Colonies Pte Ltd v SMRT Alpha Pte Ltd* [2018] 2 SLR 441 at [64].

[222] John Mason Lightwood, *The Time Limit on Actions* (Butterworths, 1909) at p 256.

[223] *CSDS Aircraft Sales & Leasing Inc v Singapore Airlines Ltd* [2022] 1 SLR 284 at [24], citing *Motor Oil Hellas (Corinth) Refineries S.A. v Shipping Corporation of India* [1990] 1 Lloyd's Rep 391 at 398.

affirm a voidable contract when a vitiating factor has been present, he has abandoned his right to rescind.[224] This runs contrary to the position in *Leaf* set out earlier, which held that knowledge of the facts giving rise to the vitiating factor is not required before the right to rescind can be lost to time.

99 To reconcile these antithetical positions, perhaps the court in *Leaf* may have seen the case as one of *caveat emptor* and sought to impose a common law duty of buyers to always inspect their goods. In this regard, Jenkins LJ said:[225]

> Clearly if, before he had taken delivery of the picture, he had obtained other advice and come to the conclusion that the picture was not a Constable, it would have been open to him to rescind. It may be that if, having taken delivery of the picture on the faith of the representation and having taken it home, he had, within a reasonable time, taken other advice and satisfied himself that it was not a Constable, he might have been able to make good his claim to rescission notwithstanding the delivery.

100 With due respect to Jenkins LJ, the failure of Mr Leaf to properly inquire into the origin of the painting should not have attracted the operation of laches. This is because the common law places no obligation on the misrepresentee to investigate the truth of the representation for "no man ought to seek to take advantage of his own false statements".[226] While Lord Blackburn in *Emile Erlanger and others v New Sombrero Phosphate Company and others*[227] had said that the inquiry into whether a right was lost via laches depended on the "degree of diligence which might be reasonably required",[228] the fact that he had used the word "degree" means that this statement should be understood as referring to the quality of the inquiries the representee ought to make only if the obligation to make an inquiry so arises; it does

[224] Dominic O'Sullivan KC, Rafal Zakrzewski & Steven Ballantyne Elliott, *The Law of Rescission* (Oxford University Press, 3rd Ed, 2022) at p 479.
[225] *Leaf v International Galleries* [1950] 2 KB 86 at 92.
[226] *Redgrave v Hurd* (1881) 20 Ch.D. 1 at 13.
[227] (1878) 3 App. Cas.1218.
[228] *Emile Erlanger and others v New Sombrero Phosphate Company and others* (1878) 3 App. Cas.1218 at 1279.

not presuppose the existence of an obligation to make such inquiries in the first place. Indeed, the same judgment also states that the obligation to use due diligence arises (only) "after there has been such notice or knowledge as to make it inequitable to lie by" on the same page.[229]

101 Thus, how could one say that Mr Leaf ought to have known of a falsehood he was under no duty to investigate? Still, Jenkins LJ was swayed by how Mr Leaf "took no steps to obtain any further evidence as to its authorship".[230] With respect, even if the famous auction company Christie's was prudent enough to investigate the authenticity of the painting when Mr Leaf sought to sell the painting to them, Mr Leaf should not be faulted for failing to inquire into the veracity of International Galleries' representation that the painting was a Constable. After all, "the attribution of works of art to particular artists is often a matter of … increasing difficulty".[231] There was no reason for Mr Leaf to have been put on inquiry to investigate the veracity of the representations to be imputed constructive knowledge,[232] otherwise, an onerous duty to look into the puffs of every salesman will be foisted on the consumer. Such a duty would also be higher than the standard of "reasonable diligence" imposed on a claimant seeking to postpone the running of time for fraud or mistake under s 29(1) of the Singapore Limitation Act,[233] where a claimant is only required to call for further investigations if there are sufficient facts or allegations to put a reasonable man on notice.[234] As the operation of affirmatory laches is predicated on knowledge of the facts giving rise to rescission, this doctrine does not explain why the lapse of time denied Mr Leaf the right to rescind.

C. The effect of the Sale of Goods Act 1979

102 In *Leaf*, Denning LJ said that delay can bar equitable rescission because if the right to terminate a contract for repudiatory breach of a condition was lost under sections 11(1)(c) and 35 of the English Sale of

[229] *Emile Erlanger and others v New Sombrero Phosphate Company and others* (1878) 3 App. Cas.1218 at 1279. See also *Spurrier v Hancock* (1799) 4 Ves 667 at 673.
[230] *Leaf v International Galleries* [1950] 2 KB 86 at 92.
[231] *Leaf v International Galleries* [1950] 2 KB 86 at 94.
[232] *Chwee Kin Keong and others v Digilandmall.com Pte Ltd* [2005] 1 SLR(R) 502 at [42].
[233] Limitation Act 1959 s 29(1).
[234] *Chua Teck Chew Robert v Goh Eng Wah* [2009] 4 SLR(R) 716 at [27]–[33]; *Symphony Ventures Pte Ltd v DNB Bank ASA, Singapore Branch* [2021] 5 SLR 1213 at [40].

Goods Act 1893, a claim for innocent misrepresentation, which is less potent, must be barred as well.[235]

103 Following this, it has been argued that the proposition from *Leaf* should be seen as *sui generis*, confined to innocent misrepresentations made during the sale of goods,[236] where there are special policy interests at play.[237] Taking this proposition to its logical conclusion, some might then argue that the operation of delay as a bar to rescission is provided for in both the English and Singapore SOGA, because the buyer is deemed to have accepted the goods after the lapse of a reasonable time.[238]

104 However, the academic consensus seems to be that Denning LJ's *dicta* that the loss of the right to rescind cannot be explained by the English Sale of Goods Act 1893, or its successors.[239] This is because acceptance of goods only bars termination for breach of a condition (*ie*, repudiatory breach),[240] which is different from rescission. Given that the Singapore SOGA closely resembles the English Sale of Goods Act 1893 and its successors, the commentary of English scholars can also be transplanted into the Singapore context.

105 Sections 35 of the English and the Singapore SOGA state that goods are deemed to be accepted upon lapse of a reasonable time. To recapitulate, the English provision relied on by Denning LJ is reproduced below:[241]

> The buyer is ***deemed to have accepted the goods*** when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he

[235] *Leaf v International Galleries* [1950] 2 KB 86 at 90–91.
[236] Dominic O'Sullivan KC, Rafal Zakrzewski & Steven Ballantyne Elliott, *The Law of Rescission* (Oxford University Press, 3rd Ed, 2022) at p 523.
[237] See *Leaf v International Galleries* [1950] 2 KB 86 at 92 and 94–95, which suggests some policy considerations like the difficulty in quantifying the restitutionary value of the goods.
[238] Sale of Goods Act 1979 s 35(4); Sale of Goods Act 1893 (c 71) (UK) s 35.
[239] Paul S. Davies, "Recission for Misrepresentation", (2016) 75(1) *Cambridge Law Journal* 15 at 17; Donal Nolan, "Remedies in Respect of Defects" in *Benjamin's Sale of Goods Vol I* (Michael Bridge KC ed) (Sweet & Maxwell, 12th Ed, 2024) at pp 620–621; Michael Bridge KC, *The Sale of Goods* (Oxford University Press, 4th Ed, 2019) at pp 186 and 189.
[240] Sale of Goods Act 1979 s 11(3); Sale of Goods Act 1893 (c 71) (UK) s 11(1)(c).
[241] Sale of Goods Act 1979 s 35(4); Sale of Goods Act 1893 (c 71) (UK) s 35 (emphasis added).

> does any act in relation to them which is inconsistent with the ownership of the seller, or *when after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them*.

106 Denning LJ had relied on s 11(1)(c) of the English Sale of Goods Act 1893 to interpret s 35 of the English Sale of Goods Act 1893 (which is *in pari materia* with s 35(4) of the Singapore SOGA) as incorporating the law on affirmation.[242] Deemed *acceptance* under the Sale of Goods Act was seen as the *affirmation* of a contract tainted by one of the vitiating factors (which could otherwise have availed the innocent party to rescind the contract). Yet, s 11(1)(c) of the English Sale of Goods Act 1893, which was cited by Denning LJ to support this proposition,[243] states that:

> Where … a buyer has accepted the goods, … the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated …

107 In other words, section 11(1)(c) of the English Sale of Goods Act 1893, and the substantively similar s 11(3) of the Singapore SOGA, only prevents the termination of a contract for ***repudiatory breach*** and has nothing to say about ***rescission***. The implied *acceptance* of the goods after reasonable time has passed therefore should not be taken as a form of *affirmation* which causes the right to rescind to be lost. Therefore, the jurisdiction to rescind contracts in equity is not governed by the Singapore SOGA and instead continues to apply alongside the Singapore SOGA to contracts for the sale of goods.[244]

108 Another point of difference between *affirmation* and *acceptance* is that acceptance of goods under s 35 of the Singapore

[242] See para 17.
[243] *Leaf v International Galleries* [1950] 2 KB 86 at 90.
[244] Donal Nolan, "Remedies in Respect of Defects" in *Benjamin's Sale of Goods Vol I* (Michael Bridge KC ed) (Sweet & Maxwell, 12th Ed, 2024) at p 618. See also Michael Bridge KC, *The Sale of Goods* (Oxford University Press, 4th Ed, 2019) at pp 186–187.

SOGA need not require knowledge of the defect,[245] but affirmation in equity does.[246] Thus, the acceptance of goods under s 35 should only operate to limit the buyer to a claim of damages where he seeks to discharge the contract for a breach of a condition (*ie*, repudiatory breach),[247] and not claims for rescission *ab initio*. Equating acceptance with affirmation overlooks the broader equitable role of the contractual vitiating factors including misrepresentation. Unlike cases involving acceptance and termination for repudiatory breach, the basis upon which a contract is vitiated in cases involving rescission is not necessarily related to the terms of the bargain – the misrepresentation may not be incorporated, and more generally, the vitiating factors deal with the formation of the contract.[248] The right to rescind therefore operates parallel to the English Sale of Goods Act 1893 (which only governs the right to terminate a contract following a repudiatory breach),[249] and by extension, the Singapore one, so the fact that one has accepted the goods should not disentitle him from rescinding.

109 At this juncture, it is acknowledged that s 62(2) Singapore SOGA poses a potential issue with regard to the argument that the equitable rules of rescission continue to apply *instead of* ss 11(3) and 35(4) of the Singapore SOGA (which merely govern the right to terminate a contract following a repudiatory breach). This is because the express words of s 62(2) of the Singapore SOGA only seem to preserve the operation of the common law rules of rescission. It states that "***rules of the common law*** … relating to … the effect of fraud, misrepresentation, duress or coercion, mistake, or other invalidating cause [*ie*, the rules pertaining to rescission], apply to contract for the sale of goods".[250] Since s 62(2) of the Singapore SOGA only refers to "rules of the common law", the issue turns on whether s 62(2) also preserves

[245] *Eastern Supply Co v Kerr* [1971-1973] SLR(R) 834 at [19]–[21], citing *Long v Lloyd* [1958] 2 All ER 402 at 407.
[246] *Straits Colonies v SMRT Alpha* [2018] 2 SLR 441 at [66].
[247] Sale of Goods Act 1979 s 11(3). See also *Eastern Supply Co v Kerr* [1971-1973] SLR(R) 834 at [17], where mention was made of "breach of implied conditions"; *P Control Technology v Mr Popiah* [2021] SGMC 86 at [49], where reference was made to repudiatory breach.
[248] *Associated Japanese Bank (International) Ltd v Credit du Nord SA and another* [1988] 3 All ER 902 at 909
[249] Donal Nolan, "Remedies in Respect of Defects" in *Benjamin's Sale of Goods Vol I* (Michael Bridge KC ed) (Sweet & Maxwell, 12th Ed, 2024) at p 663; Michael Bridge KC, *The Sale of Goods* (Oxford University Press, 4th Ed, 2014) at pp 186–187.
[250] Sale of Goods Act 1979 s 62(2) (emphasis added).

the application of the rules of *equity* pertaining to the rescission of contracts in a sale of goods context.[251]

110 At first glance, it seems that the words "common law" and the reference to the common law vitiating factors are to be interpreted as the rules laid down by the common law courts, as understood by contract lawyers. Where a legal term has a "technical meaning in a certain branch of law, and is used in a context dealing with that branch, it is to be given that meaning unless contrary intention appears".[252] Since contract lawyers would typically distinguish between common law and equity,[253] and the Sale of Goods Acts deals with contracts, it seems acceptable to adopt a restrictive reading of "rules of the common law".

111 This is, however, unsupported by a purposive reading of the provision. The title of a provision is indicative of Parliamentary intention.[254] Since s 62 of the Singapore SOGA is titled "Savings: rules of law, etc.", the purpose of s 62 is to operate as a catch-all savings clause for all the contractual vitiating factors (whether at common law or in equity) and "retain the affinity" between the sale of goods and contract.[255] Indeed, it has been consistently observed by our courts and academics alike that matters relating to the contractual vitiating factors (which includes both common law and equitable vitiating factors such as "mistake") "are not dealt with in the [Singapore SOGA]".[256] Moreover, the difficulty with the situation created by a narrow reading of "common law" in s 62(2), where the Singapore SOGA is silent on the equitable vitiating factors, but the courts are barred from applying the equitable vitiating factors to sale of goods contracts, suggests that s 62(2)

[251] Donal Nolan, "Classification of Statements as to Goods" in *Benjamin's Sale of Goods Vol I* (Michael Bridge KC ed) (Sweet & Maxwell, 12th Ed, 2024) at p 542.
[252] Diggory Bailey & Luke Norbury, *Bennion on Statutory Interpretation* (LexisNexis, 7th Ed, 2017) at p 537.
[253] Michael Bridge KC, "The Contract of Sale of Goods" in *Benjamin's Sale of Goods Vol I* (Michael Bridge KC ed) (Sweet & Maxwell, 12th Ed, 2024) at p 11.
[254] *Tan Cheng Bock v AG* [2017] 2 SLR 850 at [58].
[255] Michael Bridge KC, "The Contract of Sale of Goods" in *Benjamin's Sale of Goods Vol I* (Michael Bridge KC ed) (Sweet & Maxwell, 12th Ed, 2024) at p 11, citing Michael Bridge KC, *The Sale of Goods* (Oxford University Press, 4th Ed, 2019) at para 1.17.
[256] *Nurlinda Lee @ Lee Beng Hwa and another v Doktor Kereta Pte Ltd* [2018] SGDC 188 at [108]. While Chua Wei Yuan AR only referred to rescission at law, his citation of an older edition of *Atiyah and Adams' Sale of Goods* provides basis for reading s 62(2) to relate to rescission in equity as well (See p 462). In the English context, Michael Bridge KC, "The Contract of Sale of Goods" in *Benjamin's Sale of Goods Vol I* (Sweet & Maxwell, 12th Ed, 2024) at p 12, Bridge identifies *Goldsmith v Rodger* [1962] 2 Lloyd's Rep. 249 and *FE Rose Ltd v WH Pim & Co Ltd* [1953] 2 QB 450 as instances where equity remedies were awarded in relation to a sale of goods contract.

relates to all judge-made law (*ie*, at common law and in equity). Section 62(2) therefore does nothing to weaken the argument that ss 11(3) and 35(4) of the Singapore SOGA are not concerned with equitable rescission, but are merely concerned with acceptance in the context of repudiatory breaches.

(c) Misrepresentation Act 1967

112 Even if Denning LJ was right that the English Sale of Goods Act 1893 bars equitable rescission for innocent misrepresentation upon the acceptance of goods (because it also bars termination for the more "potent" breach of condition), this interpretation would contradict the English Misrepresentation Act. This is because s 1 of the English Misrepresentation Act allows a party to rescind a contract for misrepresentation regardless of the incorporation of the misrepresentation as a term of the contract or the availability of termination, striking at the very heart of Denning LJ's interpretation of s 11(1)(c) of the English Sale of Goods Act 1893 in *Leaf*. The same contradiction would arise in Singapore as s 1 of the English Misrepresentation Act is *in pari materia* with s 1 of the Singapore Misrepresentation Act. Section 1 of the Singapore Misrepresentation Act states that:[257]

> Where a person has entered into a contract after a misrepresentation has been made to him, and —
> (*a*) the misrepresentation has become a term of the contract; or
> (*b*) the contract has been performed,
> or both, then, if otherwise he would be entitled to rescind the contract without alleging fraud, he shall be so entitled, subject to the provisions of this Act, notwithstanding the matters mentioned in paragraphs (*a*) and (*b*).

113 The enactment of s 1 of the English Misrepresentation Act (and consequently the Singapore Misrepresentation Act), has effectively retained a party's right to rescind for misrepresentation if rescission would have been available to him but for its incorporation into the

[257] Misrepresentation Act 1967 s 1.

contract.[258] This is because prior to the enactment of s 1 of both Misrepresentation Acts, "there was significant support for the view that the incorporation of a misrepresentation as a mere warranty took away the right to rescind",[259] due to the availability of common law remedies.[260] Section 1 thus repudiates the "hierarchy" of conditions, warranties and innocent misrepresentations, rendering the concurrent existence of remedies for breach irrelevant.[261] In other words, it would no longer matter if the misrepresentation (if incorporated) is a condition or warranty (which is what s 11(3) of the Singapore SOGA addresses) and whether termination for breach is consequently available; the affected party will *always* be entitled to rescind for misrepresentation so long as the elements of misrepresentation are established.

114 Where there are inconsistencies across statutes, the courts will interpret them in a manner that continues to give effect to both.[262] It is thus evident that s 11(3) of the Singapore SOGA (which deems a condition to become a warranty if there had been acceptance of goods) cannot be taken to create a special set of rules which removes one's right to rescind for misrepresentation; doing so is prevented by s 1 of the Singapore Misrepresentation Act. Denning LJ's comparison between an "innocent misrepresentation" and "breach of a condition" is consequently inappropriate.

(2) Concluding thoughts on the Sale of Goods Act

115 Denning LJ's use of the Sale of Goods Act to justify the loss of Mr Leaf's right to rescind is a clever workaround, especially given the

[258] Michael Bridge KC, *The Sale of Goods* (Oxford University Press, 4th Ed, 2019) at pp 189–190.
[259] Michael Bridge KC, *The Sale of Goods* (Oxford University Press, 4th Ed, 2019) at pp 189–190, citing *Pennsylvania Shipping Co. v. Cie Nationale de Navigation* [1936] 2 All E.R. 1167; *Zien v Field* (1963) 43 WWR 57.
[260] In *Pennsylvania Shipping Co. v. Cie Nationale de Navigation* [1936] 2 All E.R. 1167 at 1171, the court referred to termination as the "higher contractual right", and equity need not intervene because of the availability of alternative remedies of termination and damages.
[261] Len Sealy, "Caveat Venditor: The Reform of the Law Relating to Innocent Misrepresentation" (1963) 21(1) *Cambridge Law Journal* 7 at 8; *Salt v Stratstone Specialist Ltd (t/a Stratstone Cadillac Newcastle)* [2015] EWCA Civ 745 at [34]; Michael Bridge KC, *The Sale of Goods* (Oxford University Press, 4th Ed, 2014) at pp 189–190.
[262] *R v Secretary of State for the Environment, Transport and the regions, ex parte O'Byrne* [2001] All ER (D) 47 at [22]–[23]; *Thoburn v Sunderland City Council Hunt v Hackney London Borough Council Harman and another v Cornwall County Council Collins v Sutton London Borough Council* [2003] QB 151 at [43].

fact that the Sale of Goods Act seems to thrust the burden on the buyer to inspect.[263] However, a purposive reading of s 62(2) of the Singapore SOGA seems to suggest that the equitable rules of rescission continue to apply to a sale of goods contract since the Singapore SOGA is silent on it, and it was incorrect for Denning LJ to have found the loss of the right to rescind in s 35, which conceived of the loss of the right to terminate the contract for breach. Furthermore, legislative developments in the form of the Misrepresentation Act 1967 add a further obstacle to accepting Denning LJ's reasoning in *Leaf*. Before leaving this point, and as an aside, it is acknowledged that in its current state, it seems odd that the law on the sale of goods provides for rescission as a remedy where termination is otherwise unavailable, prompting commentators to make the case for statutory reform to better align an individual's rights where he elects to rescind or reject the goods.[264] For example, Michael Bridge KC has suggested that rescission for innocent misrepresentation should not be available once the misrepresentation has become a term of the contract. Instead, the court can dispense with such a situation by exercising their discretion under s 2(2) of the Misrepresentation Act 1967 to award damages in lieu of rescission.[265]

V. Overlap with existing bars to rescission

116 Having examined the possible explanations for the existence of delay as a bar to rescission, it seems that the various equitable doctrines do not provide a satisfactory answer as to why mere lapse of time can bar rescission. Thus, I doubt that mere delay can exist as a bar to rescission. Indeed, the authors of *The Law of Rescission* have reviewed the authorities, and they write that:[266]

> It will be seen that the general rule is lost by unreasonable delay in exercising the right, once the innocent party has been emancipated from the effects

[263] *Long v Lloyd* [1958] 2 All ER 402 at 407.
[264] See the discussion on the English Misrepresentation and Sale of Goods Acts in Michael Bridge KC, *The Sale of Goods* (Oxford University Press, 4th Ed, 2019) at pp 186–190, which is in *pari materia* with the Singapore's Misrepresentation Act 1973, and the Sale of Goods Act 1979.
[265] Michael Bridge KC, *The Sale of Goods* (Oxford University Press, 4th Ed, 2019) at pp 187–188.
[266] Dominic O'Sullivan KC, Rafal Zakrzewski & Steven Ballantyne Elliott, *The Law of Rescission* (Oxford University Press, 3rd Ed, 2022) at para 24.01.

> of the vitiating factor, with prejudice shortening the delay that will be allowed.

117 Based on this excerpt, for delay to bar a claim, it has to be supplemented by additional circumstances, such as emancipation from the effects of the vitiating factor, and in some instances, prejudice, which render the lapse of time unreasonable. When these considerations are factored in, unreasonable delay is simply a manifestation of the doctrine of laches. Given that the effluxion of time is a necessary but insufficient condition for laches to be successfully pleaded as an equitable defence, mere delay cannot exist as a standalone bar to rescission.

118 Since delay as a bar to rescission requires more than the lapse of time, this paper goes further to argue that it need not exist as a separate bar to rescission. This is because the circumstances where delay would be engaged as a relevant consideration also arise where the other bars to rescission apply. Laches can either be prejudicial or affirmatory; the lapse of time must, respectively, either cause prejudice to the defendant or support an inference that the claimant has elected to waive his right to rescind, notwithstanding his earlier vitiated consent. The learned authors of *Goff & Jones* have thus argued that delay amounting to prejudice and waiver (*ie*, prejudicial laches and affirmatory laches) respectively correspond with and can be subsumed under the other bars to rescission, namely, the impossibility of *restitutio in integrum* and affirmation.[267] A similar observation was also made in *The Law of Rescission*.[268]

119 The overlap between the bars to rescission is seen from the fact that in *Leaf*, the court, when considering the effect of lapse of time, also raised the issues of impossibility of *restitutio in integrum* and prejudicial laches.[269] With regard to the impossibility of *restitutio in integrum*, the connection with delay may be explained on the basis that during the lapse of time, a change of circumstances might occur which places the defendant in a position where restitution is impossible.[270] An example is

[267] Charles Mitchell KC, Paul Mitchell & Stephen Watterson, *Goff & Jones: The Law of Unjust Enrichment* (Sweet & Maxwell, 10th Ed, 2022) at p 1059.
[268] Dominic O'Sullivan KC, Rafal Zakrzewski & Steven Ballantyne Elliott, *The Law of Rescission* (Oxford University Press, 3rd Ed, 2022) at pp 514 and 519.
[269] *Leaf v International Galleries* [1950] 2 KB 86 at 92 and 94.
[270] *Leaf v International Galleries* [1950] 2 KB 86 at 94; Dominic O'Sullivan KC, Rafal Zakrzewski & Steven Ballantyne Elliott, *The Law of Rescission* (Oxford University Press, 3rd Ed, 2022) at 396.

available locally, where the effluxion of time operated as a bar to rescission because by the time rescission was sought, the tenancy had been determined and the performance of the contract could no longer have been reversed.[271]

120 As for affirmatory laches, the court's concern over the finality of transactions[272] resembles the policy considerations of certainty and fairness behind the bar of affirmation.[273] While the etymology of "laches" is that of neglectful delay, knowledge has been established above to be an essential ingredient of affirmatory laches. This implicit refutation of *Leaf*, which held that knowledge is not necessary to establish delay as a bar to rescission, only strengthens the connection between delay amounting to affirmatory laches (which involves more than just mere lapse of time), and the general bar of affirmation. In light of the overlap between the two instances of delay and the other bars to rescission, there is no need for the former to be treated as a standalone bar.

VI. Conclusion

121 The various doctrines canvassed above (*ie*, limitation by analogy, prejudicial laches and affirmatory laches) offer no satisfactory explanation for why the passage of time alone causes the right to rescind to be lost. With regards limitation by analogy, taking into account the legislative history of and intention behind the Limitation Act, an appropriate analogy to contract is not capable of being drawn under s 6(7) of the Singapore Limitation Act. As for an analogy to tort, the case law reveals that no analogy exists for some of the other vitiating factors like undue influence, and for others like misrepresentation, where an analogy has been proposed, it is submitted that there is an insufficient correspondence between the facts giving rise to the vitiating factor and the tortious action for an analogy to be drawn. Further, the unique nature of rescission of contracts *ab initio* at *common law* puts it in a "No-Man's land", as it faces no limitation period of its own under the Limitation Act, preventing it from being analogised to a remedy for *equitable*

[271] *Oriental Investments (SH) Pte Ltd v Catalla Investments Pte Ltd* [2013] 1 SLR 1182 at [75].
[272] *Leaf v International Galleries* [1950] 2 KB 86 at 92.
[273] Dominic O'Sullivan KC, Rafal Zakrzewski & Steven Ballantyne Elliott, *The Law of Rescission* (Oxford University Press, 3rd Ed, 2022) at p 482, citing *Sargent v ASL Developments Ltd* (1974) 131 CLR 634 at 656.

rescission. Given its potential for arbitrary treatment of different equitable claims, the doctrine of limitation by analogy could be done away with, and in its place, the equitable defences of laches and acquiescence found in s 32 of the Singapore Limitation Act could instead act as a safeguard against lackadaisical litigants.

122 The operation of laches, both prejudicial and affirmatory, as well as equitable rescission, is a balancing act so there is little reason why the equities of the case will be tilted in favour of the defendant simply by the passage of time, especially one who acted "unconscionably" in procuring the contract, and when the claimant was still labouring under the effects of his vitiated consent. Where there is neither knowledge of the facts giving rise to rescind, nor prejudice to the defendant, the court should be slow to find that the claimant's right to rescind has been lost.

123 With regards to the argument that the Singapore SOGA acts as a basis for delay to bar the right to rescind, this argument fails on several fronts. First, the Singapore SOGA only provides for the loss of the right to *terminate* for repudiatory breach, but not *rescission* in the presence of a vitiating factor. Second, s 62(2) of the Singapore SOGA suggests that the rules on rescission (including both common law and equitable rules) continue to apply to sale of goods contracts. Third, the interpretation that the Singapore SOGA causes the right to rescind to be lost upon lapse of a reasonable time creates an uneasy tension with s 1 of the Singapore Misrepresentation Act.

124 Based on the lack of doctrinal explanations, there is no need for a standalone bar of delay. In fact, the survey of the equitable doctrines above challenges the idea that the right to rescind can be lost simply by effluxion of time. Given the need for the presence of other conditions to bar rescission such as prejudice or an inference of waiver, the instances where delay causes rescission to be lost can already be subsumed and accounted for under the other two bars to rescission: impossibility of *restitutio in integrum* and affirmation respectively.