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The importance of theory and history in understanding and developing the common law of contract – some further preliminary reflections

Hon. Andrew PHANG
Singapore Management University, andrewphang@smu.edu.sg

THE IMPORTANCE OF THEORY AND HISTORY IN UNDERSTANDING AND DEVELOPING THE COMMON LAW OF CONTRACT – SOME FURTHER PRELIMINARY REFLECTIONS

In a previous essay, an attempt was made to demonstrate the important role that both theory and history play in helping us to understand and develop the common law of contract. As pointed out in that essay, a comprehensive treatment of the subject would require lengthy discourse in a book or even several books. This essay follows-up on that previous essay, again by way of preliminary reflections only, to correct the dominant perception that the development of the common law in general and contract law in particular is premised mainly on doctrinal development based on logic and analogy with the occasional reference to public policy. However, as is not unexpected in the context of imperfect knowledge in an imperfect world, whilst theory and history do often contribute to such development as well, this is not always the case.

Andrew **PHANG** Boon Leong[*]
Senior Judge, Supreme Court of Singapore
Distinguished Professor of Law, Yong Pung How School of Law, Singapore Management University
Visiting Professor of Law, University of Reading
Formerly, Justice of the Court of Appeal, Supreme Court of Singapore

I. Introduction

1 In a previous essay, an attempt was made to demonstrate the important role that both theory and history play in helping us to understand and develop the common law of contract.[1] As pointed out in that essay, a comprehensive treatment of the subject would, in fact,

[*] I am grateful to Justice Goh Yihan of the Supreme Court of Singapore and Associate Professor Tan Zhong Xing of the Faculty of Law, National University of Singapore, for their valuable comments and suggestions. I would also like to express my gratitude to Ms Isabelle Lim and Mr Ivan Tang for their very able editing of the manuscript. However, all errors are mine alone.

All views expressed in this essay are personal views only and do not reflect the views of the Supreme Court of Singapore, the Singapore Management University or the University of Reading.

[1] See Andrew Phang, "The Importance of Theory and History in Understanding and Developing the Common Law of Contract – Some Preliminary Reflections" (2023) 1 *Contract and Commercial Law Review* 67.

require lengthy discourse in a book or even several books. This essay follows-up on the previous essay, again by way of preliminary reflections only, to correct the dominant perception that the development of the common law in general and contract law in particular is premised mainly on doctrinal development based on logic and analogy with the occasional reference to public policy.

2 As just alluded to above, there were numerous other topics that were not dealt with in the previous essay. This is of course not surprising in view of the fact that, as also just mentioned, a comprehensive treatment of the role of theory and history in helping us to understand as well as develop the common law of treatment would require a book-length or even a multi-volume publication. My focus in the present essay is therefore on specific aspects of specific vitiating factors. In particular, I deal with particular issues in the context of the law of mistake, misrepresentation, unconscionability and illegality. Whilst I did deal with certain specific issues in these aforementioned areas in the previous essay, constraints of space dictated that only a few issues could be dealt with – with the topic of misrepresentation not, in fact, having received any attention at all. The present essay is therefore a follow-up of sorts as it considers how theory and/or history can aid in the understanding and/or development of further aspects of these various vitiating factors (that, it should be mentioned, themselves embody the more general *theoretical* issue as to how security of sanctity of contract is to be balanced against the need by the court to achieve a just and fair result in the case at hand). Finally, I deal briefly with the Penalty Rule as it demonstrates the same contrast between the approaches adopted by the UK Supreme Court and the Singapore Court of Appeal which was also seen in relation to the topic of illegality and public policy.

3 Let us now turn to the topic of misrepresentation, not least because it was not – as just noted – even considered in the previous essay. However, before proceeding to do so, I hope that the reader will forgive me a brief "theoretical" interlude. By way of clarification as well as elaboration, it suddenly occurred to me – as I was in the midst of writing the present essay – that I had not (in the previous essay) dealt with the *interrelationship* between the two fundamental elements that were such an integral part of that (as well as, in fact, the present) essay to begin with. Put simply, what is the relationship – if any – between "theory" and "history"? Indeed, this is – to the best of my knowledge –

not a topic that has received much attention to begin with.[2] However, as I began to reflect further on this particular topic, it seemed to me that it too would require a book length treatment of its own.

II. A brief "theoretical" interlude

4 The possible interrelationship between "theory" on the one hand and "history" on the other is not a particularly straightforward one.

5 The concept of "***theory***" imports the twin (as well as closely related) qualities of ***normativity and universality***. In other words, a theoretical proposition *ought* to be universally applicable *regardless of* the factual circumstances concerned. In the legal context, this is most often embodied in what we term the "applicable law" or (perhaps more practically) the "applicable legal rules[3]" which ought to apply to the facts of the case at hand. The reader will immediately see that these applicable legal rules are both normative as well as universal inasmuch as they *ought* to be (*universally*) applicable to *all* cases in *that* particular area of the law, *regardless of* the *facts* of the case at hand. In this essay, however, when I speak about "theory" it is a somewhat ***different*** *(and broader as well as "looser")* conception of the concept of "theory" inasmuch as I am referring to *theoretical* ***propositions*** that might *assist* legal academics and/or the courts ***in arriving at*** *the "applicable legal rules"* that ought to apply in all cases in that particular area of the law in general and to the facts of the case at hand in particular. This ***latter*** conception of the concept of "theory" is especially important when we are dealing with ***novel and/or controversial areas*** of the law (here, the common law of contract). It also poses, in my view, ***fewer problematic*** *issues* simply because what is involved is ***not*** *an* ***overarching*** *theoretical* ***framework*** as such. To reiterate, they are basically *theoretical* ***propositions*** that are intended to *assist* the process of analysis. However, it is admitted that, to that extent, they may appear to be more general, vague and even sporadic as well as "looser". That having been said, they are, nevertheless, ***context-specific*** and, in that sense, appropriate for the

[2] See, for example, Maksymilian Del Mar and Michael Lobban (Gen Eds), *Law in Theory and History – New Essays on a Neglected Dialogue* (Hart Publishing, Oxford, 2016).

[3] Or to adopt so-called Dworkinian terminology, "rules and principles" (see Ronald Dworkin, "Hard Cases" in Ch 4 of *Taking Rights Seriously* (Harvard University Press, Cambridge, Massachusetts, 1977), where the distinction as well as relationship between "rules" and "principles" is elaborated upon). However, for ease of reference as well as exposition for the purposes of the present essay, I will simply utilise the rubric of "rules".

purpose(s) concerned. This is an important point – to which I shall return in a moment.

6 Following from what has been said thus far, it might be argued that the concept of "***history***" might – ***potentially*** at least – be at odds with "theory". This qualification in the word "potentially" in the preceding sentence is important. Let me elaborate.

7 When we examine the "***history***" of a particular legal rule, we are looking at *the relevant historical circumstances as well as context* that led to the formulation of the legal rule in question. These (historical) circumstances as well as context are often ***specific*** to that legal rule and would therefore have *no universal* applicability in the context of *other* legal rules (even within the same area of the law and, *a fortiori*, in relation to different areas of the law).

8 On a related note, the following observations from what was essentially a summary from a book also bear quoting as they summarise this potential conflict simply (albeit not simplistically):[4]

> Legal historians have often been sceptical of theory. The methodology which informs their own work is often said to be an empirical one, of gathering information from the archives and presenting it in a narrative form. The narrative produced by history is often said to be provisional, insofar as further research in the archives might falsify present understandings and demand revisions.[5] On the other side, legal theorists are often dismissive of historical works. History itself seems to many theorists not to offer any jurisprudential insights of use for their own projects: at best, history is a repository of data and examples, which may be drawn on by the theorist for his or her own purposes.

[4] See Maksymilian Del Mar and Michael Lobban (Gen Eds), *Law in Theory and History – New Essays on a Neglected Dialogue* (Hart Publishing, Oxford, 2016) i.
[5] Reference may also be made to Andrew Phang, "Which Road to the Past? – Some Reflections on Legal History" [2013] Sing JLS 1.

9 However, to state simply that "theory" and "history" are *necessarily* at odds with each other simply because the former deals with normative and universal propositions whilst the latter deals with particular historical circumstances and context would be ***too simplistic*** a view to take. The key point to note is that "theory" and "history" are *not* thereby *necessarily* at odds or in conflict with each other.[6] It is true that they *might* be in conflict with each other – hence the use of the word "potentially" above.

10 Indeed, given the conception of the concept of "theory" which I have adopted for the purposes of the present essay (which focuses on *theoretical* ***propositions*** (as opposed to overarching *theoretical* ***frameworks***)), the potential for conflict is ***drastically reduced***. This is because such *theoretical* ***propositions*** are more ***conceptual tools that aid analysis (as opposed to claiming to be overarching theoretical frameworks***[7]***)***. Indeed, looked at in this light, there may – depending on the legal issue at hand – well be situations, in fact, where "theory" and "history" are ***consistent with*** (and actually ***complement***) each other. Although "theory" and "history" deal with *different* aspects (the former with the universal or general, the latter with the particular or specific), they might, in fact, *complement* each other in enabling the legal academic and/or the court to arrive at the ***same*** *conclusion as to what the relevant legal rule ought to be.* It might be helpful to *illustrate* what has just been stated by reference to some examples that were considered in the earlier article.[8]

11 One situation where "theory" and "history" ***complement*** each other in order for the court to arrive at the applicable legal rules can be seen in relation to the law relating to *discharge by breach of contract*. I will not retrace ground already covered on this particular area of the

[6] For a balanced perspective, see Brian Z Tamahana, "How History Bears on Jurisprudence" in Ch 17 of Del Mar and Michael Lobban (Gen Eds), *Law in Theory and History – New Essays on a Neglected Dialogue* (Hart Publishing, Oxford, 2016).

[7] As to which see generally, for example, Andrew Phang Boon Leong, Review Article, "Constructing Theoretical Frameworks" (1988) 30 Mal LR 211 and, by the same author, *The Development of Singapore Law – Historical and Socio-Legal Perspectives* (Butterworths Asia, Singapore, 1990) at 8–13.

[8] See Andrew Phang, "The Importance of Theory and History in Understanding and Developing the Common Law of Contract – Some Preliminary Reflections" (2023) 1 *Contract and Commercial Law Review* 67. And for an essay arguing powerfully for the interaction between theory and history in the context of the law of tort, see John C P Goldberg, "History, Theory, and Tort: Four Theses" (2018) 11 J Tort Law 17.

common law of contract in my earlier article,[9] save to note that both the theoretical considerations *and* the relevant historical developments *both* supported the ultimate legal position adopted by the Singapore Court of Appeal in *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* ("***RDC Concrete***"). [10] Put simply, an understanding of the *theoretically* irreconcilable premises underlying both the relevant tests[11] *as well as* a *historical* understanding of how those tests came to be enabled the court in the *RDC Concrete* case to attempt its level best to *integrate both tests (although a perfect integration was impossible because of the aforementioned theoretically irreconcilable premises) in a manner that would achieve a just and fair result in so far as the contractual parties were concerned*.

12 In ***contrast***, however, a situation where "theory" and "history" were in ***conflict*** with each other can be seen in relation to the issue as to whether or not the ***equitable*** doctrine of *common mistake* ought to be retained. Again, I will not retrace ground covered in my earlier article,[12] save to note that whilst a *theoretical* approach *supported* retention of such a doctrine (which is the legal position in Singapore), an *historical* approach pointed in the *opposite* direction (which is the legal position in England). In such a situation, the court concerned would need to make its own choice as to what the appropriate legal position ought to be.

13 This might be an appropriate point at which to examine further aspects of the common law of contract (in particular, with regard to various vitiating factors) to ascertain whether or not "theory" and/or "history" might be helpful in understanding and/or developing them.

[9] See Andrew Phang, "The Importance of Theory and History in Understanding and Developing the Common Law of Contract – Some Preliminary Reflections" (2023) 1 *Contract and Commercial Law Review* 67 at 75–80.
[10] [2007] 4 SLR(R) 413.
[11] These were the "condition-warranty approach" and the "*Hongkong Fir* approach", respectively. Reference may also be made to the more extensive essay by Andrew Phang and Goh Yihan, "Encounters with History, Theory and Doctrine – Some Reflections on Discharge by Breach of Contract" in Ch 12 of Simone Degeling, James Edelman and James Goudkamp (Gen Eds), *Contract in Commercial Law* (Thomson Reuters, Pyrmont, NSW, 2016).
[12] See Andrew Phang, "The Importance of Theory and History in Understanding and Developing the Common Law of Contract – Some Preliminary Reflections" (2023) 1 *Contract and Commercial Law Review* 67 at 80–83.

III. Misrepresentation

14 Once again, there are a great many issues in the law relating to misrepresentation to which the theme of the present essay – that theory and history are important to an understanding as well as development of the common law of contract – applies. I will therefore consider only one discrete issue – the *quantum of damages* that ought to be awarded pursuant to *s 2(1) of the Misrepresentation Act* (assuming, of course, that liability under that provision has already been established).[13] As we shall see, history and theory interact, although it is more *the latter* which helps to further an understanding of this particular issue. However, before proceeding to consider this issue, it might be observed – in passing – that much light is nevertheless thrown on a *related* issue centring on *the very nature of s 2(1) itself* by way of an historical as well as doctrinal analysis.[14]

15 Turning to the issue relating to the quantum of damages that ought to be awarded pursuant to s 2(1) of the Misrepresentation Act, it might be apposite to set out the provision itself in full, as follows:[15]

> **2.**—(1) Where a person has entered into a contract after a misrepresentation has been made to him by another party thereto *and as a result thereof he has suffered loss*, *then*, *if* the person making the misrepresentation would be *liable to damages* in respect thereof ***had*** *the misrepresentation been made* ***fraudulently***, *that person shall be so liable* ***notwithstanding*** *that the misrepresentation was* ***not*** *made* ***fraudulently***, ***unless*** he *proves* that *he had* ***reasonable ground to believe*** ***and*** *did believe up to the time the contract was made that the facts represented were* ***true***.

[13] I draw here from Andrew Phang, "Critical Pressure Points in the Regulation of Silence in Misleading Conduct" in Ch 2 of Elise Bant and Jeannie Marie Paterson (Gen Eds), *Misleading Silence* (Hart Publishing, Oxford, 2020) at 48−51.

[14] See Andrew Phang, "Critical Pressure Points in the Regulation of Silence in Misleading Conduct" in Ch 2 of Elise Bant and Jeannie Marie Paterson (Gen Eds), *Misleading Silence* (Hart Publishing, Oxford, 2020) at 47−48.

[15] Emphasis added in italics, bold italics and underlined bold italics. See now s 2(1) of the Singapore Misrepresentation Act 1967 (2020 Rev Ed).

16 There are *two* possibilities with regard to the quantum of damages that ought to be awarded pursuant to s 2(1) of the Misrepresentation Act. The *first* is that damages are awarded based on that which would be awarded for *fraudulent* misrepresentation. The quantum of damages awarded in this regard is relatively very large: it encompasses all loss flowing directly from the entry into the contract concerned as a result of the fraudulent misrepresentation, *regardless* of whether or not such loss was foreseeable.[16] Such damages would include all consequential loss as well.

17 The *second* possibility is based on damages which be awarded for *negligent* misrepresentation under *the common law*. Put simply, damages would be awarded *only* for all *reasonably foreseeable* loss – which is, of course, much *less* than the damages that would be awarded under the first possibility (*viz*, *fraudulent* misrepresentation).[17]

18 Following both from the actual language of s 2(1) of the Misrepresentation Act[18] as well as the nature of the statutory claim flowing therefrom, one would have thought that the quantum of damages that ought to be awarded under s 2(1) would encompass the *second* possibility (as opposed to the first) – that damages would be awarded based on that which would be awarded at common law for *negligent* misrepresentation. After all, despite the use of the word "fraudulently" in s 2(1) twice, the reference to fraud was a mere ***fiction***.[19] *In any event*, it has been almost universally acknowledged that a claim under s 2(1) is, in substance, a claim for *neither* fraudulent misrepresentation *nor* wholly or totally innocent misrepresentation but, instead, one for *negligent* misrepresentation (save for a (significant) distinction in relation to the burden of proof). Hence, although this claim takes a *statutory* form, it is still one that is, in substance, for *negligence*. Indeed, the *only possible remaining* type of legal claim is one for *negligent misstatement or misrepresentation*, albeit at ***common law***.[20] Hence, regardless of the fact

[16] *RBC Properties Pte Ltd v Defu Furniture Pte Ltd* [2015] 1 SLR 997 at [81].
[17] *RBC Properties Pte Ltd v Defu Furniture Pte Ltd* [2015] 1 SLR 997 at [81].
[18] Reproduced above, note 15.
[19] *RBC Properties Pte Ltd v Defu Furniture Pte Ltd* [2015] 1 SLR 997 at [83] (also reproduced below, note 26).
[20] And which was first established in the seminal House of Lords decision in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 (see also generally Kit Barker, Ross Grantham and Warren Swain (Gen Eds), *The Law of Misstatements – 50 Years on from Hedley Byrne v Heller* (Hart Publishing, Oxford, 2015)). Reference may also be made to the heading before para 17 of the UK Law Reform Committee, 10th Report, *Innocent Misrepresentation* (Cmnd 1782, 1962).

that a claim under s 2(1) is one that takes statutory form, given that its legal roots are in *negligence*, one would have expected any damages awarded pursuant to that provision to be consistent with that awarded under *common law negligent misstatement or misrepresentation* – the *second* possibility, which (it will be recalled) would include all *reasonably foreseeable* loss. It would, by parity of reasoning, certainly ***not*** be the quantum of damages awarded for *fraudulent* misrepresentation which, as two joint authors point out, may also contain an element of punishment;[21] these last-mentioned authors also pertinently point out that a different limitation period applies to claims based on fraud.[22]

19 ***However***, the present *English* law holds *otherwise*: the measure or quantum of damages awardable under s 2(1) of the Misrepresentation Act has been held to be that which would have been awarded for *fraudulent* misrepresentation. The leading decision in this regard is that of the English Court of Appeal in *Royscot Trust Ltd v Rogerson* ("***Royscot Trust***").[23] Although the Singapore Court of Appeal did not have to decide this particular issue definitively, the following observations of that court in *RBC Properties Pte Ltd v Defu Furniture Pte Ltd*[24] are apposite inasmuch as they not only note the critical observations of Lord Steyn and Lord Browne-Wilkinson in the House of Lords decision of *Smith New Court Securities Ltd v Citibank NA* ("***Smith New Court***")[25] with respect to the *Royscot Trust* case but also set out

[21] See Jill Poole and James Devenney, "Reforming Damages for Misrepresentation: The Case for Coherent Aims and Principles" [2007] JBL 269 at 271 and 303. As the learned authors point out, "the policy dictating instigator punishment in the context of fraud disappears where the instigator is honest but careless" (at 304); they proceed to conclude that "there can be no policy grounds for holding that an honest, but careless, misrepresentor should be held fully responsible for all the losses flowing from any contract that results" (at 305). It might also be noted that, in the Singapore context, the Singapore Court of Appeal in *PH Hydraulics & Engineering Pte Ltd v Airtrust (Hongkong) Ltd* [2017] 2 SLR 129, declining to follow the Supreme Court of Canada decision of *Whiten v Pilot Insurance Company* (2002) 209 DLR (4th) 257, held that there ought to be a general rule that punitive damages could not be awarded for breach of contract.

[22] See Jill Poole and James Devenney, "Reforming Damages for Misrepresentation: The Case for Coherent Aims and Principles" [2007] JBL 269 at 303. And see s 32(1)(a) of the Limitation Act 1980 (Cap 58) (UK) and s 29 of the Limitation Act 1959 (2020 Rev Ed) (Singapore).

[23] [1991] 2 QB 297.

[24] [2015] 1 SLR 997. This decision also explored (at [58]–[67]) the historical background to s 2(1) (where the Law Reform Committee's 1962 Report (*viz*, *Innocent Misrepresentation* (above, note 20)) is also cited (at [58])). See also Timothy Liau, "Abolishing the Fiction of Fraud in the Misrepresentation Act" [2015] LMCLQ 464.

[25] [1997] 1 AC 254.

(judicially) why the decision as well as reasoning in *Royscot Trust* may be open to more than a modicum of doubt:[26]

> 82 The rationale for the more generous measure of damages under *fraudulent misrepresentation* was in fact helpfully elucidated by Lord Steyn in *Smith New Court* in the following terms (at 279): "[f]irst it serves a deterrent purpose in discouraging fraud"; and "[s]econdly, as between the fraudster and the innocent party, moral considerations militate in favour of requiring the fraudster to bear the risk of misfortunes directly caused by his fraud". In so far as the last-mentioned point is concerned, Lord Steyn proceeded to observe thus (at 280):
>
> … I make no apology for referring to moral considerations. The law and morality are inextricably interwoven. To a large extent the law is simply formulated and declared morality. And, as *Oliver Wendell Holmes, The Common Law* … observed, the very notion of deceit with its overtones of wickedness is drawn from the moral world.
>
> 83 Returning to the measure of damages to be awarded under s 2(1), we observe that the English Court of Appeal, in *Royscot Trust Ltd v*

[26] [2015] 1 SLR 997 at [82]–[85] (emphasis in the original text). Indeed, Rix J (as then was), in the English High Court decision of *Avon Insurance plc v Swire Fraser Ltd* [2000] 1 All ER (Comm) 573, recognised the difficulties with the *Royscot Trust* case. However, as he (and as the parties themselves (at [6])) acknowledged, *Royscot Trust* was a binding authority (see also the English High Court decision of *Vraj Pankhania v London Borough of Hackney* [2004] EWHC 323 (Ch) at [17]). This led the learned judge to observe that a misrepresentation ought not to be too easily found (and, in fact, after a meticulous analysis of the relevant facts, Rix J found that no misrepresentation had been proved). Reference may also be made to James Edelman, *McGregor on Damages* (20th Ed, Sweet & Maxwell, 2018) at paras 49-055–49-056 and Michael Bridge, "Innocent Misrepresentation in Contract" (2004) 57 Current Legal Problems 277 at 299–301. But *cf* John Cartwright, "Damages for Misrepresentation" [1987] *The Conveyancer and Property Lawyer* 423 (which was published *prior to Royscot Trust* and where the learned author relies, *inter alia*, on paras 17, 18 and 22 of the UK Law Reform Committee's 10th Report (above, note 20), but which Report was published *prior to Hedley Byrne* and hence had no choice but to refer to an action in fraud as it was the *only* common law route at that particular point in time which would yield a remedy in *damages* (see also above, note 20)). See now, by the same author, John Cartwright, *Misrepresentation, Mistake and Non-Disclosure* (5th Ed, Sweet & Maxwell, 2019) at paras 7-31–7-33.

Rogerson [1991] 2 QB 297 ("*Royscot Trust*"), held (disagreeing with the then prevalent academic opinion on this particular issue) that the measure of damages to be awarded under s 2(1) ought to be that measure which would have been awarded for *fraudulent misrepresentation or deceit*. In arriving at this view, the court relied primarily on the language of s 2(1) itself. However, the difficulty with such an analysis is that s 2(1) (as we have already seen) does *not* concern a situation that pertains to *actual fraud* as such, but one that, on the contrary, falls *short* of it (see Richard Hooley, "Damages and the Misrepresentation Act 1967" (1991) 107 LQR 547 ("*Hooley*")). Indeed, if Lord Steyn's observations in *Smith New Court* (quoted in the preceding paragraph) are accepted, it is, with respect, difficult to see that the moral turpitude entailed under s 2(1) would be on the same level as that entailed in a situation of fraudulent misrepresentation or deceit. Indeed, although the language of s 2(1) refers to "fraud", the *context* in which the word "fraud" is used is, in our view, of the first importance. In particular, the references to "fraud" were (as we have seen above at [63]) in fact intended to signal the fact that s 2(1) offered a *statutory* remedy for damages which was hitherto available only in the context of the (more serious) situation of fraudulent misrepresentation or deceit. Looked at in this light, s 2(1) *extended* the remedy of damages to situations that *fell short* of *fraudulent misrepresentation or deceit*, and this is underscored by the phrases "*had* the misrepresentation *been made fraudulently*" and (perhaps more importantly) "*notwithstanding* that the misrepresentation was *not* made *fraudulently*" in s 2(1) [emphasis added]. Indeed, as Prof Cartwright correctly observes, "s.2(1) does not refer to "negligence" *but that is, in substance, what it covers*" (see *Cartwright* ([60] *supra*) at para 6-64, n 386 [emphasis added]). Put simply, it is the *statutory analogue* of the *common law* action for *negligent* misrepresentation (the latter of which

was, as we have seen (see above at [65]), first established in *Hedley Byrne* ([65] *supra*)).

84 If the above analysis is correct, then it ought to follow that the measure of damages awardable under s 2(1) ought, instead, *to be that awarded under the common law action for negligent misrepresentation*. The decision in *Royscot Trust* ought not to be followed. That having been said, we note that, in the Singapore High Court decision of *Ng Buay Hock v Tan Keng Huat* [1997] 1 SLR(R) 507, *Royscot Trust* was cited with apparent approval, with the court referring (at [31]) to that case as reflecting what the "prevailing opinion" appeared to be. The Judge (at [150] of the Judgment) also expressed his agreement with *Royscot Trust*. There is nevertheless a strong case, in our view, for reconsidering *Royscot Trust*. Indeed, Lord Steyn himself noted in *Smith New Court* (at 1075), that *Royscot Trust* has been subject to "trenchant academic criticism" (citing *Hooley*; see also generally Ian Brown & Adrian Chandler, "Deceit, Damages and the Misrepresentation Act 1967, s. 2(1)" [1992] LMCLQ 40; *Chitty on Contracts* (Sweet & Maxwell, 31st ed, 2012) at para 6-075; as well as Edwin Peel, *Treitel: The Law of Contract* (Sweet & Maxwell, 13th ed, 2011) ("*Treitel*") at para 9-066). Although both Lord Steyn and Lord Browne-Wilkinson expressed no conclusive view on *Royscot Trust* in *Smith New Court*, the tenor of their judgments (particularly that of Lord Steyn) suggests that the days of *Royscot Trust* might be numbered. Indeed, as we have already noted, there is no reason in both logic and principle why a plaintiff should be as well-placed as he would have been had the misrepresentation concerned taken place in a situation of *actual* fraud or deceit since, *ex hypothesi*, the situation is in fact *not* one that pertains to actual fraud or deceit but on the contrary one that *falls short* of it. Further, and consistent with Lord Steyn's observations in *Smith New Court*, it is extremely

> difficult to see how the moral turpitude entailed under s 2(1) would on the same level as that entailed in a situation of fraudulent misrepresentation or deceit.
>
> 85 However, as this particular issue was not argued before this court, we will express a conclusive view only when it is next directly in issue before us. In any event, as already noted and shall be elaborated upon below, the result in the present case does not turn on which view is adopted with regard to the proper measure of damages to be awarded under s 2(1). This would be an appropriate juncture to turn to the application of s 2(1) (in particular, the test of reasonable belief) to the facts of the present appeal.

20 In so far as the present themes of this essay are concerned (*viz*, the importance of theory and history in understanding as well as developing the law of contract), it will be seen that these *obiter* (albeit considered) observations[27] by the court as just quoted above are not only founded on reason and logic but also take into account the ***theoretical*** implications as well – in particular, the fact that s 2(1) of the Misrepresentation Act did *not* connote that kind of ***moral turpitude*** which Lord Steyn referred to in the *Smith New Court* case (as also referred to in the quotation above[28]). The approach from *history*, however, was less satisfactory inasmuch as the relevant legislative history of the Misrepresentation Act shed no real light on how to interpret s 2(1) in the context of the measure or quantum of damages awardable pursuant to that provision was concerned.[29]

[27] See [2015] 1 SLR 997 at [84] (reproduced above, note 26).
[28] See [2015] 1 SLR 997 at [82] (reproduced above, note 26). It is important to emphasise once again that I am referring to theoretical *propositions* (here, for example, the concept of moral turpitude that underlies fraud) *as opposed to* an overarching theoretical *framework* as such.
[29] *Cf* also the quite trenchant criticism of the Misrepresentation Act generally in David Campbell, "The Consequences of Defying the System of Natural Liberty: The Absurdity of the Misrepresentation Act 1967" in Ch 7 of T T Arvind and Jenny Steele (Gen Eds), *Contract Law and the Legislature – Autonomy, Expectations, and the Making of Legal Doctrine* (Hart Publishing, Oxford, 2020).

IV. Unconscionability

21 In the previous essay,[30] I dealt with only one issue relating to the doctrine of unconscionability – and a highly theoretical one at that, *viz*, whether the hitherto quite separate doctrines of duress, undue influence and unconscionability could all be subsumed within a *single "umbrella" doctrine*. In doing so, I referred to what represents the current law in Singapore as embodied within the Singapore Court of Appeal decision of *BOM v BOK*.[31] In particular, the court in that case held that, without principled as well as practical legal criteria that would enable an "umbrella doctrine" of unconscionability to function in a coherent as well as practical manner, such a novel and radical shift towards an "umbrella doctrine", even if theoretically elegant, should *not* be undertaken.

22 In the present essay, I would like to discuss a far more fundamental as well as basic issue relating to the doctrine of unconscionability – the nature of the very doctrine itself and, in particular, the form that it presently takes in the Singapore context. Not surprisingly, perhaps, the leading Singapore decision is, in fact (and once again), *BOM v BOK*.[32] Before dealing briefly with this decision, perhaps some brief background might be appropriate.

23 The doctrine of unconscionability – particularly under English law – was (and still is to a large extent) an *extremely narrow* one. It is confined to what any reasonable person would consider to be *an extremely egregious case where one party takes unconscionable advantage of another who is in an obviously disadvantageous situation.* As alluded to above, these constitute cases of what the courts have termed "*improvident transactions*".[33] It is understandable why the courts adopted – initially at least – such a conservative and narrow approach towards the doctrine. An expansive doctrine of unconscionability might have led to the excessive exercise of judicial discretion in a *substantive*

[30] See Andrew Phang, The Importance of Theory and History in Understanding and Developing the Common Law of Contract – Some Preliminary Reflections" (2023) 1 *Contract and Commercial Law Review* 67 at 83–84.
[31] [2019] 1 SLR 349.
[32] [2019] 1 SLR 349.
[33] Oft-cited cases include *Fry v Lane* (1888) 40 Ch D 312 and *Cresswell v Potter* [1978] 1 WLR 255. The earliest cases were classified under the even more specific rubric of "expectant heirs" (see, for example, Nelson Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (4th Ed, Sweet & Maxwell, 2023) at paras 15-010−15-018).

sense where the aim of achieving fairness in the *individual* case at hand might have led to *uncertainty (and even possible arbitrariness)* in the law.

24 Although the general tenor of the *English* law relating to the doctrine of unconscionability continues to remain fairly conservative, there have been isolated observations in the case law that suggest a possibly fuller development.[34] However, the position in Australia is *quite different*. There are clear signs of a *very much broader development* of the doctrine of unconscionability. The leading decision is the High Court of Australia decision of *Commercial Bank of Australia Ltd v Amadio* ("***Amadio***").[35]

25 Returning now to the current Singapore position on the doctrine of unconscionability in general and the Singapore Court of Appeal decision in *BOM v BOK*[36] in particular, the court, in *BOM v BOK*, has now ruled determinatively that the broader doctrine of unconscionability does not form part of Singapore law. This is because the broader doctrine afforded the court too much scope to decide on a subjective basis and came dangerously close to the ill-founded principle of inequality of bargaining power as introduced in the English decision of *Lloyd's Bank v Bundy*.[37] Instead, the narrow doctrine, as exemplified by cases such as *Fry v Lane*[38] and *Cresswell v Potter*,[39] applies in Singapore. This narrow doctrine requires the plaintiff to satisfy three elements: first, the plaintiff had to be poor and ignorant; second, the transaction had to have been at a considerable undervalue; third, the plaintiff must not have had the benefit of independent advice. Upon the satisfaction of these factors, it

[34] See, for example, the English Court of Appeal decision of *Credit Lyonnais Bank Nederland NV v Burch* [1997] 4 All ER 144 at 153; the English High Court decision of *Multiservice Bookbinding Ltd v Marden* [1979] 1 Ch 84 at 110; the English High Court decision of *Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd* [1983] 1 WLR 87 at 94−95; the English Court of Appeal decision of *Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd* [1985] 1 WLR 173 at 182−183 (affirming the last-mentioned decision); and the Privy Council decision of *Boustany v Pigott* (1993) 69 P & CR 298 (on appeal from the Court of Appeal of the Eastern Caribbean Supreme Court (Antigua and Barbuda), especially at 303.

[35] (1983) 151 CLR 447. For a more recent decision of the same court considering the decision in *Amadio*, see *Kakavas v Crown Melbourne Limited* (2013) 250 CLR 392. See also Nelson Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (Sweet & Maxwell, 2023, 4th Ed) at paras 26-019−26-031.

[36] [2019] 1 SLR 349.

[37] [1975] QB 326.

[38] (1888) 40 Ch D 312.

[39] [1978] 1 WLR 255.

was for the defendant to prove that the transaction was fair, just and reasonable, failing which the transaction could be set aside on the basis of unconscionability.[40]

26 At this particular juncture, it should be noted that the court in *BOM v BOK* did question whether or not there had been an ***historical misstep*** in the law inasmuch as the narrow doctrine of unconscionability was, in fact, another species of *undue influence instead* (what we have come to term today as Class 1 undue influence).[41] If so, the argument *against* the adoption of a *broader* doctrine of unconscionability is *even stronger* inasmuch as, in that court's own words, "the ***expansion*** of the ***narrow*** doctrine of unconscionability [into the broader doctrine of unconscionability] was ***historically flawed inasmuch as it proceeded from a non-existent doctrine of unconscionability*** (which as [the court] sought to explain … was, in fact, ***Class 1 undue influence***).[42] However, the court did also "accept that it was always open to the courts to formulate, of its own accord, a ***broad*** doctrine of unconscionability";[43] however, it then proceeded to observe as follows:[44]

> However, without the benefit of an initial legal platform, so to speak (in this instance, the ***narrow*** *doctrine of unconscionability*), such a formulation is, with respect, ***flawed*** because it does ***not*** contain or embody – ***in and of itself*** – the elements of principle accompanied by a datum level of ***certainty itself*** – the elements of principle accompanied by a datum level of ***certainty and predictability***. Put simply, the ***broad*** doctrine of unconscionability looks very much like ***a broad discretionary legal device which permits the courts to arrive at any decision which it thinks is subjectively fair in the circumstances*** – or, at least, does not provide sound legal tools by which the court concerned can *explain* how it arrived at the decision it did based on principles that could be applied to *future*

[40] [2019] 1 SLR 349 at [129]–[131].
[41] See generally [2019] 1 SLR 349 at [145]–[148].
[42] See [2019] 1 SLR 349 at [147] (emphasis in bold italics and underlined bold italics in the original text).
[43] See [2019] 1 SLR 349 at [148] (emphasis in bold italics in the original text).
[44] See [2019] 1 SLR 349 at [148] (emphasis in italics, underlined italics, bold italics and underlined bold italics in the original text).

> cases of a similar type. Indeed, this is precisely why we have … − in the *Singapore* context – a consistent stream of High Court decisions which ***eschew*** *the* ***broad*** *doctrine of unconscionability* for precisely the reason which we have just noted (*ie*, ***broad and unbridled discretion***). In the circumstances, we, too, ***eschew and reject the broad doctrine of unconscionability*** and declare that it does *not* represent the law in the *Singapore* context.

27 *However*, the court in *BOM v BOK*, whilst seeing "much force" in the argument that even the *narrow* doctrine of unconscionability was ***redundant*** simply because it was *but another way* of describing *Class 1 undue influence*,[45] nevertheless acknowledged that "since acceptance of the *narrow* doctrine of unconscionability would ***not*** lead to any obvious *legal anomalies* ***and*** since it has been *generally accepted across the Commonwealth* …, [it] saw no reason to take special pains to declare that it is no longer part of Singapore law".[46] I pause to observe that ***history*** was therefore ***also relevant*** in the context of the reasoning of the court in *BOM v BOK*.

28 Although the Court of Appeal held that the narrow doctrine of unconscionability applies in Singapore, it also emphasised that it is *slightly different from* its origins in *Fry v Lane* and *Creswell v Potter*. To invoke the doctrine, the plaintiff had to show that he was suffering from an infirmity that the other party had exploited in procuring the transaction. In addition to considering if the plaintiff was poor and ignorant, the court would also include situations where the plaintiff was suffering from other forms of infirmities, whether physical, mental and/or emotional in nature. However, not every infirmity would *ipso facto* be sufficient to invoke the narrow doctrine of unconscionability. It must have been of sufficient gravity as to have acutely affected the plaintiff's ability to conserve his interests, and must also have been, or ought to have been, evident to the other party procuring the transaction. Taking a step back, the court also emphasised that this criterion of an

[45] See [2019] 2 SLR 349 at [149].

[46] See [2019] 2 SLR 349 at [149] (emphasis in italics and bold italics in the original text). The court proceeded to consider the possible relationship between the narrow doctrine of unconscionability on the one hand and Class 1 undue influence on the other (see generally [2019] 2 SLR 349 at [149]−[153]), but this point need not concern us, at least in the context of the present essay.

infirmity must not be overly broad, lest it amounted to the application of the broader doctrine. Ultimately, the approach in Singapore should be applied through the lens of cases exemplifying the narrow doctrine rather than those embodying the broad doctrine. Such an approach distinguished the narrow doctrine *subtly but significantly* from the broad doctrine, *and represented a middle ground* ***based on practical application rather than theoretical conceptualisation***.[47] Upon the satisfaction of an infirmity, the burden is on the defendant to demonstrate that the transaction was fair, just and reasonable. Further, it is not mandatory that the transaction was at a considerable undervalue or that the vendor lacked independent advice. But they would be important factors that the court would take into account.

29 In arriving at what ought to be the legal position with regard to the doctrine of unconscionability in the Singapore context, the court in *BOM v BOK* was conscious of the ***theoretical balance*** that was required in order to ***facilitate practical application*** – in particular, that the courts are concerned with the maintenance of the sanctity as well as security of contract.[48] It follows that any contractual doctrines which constitute the counterpoint to the aforementioned principle (*ie*, that relate to the unravelling of contractual relationships and that therefore undermine the sanctity as well as security of contract) ought to be carefully limited and ought to be developed in such a way as to ensure that sanctity and security of contract are not unduly undermined. Looked at in this light, the court in *BOM v BOK* was clearly of the view that an expansive doctrine of unconscionability such as that embodied in the *Amadio* case *would*, in fact, undermine the sanctity as well as security of contract and that a *narrow* doctrine of unconscionability ought therefore to be adopted instead – albeit it bears emphasising once again, in a manner that is ***based on practical application rather than theoretical conceptualisation***. Not surprisingly, perhaps, the decision in *BOM v BOK* has generated a not insignificant amount of commentary – both

[47] See, with regard to this last-mentioned point, [2019] 1 SLR 349 at [144].
[48] See also generally Andrew Phang, "Security of Contract and the Pursuit of Fairness" (2000) 16 JCL 158.

positive[49] as well as negative.[50] There has also been a judicial response from beyond the shores of Singapore.[51] However, it is now firmly part of the contractual landscape of Singapore.[52]

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[49] See, *eg*, Vincent Ooi and Walter Yong, "A Reformulated Test for Unconscionability" (2019) 135 LQR 400; Debby Lim and Jonathan Muk, "Consciously Uncoupling: Court of Appeal Becomes Conscious to Unconscionability in *BOM v BOK*" (*Singapore Law Gazette*, March 2019; available online at https://lawgazette.com.sg/feature/consciously-uncoupling-unconscionability/ (accessed, 6 September 2023)); as well as Burton Ong, "Unconscionability, Undue Influence and Umbrellas: The 'Unfairness Doctrine' in Singapore Contract Law After BOM v BOK" [2020] Sing JLS 295 (which also responds to Bigwood's article which is referred to in the note following).

[50] See, for example, Rick Bigwood, "Knocking Down the Straw Man: Reflections on *BOM v BOK* and the Court of Appeal's "Middle-Ground" Narrow Doctrine of Unconscionability for Singapore" [2019] Sing JLS 29. The author criticises the Court of Appeal decision of *BOM v BOK*, *inter alia*, for mischaracterising the *Amadio* case as embodying a broad doctrine of unconscionability and for using rhetoric in situating its concept of the narrow doctrine of unconscionability within the context of practical application instead of theoretical conceptualisation. With respect, the author has not elaborated on the fact that the formulations in the *Amadio* case do contain the potential for engendering uncertainty (save for his attempt in a lengthy footnote (p 52, note 138) in response to an anonymous referee making the same point and in which he admits that he had "no response" to the referee "except to say that the interpretation of another legal system's doctrinal formulation is to a significant and unavoidable extent perspectival, and [he] has not personally found the "special disadvantage" criterion [in *Amadio*] to be intolerably "open-ended" in its formulation (though granted this is probably shaped somewhat by [his] knowledge of how the criterion has actually been applied by the local courts)" and that he "[a]grees with the referee that language performs an important signalling function in law, although [he remains] unsure, based simply on the linguistic formulations of the respective "infirmity" and "special disadvantage" criteria [in *BOM v BOK* and *Amadio*, respectively], what exactly is the conceptual and practical distance between them in the wake of [*BOM v BOK*]"). The author also glosses over the attempt to distinguish the narrow doctrine of unconscionability as stated at [144] of *BOM v BOK* from the broad doctrine in *Amadio* through *practical application that is accompanied by a focus that entails such application being made through the lens of cases exemplifying the narrow doctrine* (such as Fry *and* Cresswell). Indeed, the author's claims that such an approach is "rhetorical" (at p 46) and (at p 38, note 59) that the aforementioned distinction "may be a little too subtle, at least for [him]" misses the dynamic interaction in that approach that is itself normative in nature. Perhaps a key to understanding the author's approach is to be found in his belief that there is no real substance to the concept of uncertainty (see at p 46 as well as his book, *Exploitative Contracts* (Oxford University Press, 2003) at 245-246) – an approach that is itself certainly not uncontroversial. Even if the author's argument is taken at its highest (and there is no difference, in substance, between *BOM v BOK* and *Amadio*), that can be no bad thing (although the formulations in both cases are indeed different).

[51] See the High Court of Australia decision of *Australian Securities and Investments Commission v Lindsay Kobelt* (2019) 267 CLR 1, where *BOM v BOK* was considered by Nettle and Gordon JJ. This case related to *statutory* unconscionability pursuant to s 12CB of the Australian Securities and Investments Commission Act 2001 (Cth) and where, as the learned judges noted (at [144]), the unwritten law had "a significant part of play in ascribing meaning to the term 'unconscionable' under s 12CB(1)". Both Nettle and Gordon JJ (together with Edelman J, who delivered a separate judgment) were in the minority in so far as the final decision on the facts of the case was concerned; in relation to *BOM v BOK*, they observed thus (at [153]):

> The doctrine of unconscionability was recently criticised by the Court of Appeal of Singapore for its vagueness and generality [in *BOM v BOK* at [121]–[125]].

V. Illegality

30 In the previous essay, I dealt – owing to constraints of space – with a very specific as well as focused issue relating to the law of contractual illegality. In particular, I dealt with the specific point which centred on the meaning to be attributed to the concept of "***reliance***"[53] in the context of contractual illegality – which understanding of reliance might, as I also noted,[54] have implications for other areas of the law,

> The Court applied a distinction [in *BOM v BOK* at [140]–[142]] between "broad" and "narrow" unconscionability in an effort to address this issue. The utility of such distinctions, however, is questionable. Certainly, in any given case, a conclusion as to what is, or is not, against conscience may be contestable: so much is inevitable given that the standard is based on a broad expression of values and norms [citing *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199 at [304]]. However, efforts to address the "indeterminacy" [citing *Commonwealth of Australia v Kojic* (2016) 249 FCR 421 at [58]] of the doctrine by way of further distillations, categorisations or definitions may risk "disappointment, ... a sense of futility, and ... the likelihood of error" (citing *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199 at [304]). This is because evaluating whether conduct is unconscionable "is not a process of deductive reasoning predicated upon the presence or absence of fixed elements or fixed rules" (citing *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199 at [304]). Instead, at least in the Australian statutory context, what is involved is an evaluation of business behaviour (conduct in trade or commerce) in light of the values and norms recognised by the statute [citing *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199 at [304]]. The problem of indeterminacy is addressed by close attention to the statute and the values derived from it, as well as from the unwritten law [citing *Commonwealth of Australia v Kojic* (2016) 249 FCR 421 at [58]].

It should be noted that this was the only reference to *BOM v BOK* in this case and that the observations just quoted tend to suggest a "broad" doctrine of unconscionability. More importantly, perhaps, they miss, with respect, a point already made above and which bears reiterating, *viz*, the attempt to distinguish the narrow doctrine of unconscionability as stated at [144] of *BOM v BOK* from the broad doctrine in *Amadio* through *practical application that is accompanied by a focus that entails such application being made through the lens of cases exemplifying the narrow doctrine (such as Fry v Lane* (1888) 40 Ch D 312 *and Cresswell v Potter* [1978] 1 WLR 255*)*. Indeed, a close reading of that part of the judgment of Nettle and Gordon JJ dealing with the *application* of the law to the facts of that case demonstrates precisely the approach that was stated at [144] of *BOM v BOK*.

[52] See, for example, the Singapore High Court decisions of *Liberty Sky Investments Ltd v Goh Seng Heng* [2019] SGHC 40 at [67]; *Jocelyn Rita d/o Lawrence Stanley v Tan Gark Chong* [2019] SGHC 125 at [26]; *Ram Niranjan v Navin Jatia* [2019] SGHC 138 at [69]; *Liew Kum Chong v SVM International Trading Pte Ltd* [2019] SGHC 163 at [29] and [31]; *Lee Wen Jervis v Jask Pte Ltd* [2020] SGHC 75 at [28]; and *Yip Fook Chong (alias Yip Ronald) v Loy Wei Ezekiel* [2020] SGHC 84 at [192]; as well as the Singapore Court of Appeal decision of *Quoine Pte Ltd v B2C2 Ltd* [2020] SGCA(I) 2 at [109].

[53] See Andrew Phang, The Importance of Theory and History in Understanding and Developing the Common Law of Contract – Some Preliminary Reflections" (2023) 1 *Contract and Commercial Law Review* 67 at 85–87.

[54] See Andrew Phang, The Importance of Theory and History in Understanding and Developing the Common Law of Contract – Some Preliminary Reflections" (2023) 1 *Contract and Commercial Law Review* 67 at 87.

such as the law of trusts.[55] The understanding of reliance was, I argued, a specific illustration of how useful an apparently simple theoretical distinction might operate in the practical sphere. This was the distinction between the descriptive on the one hand and the prescriptive (or normative) on the other. To summarise the argument on this particular point in that essay, put simply, once it is understood that only a normative or substantive "reliance" on the impugned contract would suffice to cause the claimant to fall foul of the reliance principle, the fact that a claimant "relies" in a procedural or formal sense on the impugned contract in order, for example, to establish its claim pursuant to an independent cause of action is legally unobjectionable. Indeed, if such an approach is adopted, there is no need to have to accept what has been termed the "no reliance theory"[56] and, still less, be felt that an alternative explanation is required to reconcile that theory with the endorsement of what is essentially an independent legal course of action.[57]

31 In the *present* essay, I would like to consider in more detail what I only alluded to in the briefest of terms in the previous essay[58] – the (apparent[59]) doctrinal disagreement between the UK Supreme Court on the one hand and the Singapore Court of Appeal on the other.[60]

32 More specifically, the majority in the UK Supreme Court decision in *Patel v Mirza*[61] adopted an entirely new approach towards

[55] See, in particular, the House of Lords decision in *Tinsley v Milligan* [1994] 1 AC 340.
[56] See Nelson Enonchong, "Title Claims and Illegal Transactions" (1995) 111 LQR 135 at 135.
[57] As was the case in Nelson Enonchong, "Title Claims and Illegal Transactions" (1995) 111 LQR 135.
[58] See Andrew Phang, The Importance of Theory and History in Understanding and Developing the Common Law of Contract – Some Preliminary Reflections" (2023) 1 *Contract and Commercial Law Review* 67 at 85.
[59] Because, as I shall suggest in a moment, there were indeed underlying *theoretical* differences as well.
[60] I draw liberally here from Andrew Phang and Goh Yihan, "Contract Law in Commonwealth Countries: Uniformity or Divergence?" (2019) 31 SAcLJ 170 at 192–199.
[61] [2017] AC 467. This decision is an obviously seminal one and, not surprisingly, has been the subject of much academic commentary: see, for example, Justice Datuk Harmindar Singh Dhaliwal, "The Illegality Defence after *Patel v Mirza*" [2018] JMJ 29; as well as James Goudkamp, "The End of An Era? Illegality in Private Law in the Supreme Court" (2017) 133 LQR 14; James C Fisher, "The Latest Word on Illegality" [2016] LMCLQ 483; Nicholas Strauss, "The Diminishing Power of the Defendant: Illegality After *Patel v Mirza*" [2016] RLR 145; Emer Murphy, "The *ex turpi causa* defence in claims against professionals" (2016) 32 *Professional Negligence* 241; Andrew Burrows, "A New Dawn for the Law of Illegality" (2 June 2017) *Oxford Legal Studies Research Paper No. 42/2017*; available online at: https://ssrn.com/abstract=2979425 (accessed, 23 October

contractual illegality (albeit only in relation to common law illegality) by adopting a "range of factors" test whereas the minority in that same case adopted a rule-based approach instead. Put simply, the former approach confers *discretion* on the court to decide whether or not to permit recovery notwithstanding the presence of an illegal contract. The minority, on the other hand, would *not* permit recovery pursuant to the illegal contract but was prepared to permit recovery under certain established exceptions.

33 In contrast, in the Singapore Court of Appeal decision of *Ochroid Trading Ltd v Chua Siok Lui* ("***Ochroid Trading***"),[62] the court did *not* follow the approach of the majority in *Patel v Mirza*. Affirming the principles that it had laid down in its earlier decision of *Ting Siew May v Boon Lay Choo* ("***Ting Siew May***"),[63] it summarised the law relating to illegality and public policy as follows:[64]

> 64 The court will first ascertain whether ***the contract*** is ***prohibited*** either pursuant to a *statute* (expressly or impliedly) and/or *an established head of common law public policy*. This is the ***first*** *stage* of

2023; see now Ch 2 of *Illegality After Patel v Mirza*, below); Lord Grabiner, "Patel v Mirza [2016] UKSC 42 – Illegality and Restitution Explained by the Supreme Court" (The Second Distinguished Law Lecture, Queen's College, Cambridge, 19 October 2016), available online at https://www.oeclaw.co.uk/images/uploads/seminars/Patel_v_Mirza_Lecture.pdf (accessed, 23 October 2023); M P Furmston, "Recent Developments in Illegal Contracts" in Ch 11 of Rob Merkin and James Devenney (Gen Eds), *Essays in Memory of Jill Poole – Coherence, Modernisation and Integration in Contract, Commercial and Corporate Laws* (Informa Law, Abingdon, Oxford, 2018)); Graham Virgo, "The Illegality Revolution" in Ch 14 of Sarah Worthington, Andrew Robertson and Graham Virgo (Gen Eds), *Revolution and Evolution in Private Law* (Hart Publishing, Oxford, 2018); and Zhong Xing Tan, "Illegality and the Promise of Universality" [2020] JBL 428. Indeed, Professor Goudkamp went so far as to observe that "*Patel v Mirza* … is a pivotal moment in English private law" (see Goudkamp, above at 14). See also the collection of essays in Sarah Green and Alan Bogg (Gen Eds), *Illegality After Patel v Mirza* (Hart Publishing, Oxford, 2018).

[62] [2018] 1 SLR 363. See also Alexander Loke, "Disagreement over the Illegality Defence" (2018) 35 JCL 169 and Graham Virgo, "Jones Day Professorship of Commercial Law Lecture 2019 – "The State of Illegality"' (2019) 31 SAcLJ 747. Reference may also be made to Andrew Phang, "The Intractable Problems of Illegality and Public Policy in the Law of Contract – A Comparative Perspective" in Ch 12 of Rob Merkin and James Devenney (Gen Eds), *Essays in Memory of Jill Poole – Coherence, Modernisation and Integration in Contract, Commercial and Corporate Laws* (Informa Law, Abingdon, Oxford, 2018) (which, however, predated the decision in the *Ochroid Trading* case).

[63] [2014] 3 SLR 609.

[64] [2018] 1 SLR 363 at [64]−[66] (emphasis in italics, bold italics and underlined bold italics in the original text).

> the inquiry and, if the contract is indeed thus prohibited, there can be ***no recovery*** *pursuant to the (illegal) contract*. This is subject to the *caveat* that, in the general common law category of contracts which are not unlawful *per se* but entered into with the object of committing an illegal act (and ***only*** *in this category*), the proportionality principle laid down in *Ting Siew May* ought to be applied to determine if the contract is enforceable.
>
> 65 *However*, that may not be the end to the matter as a party who has transferred benefits pursuant to the illegal contract *might* be able to recover those benefits on a ***restitutionary*** *basis* (*as opposed to* recovery of *full contractual damages*). This is the ***second*** stage of the inquiry. We saw that there were at least *three* possible legal avenues for such recovery – all of which have been summarised above (at [43]−[60]).
>
> 66 The present legal position in Singapore is thus relatively clear – at least in so far as *the legal approach* is concerned. Admittedly, the process of *application* of the relevant legal principles may be problematic but that is an inevitable part of adjudication and is common to all areas of the law. Having said that, and as alluded to above, there are issues which still need to be clarified, particularly the principles governing ***an independent claim in unjust enrichment*** for the recovery of benefits conferred under an illegal contract as well as the ***limits*** of such a claim.

34 As can be seen from the above summary, the court in the *Ochroid Trading* case did *not* (subject to an extremely narrow situation[65]) follow the "range of factors" test adopted by the majority in *Patel v Mirza* – in its view, the law on the question of whether the contract concerned was prohibited (which arose at the first stage of the

[65] See [2018] 1 SLR 363 at [64] (reproduced above, note 64).

inquiry) remained unchanged.[66] In arriving at this holding, the court was of the view that the approach of the majority in *Patel v Mirza* would *introduce further uncertainty* into the analytical process by superimposing an additional inquiry based on the "range of factors" test across the board to all situations of common law illegality. Such an approach was also undesirable as it created an unprincipled distinction between the principles which applied to statutory illegality and those which governed common law illegality (the court in *Patel v Mirza* having laid down the "range of factors" test for situations of common law illegality *only*). The "range of factors" test was also unnecessary to achieve remedial justice in the Singapore context given the flexibility of the principles laid down in the *Ting Siew May* case, which would also allow restitutionary recovery at the second stage[67] of the inquiry.[68]

35 However, the court in the *Ochroid Trading* case did go *further* inasmuch as it proceeded to hold that even where the restitutionary recovery of benefits conferred under an illegal contract would, in principle, also be available where the ordinary requirements of an independent claim in unjust enrichment were satisfied, a (separate) defence of illegality and public policy *in unjust enrichment* might nevertheless bar such recovery where *the principle of stultification* (taking reference from a seminal article by Professor Peter Birks) is engaged.[69] This principle requires the court to determine whether allowing the claim would *undermine the fundamental policy* that rendered the underlying contract void and unenforceable in the first place.[70] In each case, the court must carefully examine the relevant considerations and the policy, be it statutory or the common law, which rendered the contract illegal before considering if that same policy

[66] See [2018] 1 SLR 363 at [64] (reproduced above, note 64).
[67] See [2018] 1 SLR 363 at [65] (reproduced above, note 64).
[68] See [2018] 1 SLR 363 at [125].
[69] See Peter Birks, "Recovering Value Transferred Under an Illegal Contract" (2000) 1 *Theoretical Inquiries in Law* 155.
[70] See [2018] 1 SLR 363 at [143], [145]–[148], [158] and [159]. And on observations on other independent causes of action and the scope of the concept of stultification, see [161]–[168]. Reference may also be made to the recent decision of the Judicial Committee of the Privy Council (on appeal from the Court of Appeal of the Republic of Trinidad and Tobago) in *Attorney General of Trinidad v Tobago v Trinsalvage Enterprises Ltd* [2023] UKPC 26, where the principle of stultification was considered in the context of unjust enrichment (albeit not in the context of illegality). Whilst the relevant decisions on stultification (also considered in the *Ochroid Trading* case (see [2018] 1 SLR 363 at [147]–[159]) are considered (see [2023] UKPC 26, especially at [24]–[27]), Professor Birks's article (above, note 69) is not cited. Lord Briggs also dissented on the issue of the *application* of the principle of stultification to the facts of the case.

would be undermined or stultified if the claim in unjust enrichment was allowed. In the *Ochroid Trading* case, for example, the court held that the agreements concerned were illegal moneylending contracts that were unenforceable under the Singapore Moneylenders Act.[71] It held, further, that the alternative claim in unjust enrichment could not succeed because to permit recovery of even the principal sums under the agreements would undermine and stultify the fundamental social and public policy against unlicenced moneylending which undergirded the Moneylenders Act. An examination of the legislative policy underpinning that Act indicated that unlicensed moneylenders should be precluded from recovering any compensation whatsoever for their illegal loans. Permitting restitution of the principal sums lent would make a nonsense of this policy and render ineffectual the prohibition against illegal moneylending in the Act, which reflected the strong need to deter such conduct due to its status as a serious social menace in Singapore.[72]

36 I have, in fact, noted that the topic of illegality and public policy is "confused (and confusing)".[73] That there is, as we have just seen, been a difference in approach between the UK Supreme Court on the one hand and the Singapore Court of Appeal on the other is emblematic of the complexity of (as well as ensuing confusion in) this particular area of the law of contract. It is suggested that one of the main sources of complexity and/or confusion lies in the fact that the topic itself rests upon ofttimes uncertain (and perhaps even conflicting) *theoretical* foundations.

37 Indeed, the *overarching* theoretical premise underlying the law of illegality and public policy is one that stands in contrast to yet another. Put simply, the law in this particular area of the law of contract rests on the proposition that where the illegality concerned is such as to result in actual (or potential) harm to the wider public interest, the court is justified in overriding the parties' individual contractual rights. At the risk of oversimplification, in such situations, the community's welfare ***trumps or surpasses*** the contracting parties' individual rights and, at the risk of further oversimplification, it would appear that *utilitarian*

[71] Cap 188, 1985 Rev Ed (see now the Moneylenders Act 2008 (2020 Rev Ed)).
[72] See [2018] 1 SLR 363 at [219].
[73] See, for example, Andrew Phang, "Of Illegality and Presumptions – Australian Departures and Possible Approaches" (1996) 11 JCL 53 at 53 and, by the same author, "Illegality and Public Policy" in Ch 13 of Andrew Phang Boon Leong (Gen Ed), *The Law of Contract in Singapore* (Academy Publishing, Singapore, 2012) at para 13.001.

considerations ***trump or surpass*** *individual* rights. This last-mentioned point represents, in fact, one of the most intractable as well as fundamental *philosophical* debates that has yet to yield a satisfactory result.[74] However, even if we put to one side this more general and overarching theoretical premise as well as conundrum for a moment, there remain a number of more specific theoretical concepts as well as strands that might assist in illuminating, for example, the quite different approaches adopted by the UK Supreme Court in *Patel v Mirza* and the Singapore Court of Appeal in the *Ochroid Trading* case.

38 It is suggested that the key difference between *Patel v Mirza* on the one hand and the *Ochroid Trading* case on the other centres on the concept of ***discretion***. *Patel v Mirza* endorses a ***broad*** conception of that concept and this is evident in the majority's adoption of the "range of factors" test which, by its *very nature*, *necessitates* the exercise of a fair amount of discretion as the court concerned seeks to *balance* the various factors in arriving at its final decision. The *Ochroid Trading* case, on the other hand, attempts to ***limit*** (by way of a more rule-based approach) the amount of discretion that the court in question can exercise once the contract concerned is found to be illegal – the (further) theoretical consideration being that such illegality cannot (given the fact that ***public*** *policy* has in fact been contravened and the community's welfare has been thereby damaged[75]) be given effect to by way of (in substance at least) the endorsement and enforcement of the *illegal* ***contract***.

39 Although one might possibly construe the difference referred to in the preceding paragraph as *different legal* ***techniques*** (which would in fact, in most cases at least, result in the *same* outcome),[76] it might be equally well argued that there is nevertheless a difference in the *underlying* ***theoretical*** *perspective* as well. The fact that there might (as just mentioned) be the same outcome in most cases at least stems from the fact that even under the ostensibly stricter approach adopted in the *Ochroid Trading* case, that case nonetheless endorsed (from a doctrinal standpoint) the *existing* legal avenues that would provide a *restitutionary*

[74] Not surprisingly, the volume of literature is as enormous as the intractability of the debate itself. Though *cf* the approach adopted (albeit in a somewhat different context) in Sharon Erbacher, *Negligence and Illegality* (Hart Publishing, Oxford, 2017).
[75] And see generally Zhong Xing Tan, "The anatomy of contractual illegality" (2015) 44 *Common Law World Rev* 99.
[76] See Andrew Phang and Goh Yihan, "Contract Law in Commonwealth Countries: Uniformity or Divergence?" (2019) 31 SAcLJ 170 at 198.

remedy (notwithstanding the presence of the illegal contract) simply because there would be no (normative) reliance[77] as such on that illegal contract.[78] I should also add that there are also *theoretical* issues that arise even in so far as the "range of factors" test adopted by the majority in *Patel v Mirza* is concerned – as a very perceptive article demonstrates.[79]

40 This might be an appropriate juncture at which to turn to the final substantive topic for the present essay (and the only one that does not fall within the rubric of vitiating factors) – the law relating to penalty clauses.

VI. The penalty rule

41 A ***similar and parallel*** *theoretical* difference in approaches between the UK Supreme Court and the Singapore Court of Appeal which existed in so far as the law of illegality and public policy was concerned[80] can also be seen in relation to the Penalty Rule.[81] Let me elaborate.

42 For the longest time, the relevant law in Singapore in this particular area of the law of contract was very straightforward and consisted in applying the principles laid down by Lord Dunedin in the then leading House of Lords decision of *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd* ("***Dunlop***").[82] However, the Singapore Court of Appeal in *Denka Advantech Pte Ltd v Seraya Energy Pte Ltd*

[77] And see Andrew Phang, The Importance of Theory and History in Understanding and Developing the Common Law of Contract – Some Preliminary Reflections" (2023) 1 *Contract and Commercial Law Review* 67 at 85−87.
[78] These other (restitutionary) avenues include recovery pursuant to class protection statutes; where there has been oppression and duress or fraud or breach of fiduciary duty; and where recovery is available pursuant to an independent cause of action (in, for example, tort, unjust enrichment or pursuant to a collateral contract); as well as where there has been repentance of timely repudiation: see generally Andrew Phang Boon Leong, "Illegality and Public Policy" in Ch 13 of Andrew Phang Boon Leong (Gen Ed), *The Law of Contract in Singapore* (2nd Ed, Academy Publishing, Singapore, 2022) vol 1 at paras 13.133−13.188.
[79] See Zhong Xing Tan, "The Proportionality Puzzle in Contract Law: A Challenge for Private Law Theory?" (2020) 33 *Canadian Journal of Law & Jurisprudence* 215, especially at 225−229.
[80] And as briefly considered in the preceding part of this essay.
[81] For this part of the essay, I draw from Andrew Phang, "Penalty Clauses and Restraint of Trade – A View from Singapore" [2022] JBL 208.
[82] [1915] AC 79.

("***Denka***")[83] was fairly recently faced with decisions from both the High Court of Australia as well as the UK Supreme Court which *differed from* the approach adopted in the *Dunlop* case in relation to the scope and the substantive criteria for ascertaining whether a particular clause was a penalty clause, respectively.

43 The court in the *Denka* case undertook a comprehensive review of all the relevant case law across seven jurisdictions. In addition to examining the then current case law in Singapore itself, it examined the case law in the United Kingdom, Australia, New Zealand, Canada,[84] Hong Kong and Malaysia. The relevant academic scholarship was also considered. The analysis itself spanned almost 130 paragraphs (in a 330-paragraph judgment which included the consideration of a relatively complex fact situation as well). This illustrates, in fact, the approach I mooted right at the outset of the present lecture – that the search (here in relation to the Penalty Rule) is one that traverses all relevant decisions in all relevant common law jurisdictions in order to glean the principles that are felt to be best suited not only from the perspective of logic but also to Singapore society in general and the Singapore legal system in particular. In this particular context, the focus was more on the former, *ie*, an examination of the principles that were best suited to Singapore from the perspective of logic. What is significant is that no argument was cast arbitrarily by the legal wayside; every possible perspective (together with the accompanying legal analysis) was carefully considered. The primary motifs consisted in humility and openness before a definitive choice was made as to what should be the appropriate legal position in Singapore.

44 Returning to the actual decision in the *Denka* case, in so far as the *scope* of the Penalty Rule was concerned, the Singapore court declined to follow the High Court of Australia in *Andrews v Australia and New Zealand Bank Group Ltd* ("***Andrews***"),[85] holding that the Penalty Rule applied *only* in the context of a *breach of contract*; in this regard, it adopted the same approach as the UK Supreme Court in

[83] [2021] 1 SLR 631 (noted, Roger Halson, "Liquidated Damages and Penalties – A Review of the Cavendish Decision by the Singapore Court of Appeal" (2021) 137 LQR 375). See now also the Singapore Court of Appeal decision of *Ethoz Capital Ltd v Im8ex Pte Ltd* [2023] 1 SLR 922.
[84] See now also John Enman-Beech, "The Penalty Doctrine in Canada" (2021) 99 *Canadian Bar Rev* 504.
[85] (2012) 247 CLR 205.

Cavendish Square Holding BV v Makdessi ("***Cavendish Square Holding***").[86] In particular, the court in the *Denka* case was of the view that the extension of the Penalty Rule to situations outside of a breach of contract would vest in the courts a discretion that was at once both wide as well as uncertain. It would permit the courts to review a wide range of clauses on substantive grounds, thus constituting a significant legal incursion into the freedom of contract that had hitherto existed between the parties concerned. In contrast, the concept of a breach of contract meant that the Penalty Rule was confined to the sphere of secondary obligations only. In this regard, primary obligations between the contracting parties were not interfered with at all, unlike in the broader equitable jurisdiction mooted in the *Andrews* case.[87] This is, again, a demonstration of the *theoretical* approach of the Singapore courts towards the amount of *discretion* that ought to be exercisable by them (which, to put it simply, is to be *limited* as far as this is consistent with legal principle).

45 Somewhat ironically, however, the Singapore court decided, in so far as *the substantive criteria* for ascertaining whether a particular clause was a penalty clause were concerned, to affirm the principles set out by the House of Lords in 1915 in the *Dunlop* case and declined to follow the test of "legitimate interests" set out by the UK Supreme Court in the *Cavendish Square Holding* case. Also somewhat ironically, perhaps, the High Court of Australia in the *Andrews* case *endorsed* the test of "legitimate interests". However, it may well be the case that the application of *either* test might – in most fact situations at least – lead to the *same* result.[88] It is this particular holding that I would like to focus more upon in the present essay because (as alluded to above) the difference in approaches between the Singapore Court of Appeal in the *Denka* case and the UK Supreme Court in the *Cavendish Square Holding* case mirror, it is suggested, the ***same*** difference in approaches that was to be found in the context of the law relating to illegality and public policy as discussed in the preceding Part of this essay (*ie*, the difference in approach between the Singapore Court of Appeal in the *Ochroid Trading* case and the UK Supreme Court in *Patel v Mirza*, respectively). In particular (and returning to the present topic), the UK Supreme Court

[86] [2016] AC 1172.
[87] [2021] 1 SLR 631, especially at [82], [92] and [93].
[88] *Cf Denka Advantech Pte Ltd v Seraya Energy Pte Ltd* [2021] 1 SLR 631 at [183]. See also Andrew Phang, "Penalty Clauses and Restraint of Trade – A View from Singapore" [2022] JBL 208 at 214.

in the *Cavendish Square Holding* case (as was the case in *Patel v Mirza*) adopted a ***broad*** conception of the concept of "discretion", whereas the Singapore Court of Appeal in the *Denka* case (as was the case in the *Ochroid Trading* case) sought to ***limit*** the amount of discretion exercisable by the court.[89] Once again, it appeared (as was the case in relation to the different tests applied by the aforementioned courts in the context of illegality and public policy) that, on a *practical* level, there might nevertheless be the same outcome in most cases.[90] However, as is also (as we have seen) the case in respect of illegality and public policy, there is nevertheless *a difference* in the *underlying* ***theoretical*** *perspectives* as well.[91]

VII. Conclusion

46 The present essay has, in fact, provided me with the opportunity to clarify – for the purposes of the present as well as the previous essay[92] – the specific conception of the concept of "theory" that I have utilised. To recapitulate, when I speak about "theory", I am referring to *theoretical* ***propositions*** that might assist legal academics and/or the courts *in arriving at the applicable leal principles* that ought to apply in all cases in that particular area of the law in general and to the facts of the case at hand in particular. This is ***in contrast to*** *overarching theoretical* ***frameworks***. Put simply, *theoretical* ***propositions*** are *useful as well as practical* ***conceptual tools*** which aid in analysis; in contrast, *theoretical* ***frameworks*** tend, by their very nature, to be more abstract

[89] See, for example, one of the reasons canvassed by the court in *Denka Advantech Pte Ltd v Seraya Energy Pte Ltd* [2021] 1 SLR 631 at [155], as follows (emphasis in the original text):

> [W]e emphasise that the concept of "legitimate interest" is, in and of itself, a very general concept that could be utilised in a myriad of ways, particularly in the process of *application* to the relevant facts and circumstances of a given case. Its protean character lends itself – potentially at least – to be utilised *too flexibly* and this would lead to too much uncertainty both prior to the entry into the contract concerned as well as with regard to the specific result arrived at by the court thereafter. This, we think, may also have the unwanted effect of encouraging litigation.

[90] *Cf Denka Advantech Pte Ltd v Seraya Energy Pte Ltd* [2021] 1 SLR 631 at [183]. See also Andrew Phang, "Penalty Clauses and Restraint of Trade – A V*ie*w from Singapore" [2022] JBL 208 at 214.

[91] See also Zhong Xing Tan, "The Proportionality Puzzle in Contract Law: A Challenge for Private Law Theory?" (2020) 33 *Canadian Journal of Law & Jurisprudence* 215, especially at 229–232.

[92] See Andrew Phang, "The Importance of Theory and History in Understanding and Developing the Common Law of Contract – Some Preliminary Reflections" (2023) 1 *Contract and Commercial Law Review* 67.

and this is not surprising in the least in view of their ambitions at universality in the widest sense of the word. That having been said, as in life generally, there will be *overlaps* on occasion: for example, the apparently broad and overarching theoretical framework in respect of the law of contract that mandates that there be (as far as is possible) development of the legal doctrine concerned in such a manner as to minimise (or even eradicate) any undue or unnecessary undermining of sanctity and security of contract figures prominently in the present essay. This is not surprising in light of the fact that the major part of this essay concerns *vitiating factors* which, if applied too liberally, *would* in fact unravel the contract concerned. In other words, if they were accorded unbridled effect, the entire legal enterprise which the law of contract serves would come to naught.

47 Turning to the topics considered in the present essay, it would perhaps come as no surprise to the reader that, given the very nature of vitiating factors, the focus has been primarily on *theory* as a means of understanding and developing the law. Indeed, as we have just noted, a primary – and quite general yet simultaneously relevant – theoretical strand centred on the need to ensure that the legal principles concerned were developed in a manner that ensured that sanctity and security of contract was not unduly undermined (this appeared, in fact, to be the main consideration in the development of the doctrine of unconscionability in the Singapore context). However, this was not the only theoretical strand simply because the vitiating factors themselves also varied in content as well.

48 For example, the primary theoretical strand in relation to the doctrine of illegality and public policy centred on the need to ensure that *private* contracts which fell foul of *public* policy ought not to be enforceable. That having been said, we have also seen that there were *other theoretical* strands at play – which *simultaneously* impacted the development of the law in this particular sphere of the law of contract. For example, *different theoretical perspectives* in relation to the amount of *discretion* that ought to be exercisable by the courts led to *different* tests in the UK Supreme Court and the Singapore Court of Appeal, respectively. It could arguably be said that the latter was relatively more concerned about maintaining the main theoretical strand that private contracts which fell foul of public policy (whether under statutory or common law illegality) ought not to be given effect to save in

exceptional situations where restitutionary recovery was permissible without (normative) reliance on the illegal contract itself – hence, the *stricter* view of the amount of *discretion* that was exercisable by the court. In all this, however, *history* did not appear to play a significant – or, indeed, any – part in the development of the law of illegality and public policy.[93]

49 The *same and parallel* approach might be said to have characterised the development of the Penalty Rule in the UK Supreme Court and the Singapore Court of Appeal, respectively. However, it might also be said that the *primary* consideration – unlike that which applied to the doctrine of illegality and public policy – was *not* centred on the issue of *public* policy as such but, instead, on the need to ensure that the principle of *compensation* was not compromised by any extension of the Penalty Rule itself. In this connection, the approach of the High Court of Australia in the *Andrews* case in extending the Penalty Rule to situations outside a breach of contract represented a significant incursion into the aforementioned principle as well as the freedom of contract that had hitherto existed between the contracting parties. And, in so far as the extension of the substantive criteria for ascertaining whether or not a particular clause was a penalty clause in the *Cavendish Square Holding* case was concerned, while the (new) test of "legitimate interests" as set out in that case was not wholly irrelevant, it might confer on the court a discretion that went beyond what the rationale underlying the Penalty Rule required (which is to ensure that the clause concerned provides a genuine pre-estimate of the likely loss, consistently with the focus of the Penalty Rule being on the secondary obligation on the part of the defendant to pay damages by way of *compensation* only). In the circumstances, albeit for somewhat different reasons from that which obtained in the context of the doctrine of illegality and public policy, the UK Supreme Court in the *Cavendish Square Holding* case and the Singapore Court of Appeal in the *Denka* case adopted quite *different* approaches towards the amount of *discretion* that ought to be exercisable by the courts.

50 Finally, it might be observed that whilst theory did play some part in the views of the Singapore Court of Appeal in the *RBC Properties* case in arriving at its conclusion (albeit by way of *obiter dicta* only) that

[93] Though *cf* (in the context of the doctrine of unconscionability) the decision in *BOM v BOK*: see the text to notes 45 and 46, above.

the measure of damages under s 2(1) of the Misrepresentation Act ought to be that awarded under the common law action for negligent misrepresentation (and *not* that for fraud), history did not.

51 As emphasised in both the present as well as the previous[94] article, a full and complete analysis of the role of theory and history in the understanding as well as development of the common law of contract would require a book-length or even a multi-volume study. Nevertheless, it is hoped that the present essay has added in its own modest way to the ultimate realisation of that more ambitious project.

[94] See Andrew Phang, "The Importance of Theory and History in Understanding and Developing the Common Law of Contract – Some Preliminary Reflections" (2023) 1 *Contract and Commercial Law Review* 67 at 68 and 88.