12. CONTRACT LAW

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Formation of contract

Offer and acceptance

Offer and acceptance in different fact patterns

12.1 The rules relating to contractual formation are easy to state but apply with different degrees of difficulty in the varied circumstances of practice. Indeed, as Andrew Phang Boon Leong JA pertinently noted in *RBC Properties Pte Ltd v Defu Furniture Pte Ltd* [2015] 1 SLR 997 (at [1]):

> … [w]hilst the law to be applied is objective and universal, the facts that the law is applied to are varied and specific … therefore, the decision or result of a case is heavily dependent (in the final analysis) on the specific facts concerned.

2014 saw several cases in which the courts had to apply the rules relating to contractual formation, specifically those to do with offer and acceptance, to different fact patterns. It suffices for the purposes of this review to highlight two of such cases.

12.2 The first case is the Court of Appeal's decision of *Woo Kah Wai v Chew Ai Hua Sandra* [2014] 4 SLR 166 ("*Woo Kah Wai*") (noted in Alvin W-L See, "Contract for the Grant of a Compliant Option to

Purchase" Sing JLS (forthcoming)), which raised several issues of contractual formation in the context of an option to purchase. This section deals with the issues to do with offer and acceptance, and other sections will deal with other aspects of contractual formation. *Woo Kah Wai* concerned the sale of an apartment unit. The purchaser had made a written offer dated 10 February 2010 to the vendors to purchase the property. This written offer was handed over to the vendors' agent on 11 February 2010. Much of the appeal turned on the existence of this "pre-option" contract, as well as the actual duration of the option period, which was stated in the written offer to be "three days".

12.3 An option to purchase was prepared by the vendors' agent and dated 11 February 2010. The date of exercise stated in the option was on or before 4.00pm on 13 February 2010, which was three calendar days from 11 February 2010. The purchaser's agent went to collect the option from the vendors' agent on 12 February 2010. He complained that the option period was too short and left the option with the vendors' agent. Eventually, the vendors refused to amend the option and the purchaser's agent collected the option and finally passed it to the purchaser on 13 February 2010. However, by this time, the option had expired. The next three days were a Sunday and two public holidays. The purchaser tried to exercise the option on 17 February 2010, but the vendors refused this on the ground that the option had already expired.

12.4 The purchaser began proceedings against the vendors to specifically perform the sale of the apartment or for damages. The High Court found in favour of the purchaser, and the vendors appealed to the Court of Appeal.

12.5 The Court of Appeal dismissed the vendors' appeal. It held that the elements of offer and acceptance were present. First, there was an offer to purchase the apartment since this was clearly stated in the purchaser's written offer. Indeed, the written offer expressly provided that the vendors must "either accept or reject this offer", which showed that the purchaser intended to be bound provided that his promise was accepted by the vendors. Secondly, there was an acceptance of the purchaser's offer since the vendors had signed on an acknowledgment block indicating acceptance, and had left the rejection block blank. This signified the vendors' final and unqualified expression of assent to the terms of an offer. This case shows that while the elements of offer and acceptance will not be difficult to find, they must still be established with reference to the particular facts of a given case. In this regard, express references to "offer" and "acceptance" may go some way towards finding their existence as a legal matter.

12.6 The second case in which the court had to apply the rules relating to contractual formation is the High Court decision of *Siemens*

Industry Software v Lion Global Offshore Pte Ltd [2014] SGHC 251 ("*Siemens Industry Software*"). This was an appeal by the defendant, Lion Global Offshore Pte Ltd, against the assistant registrar's decision to enter summary judgment in favour of the plaintiff, Siemens Industry Software Pte Ltd. Owing to a copyright dispute over the use of the plaintiff's software by the defendant, the parties entered into a settlement arrangement. This arrangement involved a full and final settlement of the copyright dispute on a no-fault basis, conditional upon the defendant paying $267,500 (including taxes) under a licensed software designation agreement ("LSDA") for six software licences. Accordingly, two documents were concluded: a settlement agreement ("SA"), and the LSDA. When the defendant refused to pay the $267,500, the plaintiff considered that refusal to be a repudiatory breach of the LSDA. The plaintiff elected to continue with the LSDA and delivered six software licences to the defendant. It then issued a letter of demand to the defendant for the $267,500. When the defendant still refused to pay, the plaintiff succeeded in obtaining summary judgment in its favour. The defendant argued on appeal that it should be given leave to defend as there were several triable issues.

12.7 One of those triable issues concerned issues of offer and acceptance: whether the plaintiff was precluded from proceeding with its claim based only on the LSDA. Essentially, the defendant's argument was that since the SA was made conditional upon the completion of the LSDA, the SA needed to be considered as well.

12.8 Whether this was a triable issue requires the consideration of basic offer and acceptance principles. The law adopts an objective approach towards such ascertainment. Thus, whether a contract is formed (and its constituent terms) depends not on the parties' subjective assertions, but on how a reasonable person would understand the situation.

12.9 Although not expressly stated by the court in *Siemens Industry Software*, it is clear that it applied these principles. It held that the fact of the SA being conditional on the sale of the six software licences pursuant to the LSDA did not mean that the LSDA was conditional on the SA. The defendant's own subjective assertions on a contrary effect of the SA and the LSDA was thus irrelevant. In any case, the evidence contradicted this assertion as the defendant had stated in an e-mail that it understood that an agreement had been concluded. It was at that point that the coincidence of offer and acceptance occurred. As such, there was no need to consider the SA, and this first alleged triable issue was not in fact triable.

Silence as valid acceptance?

12.10 The rules of offer and acceptance admit of more specific issues apart from that requiring their coincidence. One such issue, considered by the Court of Appeal in *R1 International Pte Ltd v Lonstroff AG* [2015] 1 SLR 521 ("*R1 International*"), is whether there can be a valid acceptance by silence. It must be said that *R1 International* also concerned other issues of contractual formation, all of which will be dealt with below (at paras 12.10–12.13). The case concerned whether a set of terms to arbitrate in Singapore, found in a detailed contract note which had been sent by the appellant to the respondent shortly after their deal was concluded, was incorporated as part of the contract between the parties. The answer to this issue would determine whether the High Court was correct in dismissing the appellant's application for a permanent anti-suit injunction.

12.11 The deal between the parties had come about in the following way. Between January and December 2012, the respondent purchased rubber from the appellant over several transactions. In one of those transactions, the respondent notified the appellant that the rubber it had taken delivery of emitted a foul smell. The appellant did not dispute the presence of the smell, but said that as "smell" was not a contractually specified parameter of the rubber, it was not in breach of contract.

12.12 The respondent commenced proceedings in Switzerland against the appellant, and the appellant responded by commencing proceedings in Singapore. The appellant sought an anti-suit injunction to prevent the respondent from continuing with the Swiss proceedings. The appellant's basis for doing so was that the respondent was in breach of an agreement found in a contract note to arbitrate any disputes in Singapore.

12.13 Although the respondent never countersigned and returned the contract note, it is important to note the particular way in which each transaction was concluded. First, the parties would negotiate the sale of rubber by e-mail or telephone. Secondly, after the basic terms had been concluded, the appellant would send an "e-mail confirmation" to the respondent. The respondent would then send a "purchase order" to the appellant. Thirdly, the appellant would send the respondent a contract note, with a request that the respondent countersign and return a copy. The appellant would then deliver the rubber and issue an invoice, which the respondent would accept and pay for.

12.14 The appellant argued on appeal that it was typical in commodity trading transactions for parties to negotiate and agree on key commercial terms over telephone. This would be recorded in an e-mail sent by the sellers to confirm the trade and key terms. A more detailed

set of terms would follow to supplement those key terms. It was therefore said that the respondent, being an experienced buyer in the rubber commodities market, would thus have expected the appellant's further terms, as contained in the contract note, to follow. In so far as offer and acceptance are concerned, the appellant argued that the respondent's failure to countersign the contract note could not be construed as equivocal silence that invalidated acceptance, since the respondent had paid the invoiced amount thereafter. On the contrary, the respondent's payment objectively constituted acceptance of the terms in the contract note, binding it to the agreement to arbitrate in Singapore.

12.15 The Court of Appeal agreed with this argument and found that silence is not necessarily fatal to a finding that terms have been accepted. The effect of silence is context-dependent; indeed, the High Court had held in *Midlink Development Pte Ltd v The Stansfield Group Pte Ltd* [2004] 4 SLR(R) 258 that whether silence amounted to acceptance depended on whether the conduct of the parties, objectively ascertained, supported the existence of a contract.

12.16 On the facts, the Court of Appeal regarded as important that the respondent did not ever demur from the applicability of the appellant's contract note. Thus, the respondent's payment of the invoice for the contract note without protest was taken as unequivocal acceptance of its terms. While a party may request that a countersigned copy of a document be returned, this may not be an essential act to constitute a contract. Indeed, on the facts, the contract note did not state that it could only be accepted after it was countersigned and returned.

Whether acceptance needs to be communicated

12.17 Another specific rule relating to the rules of offer and acceptance is whether an acceptance needs to be communicated for it to be effective. This issue arose for the High Court's consideration in *Brader Daniel John v Commerzbank AG* [2014] 2 SLR 81 ("*Brader Daniel John*"). The case concerned an alleged promise made by Dresdner Kleinwort ("DKIB"), the global investment banking division of Dresdner Bank AG ("Dresdner Bank"), that there would be a minimum pool of €400m from which the DKIB's employees would be paid their bonuses in 2008. An initial announcement was made on 18 August 2008 ("the 18 August announcement"). This was followed by DKIB sending out letters to all eligible employees, including the plaintiffs, on 19 December 2008. When DKIB announced later that it was reducing the bonuses payable, the plaintiffs sued to enforce the balance sum promised in the 19 December letter as damages.

12.18 In considering whether a valid contract was concluded between the parties, the court considered whether the fact that none of the plaintiffs communicated their acceptance of the 18 August announcement precluded such a finding. The court held that while usually acceptance has no effect until it has been communicated to the offeror, this is not without exceptions. In particular, the offer may expressly or impliedly waive the requirement that the acceptance be communicated. This was applicable to the present case since there was no indication that Dresdner Bank asked employees to indicate their acceptance of the minimum bonus pool. This constituted a waiver of the need for the plaintiffs to communicate their acceptance. Alternatively, the court construed the 18 August announcement as a unilateral contract, which obliged DKIB to pay the bonus in return for the plaintiffs' continued employment and performance. Once the plaintiffs had commenced such employment and performance, Dresdner Bank would come under an obligation not to revoke the offer.

Consideration

12.19 In *Woo Kah Wai* (above, para 12.2), the vendor argued that there was no consideration since the cheque was for the option to purchase and not in support of the pre-option contract. The Court of Appeal, on the facts as described above at paras 12.2–12.5, had no difficulty rejecting this argument. It found that there was consideration to support the pre-option contract since the purchaser had provided a cheque in exchange for the provision of an option to purchase. It also held that the vendor's argument was far too technical a view of the entire transaction.

12.20 This demonstrates that the Singapore courts will not adopt an overly technical reading of the requirement of consideration that might avoid the finding of a contract. This is especially true if the transaction concerned commercial entities or exchanges. As has been said in many cases (see, *eg*, *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2004] 2 SLR(R) 594 at [139]), the courts will look at the substantive content of a transaction in discerning consideration, and will not easily accept the breaking down of a transaction into artificially minor parts to avoid the finding of consideration.

12.21 Indeed, the High Court in *Brader Daniel John* (above, para 12.17) noted that consideration remains a standard requirement for the formation of a valid contract notwithstanding heavy criticism of it. On the facts as described above at paras 12.17–12.18, and applying the benefit-detriment analysis, the court found that the consideration sought in the 18 August announcement was the plaintiffs' continued

employment and forebearance from resigning. There was therefore consideration on the facts.

12.22 Alternatively, the court also found consideration on the "more modern" analysis set out in *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1. That case recognised the concept of practical benefit to the promisor that can constitute valid consideration even though the promisor had paid more for the same promise. The court in *Brader Daniel John* found that this analysis also applied on the present facts since the plaintiffs were not obliged to continue in their employment in the first place; by continuing their employment, they had conferred on Dresdner Bank a practical benefit in terms of employee stability. This analysis simply shows that the courts very easily find consideration in commercial contexts.

Promissory estoppel

12.23 The doctrine of promissory estoppel, usually used to enforce promises otherwise unsupported by consideration, arose for the High Court's consideration in *Bank of China Ltd (Singapore Branch) v Huang Ziqiang* [2014] SGHC 245. In this case, the plaintiff bank sued the first defendant to recover the sums on the basis of him being the guarantor of a loan granted to the borrower. The first defendant resisted this claim, saying that the bank had falsely represented to him that it would not enforce its rights under the guarantee. Those fraudulent misrepresentations allegedly induced the first defendant to execute the guarantee. In conjunction with his claim of fraudulent misrepresentation, the first defendant also argued that those same misrepresentations gave rise to the defence of promissory estoppel.

12.24 The High Court found that promissory estoppel did not apply on the facts. First, it held that the first defendant's reliance on the doctrine was inconsistent with his plea of fraudulent misrepresentation. This was because, for promissory estoppel to apply, there must be a legal relationship giving rise to rights and duties between the parties. Such a legal relationship would not arise from the first defendant's insistence that the bank's fraudulent misrepresentation prevented the guarantee from arising in the first place. Secondly, the court also found that, even if made out, the effect of promissory estoppel was suspensory only and was founded on the bank's inequitable conduct. There was nothing on the facts that pointed to such inequitable conduct. Thus, this case reminds us of the usual elements of promissory estoppel, namely, the existence of a legal relationship and conduct that would make it inequitable for the insistence of strict legal rights.

Intention to create legal relations

12.25 The High Court in *Brader Daniel John* regarded the intention to create legal relations as the very marrow of contractual relationships. Contrary to the plaintiffs' submissions, the court rightly found that the burden was on the party seeking to establish the existence of the contract to prove an intention to create legal relations. On the facts as described above at paras 12.17–12.18, an inference of an intention to be bound can be drawn from the subject matter of the announcement in the present case, which was the remuneration of an employee by the employer.

Certainty and completeness

12.26 It is clear that a contract must be certain and complete before it can be enforceable. Put another way, before there can be a concluded contract in law, its terms must be certain and the agreement must similarly be complete. A term that is "uncertain" exists but is otherwise incomprehensible. On the other hand, an agreement that is "incomplete" has certain terms that do not (but should) exist and the non-existence of these terms make the agreement incomprehensible. A contract may be unenforceable for uncertainty or incompleteness even though there has otherwise been both offer and acceptance between the parties: see *Brader Daniel John* at [82].

12.27 Even if a contract is uncertain or incomplete, that can be remedied by a previous course of dealing between the parties. This was exactly the situation in *Brader Daniel John*, in which the defendant argued that the 18 August announcement was uncertain since it did not provide for the specific bonus to be given to each employee. However, the court found that the parties' past conduct on how such bonuses were to be paid remedied this gap.

12.28 The degree of certainty and completeness required becomes relevant when parties conclude an interim agreement with the intention of adding more detailed terms later on. The question then becomes whether the interim agreement is sufficiently certain and complete, given that it is explicitly not meant to be detailed. The Court of Appeal had occasion in *R1 International* (above, para 12.10) to deal with such a situation. It found that it is not uncommon for parties to first agree on a set of essential terms that they are bound as a matter of law, even though there may be ongoing discussions and further incorporation of the other more detailed terms.

12.29 On the facts as described above at paras 12.10–12.13, the Court of Appeal in *R1 International* found that the key terms in the e-mail

confirmation would have been sufficient to satisfy the requirements of certainty and completeness and hence constitute a valid contract. However, the Court of Appeal also noted that, given the size and scope of the subject matter of the deal, it was improbable that the parties intended to contract on the bare bones of the e-mail confirmation. Indeed, the e-mail confirmation was silent on a few potentially important matters that were dealt with in the contract note. This gave rise to the issue of whether terms dealing with these matters may be incorporated into the parties' agreement, an issue dealt with below (at paras 12.37–12.40).

12.30 The question of certainty and completeness also featured in *Siemens Industry Software* (above, para 12.6). The plaintiff argued on appeal that the LSDA was sufficiently complete and certain to be enforceable. The defendant argued that the LSDA could not be enforced as there was, first, no agreed terms for payment, and secondly, vagueness relating to the words "valid through: June 30, 2014".

12.31 The High Court found that uncertainty as to the time of payment may render an agreement unenforceable when it is determined to be vital to the agreement. Indeed, such was the case in *T2 Networks Pte Ltd v Nasioncom Sdn Bhd* [2008] 2 SLR(R) 1 ("*T2 Networks*"), where the High Court found that a settlement agreement was not legally binding because the payment terms were not certain. In contrast, the court in *Siemens Industry Software* found that there was no evidence that time of payment was vital to the transaction. Thus, while the court accepted that there was indeed an uncertainty as to the time of payment, this did not render the contract unenforceable because the time of payment terms was not vital to the transaction.

12.32 With respect, it may be unclear why time of payment is not vital in the present case. Similar to *T2 Networks*, *Siemens Industry Software* concerned a settlement agreement. Thus, it ought to be a valid consideration to all parties *when* the settlement is to be effected. Indeed, contrary to the court's conclusion that time of payment was a minor term compared to the other terms of the agreement, such as the quantity of products to be purchased and the price of sale, it is respectfully submitted that, without agreement of the time of payment, the LSDA would be an essentially "empty" agreement. It would be "empty" because it did not stipulate when the defendant must perform its obligations, thereby nullifying the other terms that the court did regard as important, such as those to do with quantity and price.

12.33 However, the court was, with respect, correct that the words "valid through: June 30, 2014" simply meant that the LSDA was open for acceptance until that date. This therefore did not render the LSDA uncertain and unenforceable.

The terms of the contract

Distinguishing representations from terms in an oral contract

12.34 The issue of distinguishing representations from terms in the context of an oral contract arose in the High Court decision of *Low Kin Kok (alias Low Kong Song Song) v Lee Chiow Seng* [2014] SGHC 208 ("*Low Kin Kok*"). The case concerned a failed investment project undertaken by the plaintiffs and the defendants. The plaintiffs' claim in breach of contract was confined to a supposed subsequent agreement between the parties to enable the plaintiffs to recover their investments. This could be characterised as either being an agreement to vary the original contract, or an agreement to rescind the original contract and enter into a new contract. However, because no written agreement had been entered into by the parties throughout the course of their entire working relationship, the court had to consider the oral accounts and ascertain the exact ambit of agreement, if any.

12.35 The High Court's decision in *Low Kin Kok* contains a valuable discussion of the identification of the contractual terms where there had only been an oral agreement between the parties. The court found that, apart from the evidential difficulty in reconstructing exactly what transpired between the parties, there is also the challenge of distinguishing representations and terms. The court held that an objective test is to be used to ascertain whether a statement is a mere representation or a term, and the test is concerned with what would appear to a reasonable person to be the parties' intention in the particular circumstances of the case.

12.36 Of course, distinguishing representations from terms is only one of the many challenges where there is only an oral agreement between the parties. The more substantive challenge involves actually finding agreement, though that is again approached by an objective test. Such a test may allow the ascertainment of agreement from a course of conduct or dealings between the parties or from correspondence or all relevant circumstances. Needless to say, the requirements for the formation of a contract, such as offer and acceptance, consideration, intention to create legal relations and certainty of terms must be satisfied before the court would find the existence of a contract.

Incorporation of terms

12.37 Whether the terms contained in a separate document are incorporated into a present agreement may be important, especially when contracting parties intend to supplement an otherwise bare agreement with more detailed terms subsequently. On the facts, as

detailed above (at paras 12.10–12.13), the Court of Appeal in *R1 International* (above, para 12.10) held that both parties did contemplate that the basic terms of the e-mail confirmations would be supplemented by a set of standard terms. In doing so, it laid down some important principles to do with the incorporation of terms.

12.38 First, the Court of Appeal held that the law adopts an objective approach towards questions dealing with incorporation of terms. Thus, when the deal had come into being and whether the terms of the contract note had supplemented (or was incorporated) into the deal turned on ascertaining the parties' objective intentions as gleaned from their correspondence and conduct in light of the relevant background as disclosed by the evidence. Importantly, the Court of Appeal noted that the relevant background includes the parties' industry, the character of the document that contained the terms in question, as well as the course of dealings between the parties.

12.39 Applying these principles to the case, the Court of Appeal found that it was indeed the practice in the international rubber commodities market for parties to initially only discuss the key terms of each trade, such as the specific product, quantity, price and destination at the time the trade was confirmed. The remaining terms would generally be concluded later. Thus, the respondent ought to have been aware of this practice and contemplated that the terms within the contract note could supplement those key terms in the e-mail confirmation.

12.40 It is important that the Court of Appeal found as a matter of fact that the respondent ought to have expected, in line with industrial norms, that the key terms of the e-mail confirmation would be supplemented by the terms of the contract note. Without this finding, it might have been difficult for a court to hold that a bare bones contract must always be supplemented by more detailed terms. Indeed, as the Court of Appeal itself noted in *R1 International*, it would have been possible, though inconvenient, for the parties to proceed on just the key terms of the e-mail confirmation. However, construed objectively from industrial norms and their own previous dealings, it was clear that the parties' *objective* intentions were that more detailed terms were expected and indeed incorporated via the contract note.

Implication of terms

Implication of terms in fact

12.41 In 2013, the Court of Appeal in *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 ("*Sembcorp Marine*") prescribed a new three-step process for the implication of terms in fact. The first step

requires the court to ascertain that a gap in the contract had arisen because the parties had not contemplated the gap; it is only in such a situation that a term can be implied. Next, the court is to consider whether it is necessary in the business or commercial sense to imply *a* term in order to give the contract efficacy. Finally, the court is to consider the *specific* term to be implied. A term is only to be implied if it passes the "officious bystander" test, that is, the contracting parties, having regard to the need for business efficacy, would have responded positively to the suggestion of the term to be implied. In the one year since, the courts have had various occasions to apply the test for implication as spelt out in *Sembcorp Marine*.

12.42 The first occasion is the High Court decision of *Quek Kwee Kee Victoria v Quek Khuay Chuah* [2014] 4 SLR 1 ("*Quek Kwee Kee Victoria*"). The parties to the action had disputed the bequests made by the deceased to various beneficiaries, including themselves. Eventually, both parties agreed to settle the disputes. Under the terms of the settlement agreement, the defendant was to sell his one-sixth share in two properties to the first plaintiff at market value, which was to be determined by Knight Frank Pte Ltd ("Knight Frank"). Knight Frank valued the properties at $4.2m, with the result that the first plaintiff had to pay $700,000 for the defendant's one-sixth share.

12.43 The defendant was not satisfied with Knight Frank's valuation and appointed other valuers, who on average valued the properties at $7.5m. The defendant argued that the higher valuation should be used because there was an implied term that Knight Frank's valuation would be at market value and/or fair or reasonable. The first plaintiff refused to accept this new valuation and sued to enforce the previous valuation and for the specific performance of the settlement agreement.

12.44 The High Court found for the plaintiffs. Although the relevant clause calling for Knight Frank's valuation was not stated to be final and binding, the court was satisfied that the parties intended this to be the case. In so far as the defendant's argument of implication was concerned, the court found that the parties had agreed on a formula, that is, at "market price", for the sale of the one-sixth interest. There was thus no gap and hence no room for any implication that the price would be "fair and reasonable" or that the "market price" would be a price either party considered to be fair and reasonable. Moreover, since the parties had named Knight Frank, which was well known and well respected in the Singapore property market, as the valuer, there was nothing strange in the choice that might lead to any ambiguity or any implication that the valuation obtained would have to be supplemented in any way.

12.45 Although the High Court in *Quek Kwee Kee Victoria* did not refer to the three-step process for the implication of terms in fact in

Sembcorp Marine, it is evident that it had that process in mind. It first reasoned that there was no "gap", an express consideration the Court of Appeal laid down in the first step. Next, the court also found that there was no ambiguity; again, another consideration arguably found in the remaining steps of the *Sembcorp Marine* three-step process. It is, however, respectfully submitted that the three-step process might be explicitly applied so as to ensure consistency and clarity in cases concerning the implication of terms in fact.

12.46 A second occasion in which the courts had to consider the *Sembcorp Marine* three-step process is the High Court decision of *The One Suites Pte Ltd v Pacific Motor Credit (Pte) Ltd* [2014] 4 SLR 806 ("*The One Suites Pte Ltd*"). Unlike *Quek Kwee Kee Victoria*, the court in this case *did* expressly apply the *Sembcorp Marine* three-step process to the facts, which involved an option to purchase ("OTP") a property at 11 Leng Kee Road. The OTP provided that the property was to be sold "subject to the existing approved use". The purchaser was to apply for the written approvals from the Housing and Development Board ("HDB") and other relevant authorities for the sale of the property. The completion date was set at 12 weeks from the date the OTP was exercised, or three weeks from the date of approval of the sale of the property by HDB, whichever was later. The OTP also provided that if HDB did not approve of the sale, then the sale would be rescinded.

12.47 Pursuant to its obligations, the purchaser applied to the relevant authorities for approval. However, the National Environment Agency ("NEA") refused the application because the purchaser's proposed use of the property did not fit with its long-term land use plan. The HDB was thus unable to approve of the sale as well. The purchaser thereafter regarded the sale of the property to be rescinded and sought a refund of the deposit. The vendor refused to refund the deposit but wrote to the NEA without the purchaser's knowledge and persuaded the NEA to reconsider its earlier decision on the premise that there was to be no change to the use of the property. Although the vendor urged the purchaser to apply to the HDB again given that the NEA had changed its mind, the purchaser refused and sued the vendor for the return of the deposit.

12.48 The High Court noted that, in the absence of any implied terms, the OTP could continue indefinitely as there was no obligation on the purchaser to pursue the relevant authorities for approval beyond the submission of its applications in the first place. It considered whether it should intervene by implying a term in fact to stipulate an end date for the OTP. Applying the first step of the *Sembcorp Marine* three-step process, it found that there was a glaring gap in the OTP regarding such a deadline. Since the parties had not contemplated such a gap, the next step of the three-step process was invoked. Applying the second step, the

court found that it was necessary in the business or commercial sense to imply a term in order to give the OTP efficacy so as not to leave both parties in limbo if the relevant approvals were not forthcoming.

12.49 In relation to the third step, the court regarded the real dispute to be about how the gap should be filled. Having considered the overall context of the OTP, the court found that there was an implied term that the purchaser had to use all reasonable endeavours to obtain the HDB's written approval and such other relevant authority for the sale of the property within a reasonable time. If no such approval was forthcoming after a reasonable time had lapsed, then either party may give notice to rescind. On the facts, the court found that the purchaser had not taken such reasonable steps; hence, its claim for the deposit failed. It should be noted that the High Court's decision has been reversed on appeal ([2015] SGCA 21), but its application of the *Sembcorp Marine* test may still be used as an illustration of such application.

12.50 A third instance of the courts applying the *Sembcorp Marine* three-step process for the implication of terms in fact is the High Court decision of *TYC Investment Pte Ltd v Tay Yun Chwan Henry* [2014] 4 SLR 1149. The case concerned whether the two directors of the first plaintiff company had properly exercised their right to approve payments made by the company to its creditors. This right had come about due to a divorce settlement agreement between the two directors, who had been married to each other. As part of the settlement agreement, a payment clause obliged either party to approve the other's payment on behalf of the company to its creditors. The plaintiffs commenced the present action against the two directors for a declaration that the cheques signed by the husband were valid despite the absence of the wife's approval. The plaintiffs additionally asked for the wife to specifically perform her contractual obligations under the settlement agreement, in particular the obligation based on an implied term that prevented her from exercising her right of approval for an improper purpose, capriciously or arbitrarily.

12.51 The High Court found that the purported implied term did not satisfy the *Sembcorp Marine* three-step process. Applying the first step, the court found that there was a gap in the settlement agreement as it was silent on what should happen if either director paralysed the company by declining to approve any payments. However, the second step was not satisfied because the gap caused by the right to approve payments did not undermine the efficacy of the settlement agreement because that gap was adequately covered by the existing directors' duties imposed on the two directors in their capacities as directors of the company. There was thus no need to imply a term that prevented any of the directors, in this case the wife, from exercising the right of approval for an improper purpose, capriciously or arbitrarily.

12.52 A fourth instance of the courts applying the *Sembcorp Marine* three-step process for the implication of terms in fact is *Culindo Livestock (1994) Pte Ltd v Ananda UK (China) Ltd* [2014] SGHC 178 ("*Culindo Livestock*"), the main facts of which are covered below in relation to the implication of terms in sale of goods: see paras 12.57–12.58. For present purposes, the relevant argument is that of the defendant, who submitted that there was an implied term that the source of the goods in question, ceftiofur sodium sterile ("CSS"), would be specifically from Chem Tec Incorporated ("Chemtec"). The defendant had argued this in order to show that Chemtec's certificate of analysis would be sufficient to certify the suitability and quality of the CSS delivered, and so escape liability under the Sale of Goods Act (Cap 393, 1999 Rev Ed) ("SOGA"). Relatedly, the defendant also argued for the implication of a term that the quality of the CSS supplied should be assessed with regard to the Chemtec standard, which was entirely dependent on the sample supplied by Chemtec.

12.53 In considering whether the first term can be implied, the High Court held that the defendant failed to prove that the presumed intention of both parties was to purchase CSS from Chemtec. Thus, applying the first step of the *Sembcorp Marine* three-step process, the court did not think that there was any gap in the contract that needed to be filled. This therefore rendered the next two steps unnecessary, although the court did consider that the second step would not be satisfied because there was no need to imply any term to give the contract efficacy. The third step also failed since there was no evidence that both parties would have thought it obvious that the sale was restricted to the particular source from Chemtec.

12.54 The court also held that the second term could not be implied. It cited *Sembcorp Marine* for the proposition that a term that is not reasonable, not equitable, unclear or that contradicts an express term of the contract will not be implied. Applying this proposition, the court thought that a term holding the defendant to the Chemtec standard would be wholly subjective and run counter to the purpose of a scientifically objective test. This would also contradict the express term that CSS was to be delivered, since the defendant could then deliver any goods that fit the Chemtec standard, which may not actually be CSS.

12.55 A final instance is the High Court decision of *Rotol Projects Pte Ltd v CCM Industrial Pte Ltd* [2014] SGHC 72 ("*Rotol Projects*"), where the court used the *Sembcorp Marine* three-step process to reject the implication of a binding claims procedure argued for by the defendant. Although the court said that the three steps would all fail (at [48]), it appears that its ultimate decision was grounded on the fact that there was no gap in the contract to be filled.

Implication of terms by law

12.56 The High Court decision of *Rotol Projects* also contains a short but important reminder (at [49]) that terms should not lightly be implied by law since such a term, once implied, will also be implied in all contracts of that particular type. In order for such implication to occur, there needs to be very strong reasons provided, which was certainly not the case in *Rotol Projects*.

Implication of terms in sale of goods

12.57 The implication of terms in the context of the sale of goods arose in the High Court decision of *Culindo Livestock*. The case concerned the sale of CSS, an antibiotic for livestock, from the defendant to the plaintiff. Such a sale took place over 11 sales contracts entered into between the parties from 2009 to 2011. The dispute in the present case concerned the tenth and 11th contracts, in which the CSS supplied by the defendant was found to be below the requisite quality standard. This in turn led the plaintiff to claim the defendant had supplied cefotaxime sodium ("CFX"), a substantially cheaper compound, in place of CSS. The plaintiff thereafter sued the defendant for breach of the implied condition under s 13 of the SOGA, in that the goods (allegedly CFX) did not correspond with the description (CSS). The plaintiff further asserted that the CSS delivered was not fit for its intended purpose pursuant to ss 14(1) and 14(2) of the SOGA.

12.58 The High Court considered that it needed to ascertain the nature of the sale transaction to decide which of the implied terms under the SOGA would apply. As to whether the implied term under s 13 would apply, the court considered that where the contract is for unascertained goods, the sale must be by description since the buyer must have some means of knowing whether the goods supplied by the seller are the goods supplied in the sale contract. In the present case, the plaintiff would state the description of the goods, the quantity required, the unit price, and the amount to be paid in the purchase order. The defendant would in return reply with a sales contract to confirm the conditions of sale, which described the commodity required as CSS.

12.59 While this showed that the sale of goods from the defendant to the plaintiff was a sale by description, this was not enough since s 13(2) of the SOGA provides that it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description in the event that "the sale is by sample as well as by description". Section 15(1) in turn provides that a contract of sale is a contract for sale by sample where there is an express or implied term to that effect. However, the court found that there was nothing on the facts that suggested the sales were by sample. Indeed, up to the point when

the parties concluded the sales contract, there was no mention of any sample being used as the reference standard for the purpose of the sale. Moreover, a sample that was agreed as a reference standard *after* the contract had been concluded would usually not be relevant to a contract for sale by sample: see *Compact Metal Industries Ltd v PPG Industries (Singapore) Ltd* [2006] SGHC 242 ("*Compact Metal Industries Ltd*"). The court therefore found that there was an implied condition that the goods will correspond with the description, pursuant to s 13(1) of the SOGA.

12.60 The High Court considered that it was of crucial importance that s 13(1) classified every description of the contract as a "condition". Citing *Chai Cher Watt v SDL Technologies Pte Ltd* [2012] 1 SLR 152, the court also noted that there are generally two types of cases where goods have been held not to correspond with their description. The first type is where there is some small discrepancy from the description in the contract. The second type comprises cases where in the absence of detailed commercial description, the goods supplied are to be regarded as not being the goods ordered in a general sense. In the present case, the court found that the evidence showed the defendant had supplied CFX rather than CSS, thereby breaching its implied term under s 13(1) of the SOGA.

12.61 In relation to the plaintiff's argument that the defendant was also in breach of the condition of satisfactory quality implied under s 14(2) of the SOGA, the court relied again on *Compact Metal Industries Ltd*, which elucidated the relevant governing principles: *Culindo Livestock* at [102]. Applying those principles, the court held that the plaintiff had proved its case under s 14(2). This was also because s 14(2A) provides that goods are of satisfactory quality if they meet the standard that a reasonable person would regard as satisfactory, taking into account the relevant circumstances. In the present case, the goods supplied were clearly described as CSS but the goods supplied were CFX instead, which were of a lower market price than CSS. There was also evidence that CFX differed from CSS in its usage, and might not have successfully treated the plaintiff's livestock.

Implied term of mutual trust and confidence

12.62 In 2013, the High Court held in *Cheah Peng Hock v Luzhou Bio-Chem Technology Ltd* [2013] 2 SLR 577 that unless there were express terms to the contrary, there was a term, implied by law, that an employer owed an employee a duty not to undermine or destroy mutual trust and confidence. This included a duty of fidelity, that is, a duty to act honestly and faithfully, although the content of such a duty would vary depending on the facts of the case. 2014 saw some cases discussing this implied term of mutual trust and confidence.

12.63 In the Court of Appeal decision of *Wee Kim San Lawrence Bernard v Robinson & Co (Singapore) Pte Ltd* [2014] 4 SLR 357, the court held that the concept of constructive dismissal and the implied term of mutual trust and confidence were distinct but related. Thus, a breach of the implied term of mutual trust and confidence, being the breach of a fundamental term of the employment contract, would entitle the employee to terminate the contract. If the employee elected to terminate, he would be treated as having been "constructively" dismissed. Where this occurred, the employee would be able to claim "premature termination losses", that is, losses that were causally connected to the premature termination of the employment contract. This was to be measured by the amount the employee would have received under the contract had the employer lawfully terminated the contract by giving the required notice or paying salary in lieu of such notice. Thus, in most cases, damages from a breach of the implied term of mutual trust and confidence would be tied to constructive dismissal, unless the consequence of the breach was something other than the premature termination of the employment contract, such as impairment of future employment prospects.

12.64 The High Court in *Brader Daniel John* (above, para 12.17) considered that breach of an implied term of trust and confidence can only be established on proof that the employer's conduct was without reasonable cause and such conduct was calculated and likely to destroy or seriously damage the relationship of trust and confidence. The court noted that it would take quite extreme behaviour on the part of the employer to satisfy these requirements: *Brader Daniel John* at [114].

Non-absolute obligations clauses

12.65 The Court of Appeal decision of *KS Energy Services Ltd v BR Energy (M) Sdn Bhd* [2014] 2 SLR 905 ("*KS Energy*") (noted in Yip Man & Goh Yihan, "Default Standards for Non-absolute Obligation Clauses" [2014] LMCLQ 320) raised some important points relating to non-absolute obligations clauses. In the case, BR Energy (M) Sdn Bhd ("BRE") was awarded a charter for an oil rig to Petronas Carigali Sdn Bhd ("Petronas") by 21 March 2006. It eventually approached KS Energy Services Ltd ("KSE") to supply the rig. KSE engaged a third party contract, Oderco Inc ("Oderco"), to build the rig. KSE also formed a joint venture company with BRE to charter the rig. The key provision in the joint venture agreement provided that KSE was to:

> … use all reasonable endeavours to procure the [oil rig] is constructed and ready for delivery in Abu Dhabi or other location specified by KSE within six months after the Charter Agreement is executed.

12.66 As it turned out, Oderco could not meet its deadline and the rig was not constructed in time. Petronas terminated its charter agreement with BRE. BRE then purported to terminate the joint venture agreement with KSE on the ground that KSE had failed to use all reasonable endeavours to procure the construction of the oil rig. The case therefore turned on the interpretation of the "all reasonable endeavours" clause. In this regard, the Court of Appeal provided some valuable guidance on the interpretation of such clauses, as well as other non-absolute obligations clauses.

12.67 First, an "all reasonable endeavours" clause required the obligor to act as a prudent and determined person in the interest of the obligee and anxious to procure the contractual outcome within the stipulated timeframe. On the facts, KSE's conduct satisfied this requirement since they were persistent in pushing for Oderco's compliance, within reasonable boundaries.

12.68 Second, there was a need to distinguish between an obligation to use all reasonable endeavours to procure a third party's performance and an obligation to do the same oneself. The former required a lesser degree of reasonable endeavour as compared to the latter since the procurement of a third party's performance might involve some uncertainty. Applied to the present case, KSE could not be expected to deploy permanent staff to supervise Oderco. Indeed, this would be an intrusive right in relation to a third party builder.

12.69 Third, there was little or no difference between the standard imposed by an "all reasonable endeavours" clause and a "best endeavours" clause. There was, however, a distinction between these clauses and a simple "reasonable endeavours" clause, which simply requires the obligor to act reasonably to procure the contractual outcome.

12.70 With respect, the Court of Appeal's decision in *KS Energy* is sensible in avoiding the thin distinction that had hitherto existed in foreign cases concerning the distinction between an "all reasonable endeavours" and "best endeavours" clause. Perhaps the most practical lesson from the case is that parties should spell out completely the exact non-absolute obligations they require of the other party, failing which, they leave it to the courts to construe such clauses for them. This, being an objective exercise, may not meet the subjectively intended obligations held by parties at the time the non-absolute obligation was entered into.

12.71 The High Court case of *The One Suites Pte Ltd* (above, para 12.46) also involved the application of a non-absolute obligations clause, albeit an implied one. Notwithstanding, the principles laid down by the Court of Appeal in *KS Energy* apply with equal force. On the facts

as described above (at paras 12.46–12.48), the court found that an "all reasonable endeavours" clause was implied in the OTP, which obliged the purchaser to use such endeavours to obtain the written approval of the HDB and other relevant authorities within a reasonable time. What was reasonable would depend on each situation. Thus, if the relevant authority had already considered all the possible arguments and made a clear decision, then it may not be reasonable to expect a purchaser to appeal. However, if a purchaser, as was the case in *The One Suites Pte Ltd*, knew that there were realistic prospects of success on appeal, then it should try. In doing so, it did not have to sacrifice its own commercial interests and change its business plans to ensure that it got the approval, but it had to try. If it failed to try, it might breach its obligation to use all reasonable endeavours. However, on appeal to the Court of Appeal ([2015] SGCA 21), this aspect of the High Court's decision was reversed. The Court of Appeal held that it was not necessarily the case that there was the obligation to use all reasonable endeavours to secure approval after an initial rejection, especially if there was a clause that ended the contract upon initial rejection, which the court found to be the case here.

Vitiating factors

Misrepresentation

12.72 The law concerning misrepresentation is not generally thought to be obscure but there are still aspects of it that are not well understood. These gaps or misconceptions surfaced in the important case of *RBC Properties Pte Ltd v Defu Furniture Pte Ltd* [2015] 1 SLR 997 ("*RBC Properties*"), where the Court of Appeal took the opportunity to restate the relevant legal principles, with particular focus on s 2(1) of the Misrepresentation Act (Cap 390, 1994 Rev Ed) ("MA"). The pertinent facts are as follows. On 11 March 2011, the respondent ("Defu") entered into a lease agreement ("the Lease") with the appellant lessor ("RBC") to use the leased premises ("the Premises") as a furniture showroom. The Premises formed part of a building ("the Property") leased by the State to a company known as RLG Development Pte Ltd ("the State Lease") in 2007, which in turn granted a ten-year lease of the same property to RBC in 2008 ("the Head Lease"). Defu took possession of the Premises in April 2011 and commenced fitting out works. Soon after, however, RBC was informed by the Singapore Land Authority ("SLA") that the use of the Premises as a showroom constituted a "change of use" under the terms of the State Lease for which a differential premium for the enhancement of land value was chargeable. RBC then sought to pass the burden of this charge to Defu, which not only refused to accept the obligation but also instituted legal action to rescind the Lease and seek damages on the ground of misrepresentation. The alleged

misrepresentation was that RBC had represented to it that it could use the Premises as a showroom without further approvals from the authorities other than that granted by the Urban Redevelopment Authority ("URA").

12.73 In the High Court (*Defu Furniture Pte Ltd v RBC Properties Pte Ltd* [2014] SGHC 1), the trial judge found that RBC had misrepresented as alleged without any reasonable ground for believing the representation to be true. Defu could therefore rescind the Lease and recover its loss under s 2(1) of the MA. This finding was partially reversed by the Court of Appeal which, whilst agreeing that the false representation had been made, nevertheless found it to be innocent as RBC did have a reasonable basis for believing it to be true. Consequently, though Defu was entitled to rescind the Lease along with an indemnity for all sums incurred thereunder, it could not claim damages under s 2(1) of the MA.

12.74 Evidently, a significant part of the dispute turned on the application of s 2(1) of the MA when the matter came before the Court of Appeal. This necessitated a review of the principles governing the application of this provision. In a detailed and thorough analysis, Andrew Phang Boon Leong JA (delivering the court's judgment) set forth the relevant principles, which we would endeavour to summarise as follows:

> (a) Section 2(1) of the MA was enacted to fill a remedial lacuna in the law. It allows a person who had been induced by a false representation to contract with another to seek damages in addition to the remedy of rescission. For this purpose, it is not necessary, unlike the position at common law, for the representation to have been fraudulently made.
>
> (b) However, a representor may avoid liability under s 2(1) of the MA if 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" (the "reasonable belief test"). The representor bears the burden of proving that he held such belief.
>
> (c) The inquiry for determining whether the representor met the reasonable belief test involves two stages:
>
> > (i) The first is to ascertain the representor's subjective state of mind. However, while the subject of inquiry is the representor's *subjective* belief, such belief can only be established by an objective assessment of the evidence before the court. Were it otherwise, it would be all too easy for the representor to assert that he honestly believed what he represented.

(ii) Having established the representor's subjective belief, it is then necessary to assess whether the representor had reasonable grounds for that belief. This is "an *objective enquiry* undertaken with regard to all the considerations that were *subjectively present* in the mind of that person" [emphasis in original]: *RBC Properties* at [77]. In other words, the test is not whether his belief was reasonable having regard to what a reasonable person would have known, but whether it was reasonable having regard to what he *subjectively knew*. However, a representor will not be allowed, for this purpose, to plead innocence if he wilfully turned a blind eye to obvious sources of information. Furthermore, in a case where the representor had recourse to conflicting sources of information, "the touchstone is whether he possessed objectively reasonable reasons to prefer one source over another": *RBC Properties* at [77].

(d) Moreover, to avoid liability under s 2(1) of the MA, the representor must have held the reasonable belief over an operative time frame that commences from the time the representation was made to the time the contract was entered into. Consistently with this requirement, the objective assessment of the reasonableness of his belief must also be assessed over the same time frame, so that if the reasonable grounds had existed at the time of the representation but ceased to exist by the time of the contract, the representor would not be regarded as having satisfied the test of reasonable belief under s 2(1) of the MA.

(e) As for the measure of damages recoverable under s 2(1) of the MA, Phang JA observed (*obiter*, and doubting the correctness of *Royscot Trust Ltd v Rogerson* [1991] 2 QB 297 in this aspect) that it is the measure applicable to negligence (rather than fraud) that appears more appropriate in this context given that s 2(1) of the MA is really intended as the statutory analogue of negligent misrepresentation at common law.

12.75 As already mentioned, the Court of Appeal had concluded that RBC did in fact have a reasonable basis for its representation. The pivotal consideration was the need to assess the reasonableness of RBC's belief – not from the perspective of what it ought (objectively) to have done – but by reference to the *factors that were subjectively operating on its mind*. Before the Court of Appeal, it was argued for the appellant that it did have reasonable ground for its belief because even if RBC had examined the terms of the State Lease (which appeared ambiguous as to

the precise circumstances in which the differential premium would have been chargeable), it would still reasonably have concluded that no approval other than that of URA was required for the use of the Premises as a showroom. Phang JA expressed sympathy for this argument. Nevertheless, this was ultimately not a relevant consideration because RBC had not in fact checked the terms of the State Lease. It was not, therefore, a factor that was subjectively present in its mind when the representation was made. Rather, the correct approach was to assess the reasonableness of RBC's belief in light of the fact that it had not in fact checked the State Lease.

12.76 Fortunately for the appellant, the Court of Appeal found that the reasonableness of its belief could be established even without taking into account the ambiguity in the terms of the State Lease. The court came to this conclusion after taking into account all the circumstances that existed from the time the Property was developed to the time the Lease was signed. Critically, it noted that although SLA had (belatedly) asserted that its right to charge a differential premium in respect of the showroom had accrued at the inception when the Property was being developed, yet there was no explanation why it had not levied the charge at that time, or why it had taken no step to collect it for almost four years thereafter. In the meantime, there was no event or other evidence that would have put RBC on notice of the need for SLA's approval. In those circumstances, it would not have been reasonable to expect RBC to check for SLA's approval. Nor was the requirement for such approval so "obvious or apparent" that the mere failure to check for it would automatically render the appellant's belief unreasonable: *RBC Properties* at [102].

12.77 Having concluded that the misrepresentation was innocent, and that Defu could not claim damages under s 2(1) of the MA, the court then had to consider what losses it could recover on an indemnity basis. It clarified, in this regard, that the purpose of an indemnity was *not* to place the representee (*RBC Properties* at [118]):

> … in the same position as before in *all respects*, but only as regards those *obligations* which have been created by the contract into which he has been induced to enter by the misrepresentation. [emphasis in original]

Further, the court stressed that (*RBC Properties* at [126]):

> … [t]he indemnity for innocent misrepresentation applies to *both parties*, … and it follows that the representee can recover only those benefits which he was *obliged* to give, and in return the representor re-assumes those burdens which he was *obliged* to pass under the contract, and *vice versa*. [emphasis in original]

This means, on the facts, that Defu could recover those expenditure mandated by the Lease (such as the security deposit and pre-paid rent) but not the larger sum incurred in fitting out the Premises. The latter could only have been recoverable by way of a claim for damages though, as we have seen, this avenue was not open to Defu under s 2(1) of the MA.

12.78 More generally, where a misrepresentation was innocently made, the court is entitled to exercise its discretion under ss 2(2) and 2(3) of the MA to award damages in lieu of rescission. This is so even if a claimant had not specifically pleaded to recover on this basis. In Phang JA's view, however (*RBC Properties* at [130]):

> … this discretion is to be exercised *only in accordance with established principles*, the foremost of which is that, where the misrepresentation is slight or relatively unimportant in the circumstances of the case, so that rescission *may* be disproportionately harsh on the representor, damages may be awarded in lieu thereof. [emphasis in original]

On the facts, it was clear that there was no room for the exercise of this discretion as the misrepresentation was neither slight nor unimportant, but in fact "*went to the heart of the contract*" [emphasis in original]: *RBC Properties* at [131].

12.79 Finally, it should be mentioned, in the interests of completeness, that RBC had also argued that its liability for misrepresentation was excluded under cl 6.9 of the Lease. This argument was, however, rejected because the court found that cl 6.9 was clearly an entire agreement clause in that its intention was to stipulate that "no representations or promises except those expressed in the Lease can have *contractual* effect" [emphasis in original], which therefore had no application to pre-contractual representations leading to claims in misrepresentation: *RBC Properties* at [113].

Mistake

12.80 In *Olivine Capital Pte Ltd v Chia Chin Yan* [2014] 2 SLR 1371, the Court of Appeal briefly restated the law relating to common and unilateral mistakes. However, the court did not in fact have to consider the application of these principles to the facts as the only issue in this connection was whether the issue was one that was suitable for summary determination under O 14 r 12 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed). For that reason, it is not proposed to reproduce those statements here except to note that the court once again affirmed its earlier holding in *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2005] 1 SLR(R) 502 that there continues to exist in Singapore a

doctrine of common mistake in equity even though this doctrine has been abolished in England.

12.81 Although it is well established that *non est factum* is a doctrine of extremely limited application, an attempt was nevertheless made to invoke it in *Mahidon Nichiar bte Mohd Ali v Dawood Sultan Kamaldin* [2014] 4 SLR 1309. Here, a dispute had arisen amongst members of a family concerning the ownership of a property. A weakness in the plaintiffs' case lay in the fact that they had signed a deed ("the Deed") renouncing their beneficial interest in the property in favour of the defendant and their mother. To escape the effects of the Deed, the plaintiffs pleaded *non est factum*. Unsurprisingly, the High Court rejected the plea. In his reasons, Lee Kim Shin JC reiterated the traditional understanding that the doctrine would only apply where a person signing the document was, without any negligence on his part, *fundamentally* mistaken as to its character or effect. The ambit of the doctrine is particularly narrow because it is devised primarily for the protection of (at [186]):

> … those who are permanently or temporarily unable, through no fault of their own, to have without explanation any real understanding of the purport of a particular document. This was a narrow class of persons who are typically unable to read owing to blindness or illiteracy and who therefore had to trust someone to tell them what they were signing.

That being the case, the doctrine clearly did not assist the plaintiffs, who had the benefit of proper professional explanation prior to executing the Deed. To hold thus would not, in the learned judge's view, lead to a harsh result, for it had to be borne in mind that (at [185]):

> … [t]he doctrine of *non est factum* is not meant to give contracting parties an easy way out of a bargain, especially one that was entered into irresponsibly.

Illegality

12.82 In last year's edition of this Ann Rev, the authors discussed *Boon Lay Choo v Ting Siew May* [2013] 4 SLR 820, which concerned a dispute arising from an attempt to circumvent certain property cooling measures. On 13 October 2012, the plaintiff-respondents entered into an option to purchase the defendant-appellant's property ("the Option"). However, the Monetary Authority of Singapore had on 5 October 2012 announced a spate of measures to cool the residential property market, one of which was to reduce, in certain circumstances, the amount of loan that a bank could extend for the purchase of residential properties ("the 5 October Notice"). To circumvent this restriction, the respondents requested to backdate the Option to 4 October 2012. The appellant

initially acceded to the request but subsequently withdrew her offer on the ground that the backdated agreement constituted an "illegality". After various unsuccessful attempts to exercise the Option (including an offer to proceed on the basis that the agreement was dated 13 October 2012), the respondents instituted legal action to enforce the agreement and succeeded in the High Court. The judge found that the Option was not void for statutory illegality as it was neither expressly nor implicitly prohibited by the relevant statutory provision. He also found that it was not void at common law as the illegality in question (the illegal mode of obtaining financing) was merely incidental to, and thus too remote from, the Option.

12.83 Whilst agreeing with the High Court that the Option was neither expressly nor implicitly prohibited by the relevant statutory provisions, the Court of Appeal nevertheless concluded in *Ting Siew May v Boon Lay Choo* [2014] 3 SLR 609 ("*Ting Siew May*") that the agreement was void at common law as an agreement entered into with the object of committing an illegal act. In reaching this conclusion, Andrew Phang Boon Leong JA (who delivered the court's judgment) helpfully analysed the legal principles relevant for identifying this form of illegality. His Honour clarified that the distinctive feature of this category of illegal contracts lay in the parties' *intention* to use the contract for the furtherance of some unlawful objective. Thus, while the contract may not by its terms oblige the parties to commit any unlawful act, it may nevertheless be void for illegality as it would be an affront to public policy to allow a party intending to use the contract for an unlawful end to enforce it. Indeed, the same policy concern may render a contract void at common law even if the unlawful objective is founded on a breach of statute and that statute neither expressly nor impliedly prohibits the formation of such contracts. This was in fact the case in *Ting Siew May*, where the respondents' purpose in backdating the Option would, had it succeeded, constitute an offence under the provisions of the Banking Act (Cap 19, 2008 Rev Ed). However, the Option was not, as the courts found, prohibited by the provisions of that Act. Even so, the agreement was vitiated for illegality at common law.

12.84 *Ting Siew May* thus makes it clear that so far as contracts formed to commit unlawful acts are concerned, the illegality is premised on the *intention* of the guilty party. Proof of such intent is therefore necessary for establishing the "connection" between the contract and the illegal act. This, however, then raises a notoriously difficult question – for how strong does this connection have to be before the contract is tainted by illegality? Or, put another way, when is the link so tenuous that the contract should be left undisturbed? In *Ting Siew May*, Phang JA located the answer in the "proportionality principle" (at [66]):

> [Where] a contract is entered into with the object of committing an illegal act, the general approach that the courts should undertake is to examine the relevant policy considerations underlying the illegality principle so as to produce a proportionate response to the illegality in each case.

12.85 As is evident from the text just quoted, the proportionality principle is not a single test, but rather an evaluative process that involves weighing competing public policy concerns. This process requires the court to consider a number of general factors including (at [70]):

> (a) whether allowing the claim would undermine the purpose of the prohibiting rule;
>
> (b) the nature and gravity of the illegality;
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> (c) the remoteness or centrality of the illegality to the contract;
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> (d) the object, intent and conduct of the parties; and
>
> (e) the consequences of denying the claim.

12.86 The factors identified above are obviously not intended to be conclusive. Nor should they be applied in a rigid or mechanistic fashion. Rather, the evaluation is ultimately a fact-centric exercise. This means that the application of the proportionality principle would inevitably engender some uncertainty, but this cannot be avoided given the nature of the enquiry.

12.87 When endorsing the "proportionality principle", Phang JA also clarified that this principle is in large measure similar to and not inconsistent with the "remoteness test". The latter appears to focus on whether there is "sufficient proximity" between the illegal intention and the contract to be vitiated by illegality. As the following passage explains, however, the difference between the two approaches lies only in their scope but not in their substance (at [64]):

> In our view, there is, in substance, no real difference between the approaches taken in *ParkingEye* [the proportionality principle] and *Madysen* [the remoteness test]. For instance, if the illegal conduct is *too remote* from the contract concerned, then it could be argued that to find that that contract is rendered void and unenforceable because of that illegal conduct would be to administer the doctrine of illegality and public policy in a *disproportionate* manner. However, it seems to us that the principle of proportionality is broader and more malleable than that of remoteness. It is capable of encompassing not only the concept of remoteness of the illegality but also considerations such as the nature of the illegality (*ie*, whether the illegality was of a serious or trivial nature) and the relative effects on the parties of rendering the contract concerned unenforceable. [emphasis in original]

12.88 Though the two approaches are consistent, Phang JA clearly preferred the proportionality principle for its greater breadth. Ultimately, a broad approach is not only desirable, but actually necessary, because the category of illegality under consideration is ultimately identified by its substance and not its form, a point emphasised by Phang JA (at [73]):

> As we have already noted, this category is a rather *broad and general* one. On one view, it can be seen as a kind of '*bridging*' category which focuses on the substance of the transaction instead of its form. To elaborate, one or both of the contracting parties will not be permitted to evade the law (whether in its statutory or common law form) by simply structuring the transaction in a manner which renders the contract lawful on its face – if the underlying purpose of the transaction would constitute a general affront to public policy. [emphasis in original]

12.89 With these principles in mind, Phang JA turned to examine the facts. He located the illegality that could taint the Option in "the Respondents' *intention* (which was apparent on the face of the Option) to use the Option itself (*ie*, its documentation) to circumvent and contravene the 5 October Notice" [emphasis in original] (at [80]) and concluded that it would not be disproportionate to refuse to enforce the Option Agreement because (at [82]–[93]):

> (a) There was no doubt that the buyer's object and intent from the outset was to falsify the date for an unlawful purpose.
>
> (b) The nature of the illegal act that the respondents set out to commit was neither trivial nor merely administrative as it contravened a principal measure introduced by the 5 October Notice to foster price stability of residential properties.
>
> (c) To allow the buyer's claim would undermine the policy underlying the loan restriction, which was to foster price stability.
>
> (d) The respondents' illegal purpose was not too remote from the Option. Here, the court stressed the fact that that the agreement itself contained an "overt act" – the falsification of the date – was a key factor that helped to establish the closeness of connection between the Option and the unlawful purpose.
>
> (e) To deny the buyer's enforcement of the agreement would not lead to a disproportionate response as there was no evidence that the buyer would suffer substantial loss as a result.

12.90 For completeness' sake, Phang JA also rejected the respondents' argument that the illegality had in fact been "cured" by the respondents' subsequent abandonment of their original intention and offer to obtain

financing on the basis that the agreement was signed on the actual date. There was no authority, in the learned judge's view, for the proposition that a contract formed with the intention to commit an illegal act would cease to be illegal once the relevant party subsequently abandoned the intended course of conduct.

12.91 Though it was not necessary given his conclusions on common law illegality, Phang JA proceeded to consider the arguments founded on statutory illegality. His Honour reiterated the well-established proposition that whether or not the contravention of a statutory provision would have the effect of invalidating a contract is a matter of legislative intent, *viz*, whether the prohibition in question is intended merely to prohibit a course of conduct, or to prohibit the contract as well. The answer is obvious where the statute expressly prohibits the formation of contract, but such express prohibition will likely be rare. More often, the question is whether the statute impliedly prohibits a contract the performance of which would have the effect of contravening the statute. Where this is the question in issue, courts should, Phang JA cautioned, generally be slow to imply the statutory prohibition of contracts. This is because statutory illegality generally does not take account of the parties' subjective intention, their relative culpability, as well as the gravity of infraction. A liberal approach to implied prohibition may therefore result in contracts being vitiated for trivial infractions.

12.92 But even if a contract were not expressly or impliedly prohibited by statute, it may still be vitiated at common law, under the principle that we have just considered, namely, that a contract formed with the intention to commit an illegal act may be unenforceable by the party with the illegal intention. In such a case, how that illegal intention affects the contract would depend, not on the discovery of legislative intention, but on the principle of proportionality, as we have discussed. On these principles, Phang JA found that the relevant provisions of the Banking Act neither expressly nor impliedly prohibited the Option, although the agreement was, as we have seen, vitiated at common law.

12.93 A final point worth noting concerns the court's observations on the "reliance principle" that was raised by the respondents to buttress their case. Rejecting this argument, Phang JA explained (at [126]) that this principle traditionally operated only within a narrow ambit, for:

> … [i]t is usually invoked only by a contracting party seeking to recover (on a restitutionary basis) what it had transferred to the other party pursuant to the (illegal) contract.

Moreover, such recovery will normally have to be "premised on *an independent cause of action* – thereby avoiding the need to rely on the

(illegal) contract" [emphasis in original]. So understood, this principle clearly did not assist the respondents since they were not in fact seeking to recover property transferred under an illegal contract, nor were they relying on an independent cause of action. In so far as the respondents' arguments entailed an *extension* of the reliance principle (that is, that a guilty party may enforce a (otherwise illegal) contract so long as it does not involve any factual reliance on the illegal act), the court also declined to countenance such development. In its view, such extension would significantly undermine the very rationale and public policy on which the doctrine of illegality is based.

12.94 As the most recent (and perhaps only) appellate decision that extensively considers the effects of illegality on contracts, *Ting Siew May* is of undoubted significance. Although the court's observations were made in relation to contracts formed to commit or facilitate illegal acts, its observations on the need to rigorously evaluate the public policy concerns that underlie each dispute are of general relevance. At the end of the day, the question whether a contract or an obligation should be enforced notwithstanding the presence of some illegal elements can only be resolved by weighing the competing public policy concerns. Depending on the facts, that process may be complex and multi-faceted. Any attempt to reduce the doctrine to a single concept or test (such as "remoteness" or "reliance") will likely be unhelpful, and even dangerous.

12.95 The defence of illegality was also raised in *Sheagar s/o T M Veloo v Belfield International (Hong Kong) Ltd* [2014] 3 SLR 524 in an attempt to vitiate a loan by reference to the Moneylenders Act 2008 (Act 31 of 2008) ("MLA"). In this case, the respondent sued the appellant under a deed of guarantee which the latter had signed to guarantee the repayment of a loan made by the respondent to Blue Sea Engineering Pte Ltd ("BSE"), a company controlled by the appellant. In defence, the appellant argued that recovery under both the guarantee and the underlying loan were prohibited by s 14(2) of the MLA as the respondent had acted as an unlicensed moneylender. This defence failed, for the evidence was that the respondent had only made commercial loans to corporations, and hence qualified as an "excluded moneylender" who was not prohibited by the MLA from making loans. Importantly, the Court of Appeal clarified that where an issue arose as to whether the lender was an excluded moneylender, the burden of proving that he was not such a lender fell on the borrower (that is, the appellant in this case). Another route by which the appellant sought to avoid liability under the guarantee was to argue that the loan was made in contravention of the Hong Kong Money Lenders Ordinance (Cap 163); therefore, the guarantee should not be enforced as a matter of international comity. However, this argument also failed as there was no evidence that the respondent had either carried on moneylending business or that it had an assumed place of business in Hong Kong.

12.96 In *Poh Cheng Chew v K P Koh & Partners Pte Ltd* [2014] 2 SLR 573, the parties to a construction dispute entered into a settlement which contained, *inter alia*, an undertaking by the plaintiff to refrain from lodging any complaint with the Professional Engineers Board ("PEB") ("cl 12"). When a dispute arose under the settlement, however, the plaintiff commenced legal suit and filed a complaint with the PEB against the defendants. At trial, one issue that arose was whether the plaintiff had acted in breach of cl 12 when it complained to the PEB. The High Court held that it had not. This was because cl 12 was in fact illegal and unenforceable in so far as it purported to allow a professional engineer to contract out of the regulatory oversight of his professional conduct by the PEB under the Professional Engineers Act (Cap 253, 1992 Rev Ed). Lionel Yee JC arrived at this conclusion taking into account various considerations, the most significant of which was the legislative intent underpinning the relevant regulation, that is (at [96]):

> … to make an engineer accountable for his professional conduct not only to his client but also to a statutory body whose functions include the maintenance of standards of professional conduct and ethics of the engineering profession.

So although public access to the PEB is legislated as a facility rather than a legal duty, the wider *public interest* in upholding professional standards precludes its exclusion by way of private contracting. For the same reason, cl 12 is not comparable to other contractual arrangements of compromise or contracts which relate to offences or wrongs that pertain only to *private* interest, which have been held to be enforceable. Furthermore, a distinction has to be drawn between an undertaking not to file a complaint in future and an undertaking to cease or withdraw a complaint that has already been lodged. In the latter situation, the disciplinary body, having been seised of jurisdiction, is at liberty to continue with its disciplinary action. In the former situation, however, the disciplinary body would likely have been deprived of an opportunity to apprise itself of the misconduct in the first place. For these reasons, Yee JC concluded that cl 12 was illegal. However, this illegality did not affect the validity of the settlement agreement as the offending clause, not being the main consideration, could be severed from the agreement.

Restraint of trade

12.97 In *Lek Gwee Noi v Humming Flowers & Gifts Pte Ltd* [2014] 3 SLR 27 ("*Lek Gwee Noi*"), the High Court considered a number of important issues concerning the restraint of trade doctrine. The plaintiff in this case was originally employed as a sales manager of Humming House Flowers and Gifts Pte Ltd ("Humming House") which, as its name suggested, carried on a flower and gift business. In 2008,

Humming House sold its business to the defendant, a wholly owned subsidiary of Noel Gifts International Ltd ("Noel Gifts"). Subsequent to the sale, the plaintiff's employment was transferred to the defendant. At the end of 2011, the plaintiff left the defendant's employment and informed it of her intention to set up a competing business. The defendant objected, relying on a restrictive covenant contained in her contract of employment. Instead of waiting to be sued, the plaintiff then instituted pre-emptive legal action to seek a declaration that the restrictive covenant was void and unenforceable in restraint of trade.

12.98 To decide if the restrictive covenant could be enforced, it is necessary to first determine if a covenantee has any interest that it could legitimately protect against the covenantor. For this purpose, it is common to distinguish between covenants made in the context of a sale of business and covenants made in employment contracts. A more liberal view is generally taken of the former, as the goodwill of a business is an important asset of the business that a purchaser may legitimately protect through the use of post-sale covenants. In contrast, an employer is generally able to extract the full value of the employee's services during the currency of the employment, so a post-employment covenant may only be justified if it is shown to be necessary for the protection of some *other* interest. In *Lek Gwee Noi*, Vinodh Coomaraswamy J acknowledged (at [37]) that this categorisation would often serve as a convenient means of identifying the interests that the covenantee is seeking to protect, but warned against elevating it "as a matter of law or logic into a threshold question for determining whether a restrictive covenant is enforceable". Instead (at [37]):

> … [t]he true threshold question always is whether the restrictive covenant is aimed at protecting a legitimate interest of the covenantee as against the covenantor. The question of categorisation determines the array of legitimate interests which a restrictive covenant may protect. The question of categorisation is, therefore, logically subsidiary to that threshold question and not logically prior to it.

12.99 It is clear, however, that Coomaraswamy J was not denying the relevance of these categories, but only that a proper categorisation cannot be achieved only by looking at the type of document that contains the covenant. Instead, the relevant categorisation is determined by the *nature* of the interest that the covenant purports to protect. This may be illustrated by his analysis of the facts. Contrasting the covenant undertaken by the plaintiff and those undertaken by her brothers (who were shareholders of Humming House), the learned judge concluded that the former was an employee covenant while the latter were vendor covenants. In respect of the latter, the learned judge found that the covenants, though contained in employment contracts, were really an integral aspect of the sale of Humming House's business to the defendant. That being so, the defendant could legitimately invoke them

to protect the goodwill of the business. In contrast, the plaintiff had never owned the business. She was not a party to the sale, nor did she derive any financial benefit from it. Though she was offered employment with the defendant, such employment was contracted on a voluntary basis, and was not mandated as a condition precedent to the sale. So while the defendant was entitled to protect the goodwill of the business, such protection was available only against the parties from whom the goodwill was acquired but did not extend to a person – such as the plaintiff – who did not at any time own the goodwill.

12.100 Having determined that the restrictive covenant was formed in the context of an employment relationship, the learned judge turned to consider the defendant's legitimate interests, and concluded that it was entitled to protect its *trade connection* as against the plaintiff. Being a senior sales personnel, the plaintiff had sufficient knowledge of the defendant's customers to influence them and the defendant was entitled to protect against such influence after the end of the plaintiff's employment. Indeed, the defendant's interest extended to protect any *pre-existing* trade connection that the plaintiff established prior to joining the defendant. Coomaraswamy J made it clear, however, that this would not be so in every case, for whether an employer had any legitimate interest in an employee's pre-existing trade connection is a question of fact. In the present case, what tilted the balance in the defendant's favour was the fact that it had clearly bargained for and acquired such pre-existing trade connection – such custom being part and parcel of the goodwill that was sold by Humming House to the defendant.

12.101 In addition to trade connection, the defendant also argued that the restrictive covenant was needed to protect against the disclosure of confidential information (such as client information, sales data, cost structures and business model) by the plaintiff. However, this argument met with the difficulty that in *Stratech Systems Ltd v Nyam Chiu Shin* [2005] 2 SLR(R) 579 ("*Stratech*"), the Court of Appeal had held that an employer's interests in protecting confidential information is not a sufficient justification for imposing a restraint of trade clause where such information is separately protected by a clause imposing on the employee a duty of confidentiality. Where that is so, a non-compete clause may only be justified if the employer is able to demonstrate that it has some *other* interest, over and above the protection of confidential information, that warrants protection. As the defendant in *Lek Gwee Noi* was in fact comprehensively protected by a confidentiality clause, Coomaraswamy J felt bound by *Stratech* to conclude that the defendant's interests in confidential information could not justify the restraint imposed on the plaintiff. However, the learned judge acknowledged that this aspect of *Stratech* was problematic because (as Woo Bih Li J noted in *Centre for Creative Leadership (CCL) Pte Ltd v Byrne Roger Peter*

[2013] 2 SLR 193 ("*CCL*") at [92]) it would compel the illogical conclusion that an employer who has done more to protect its confidential information (by incorporating both a non-compete covenant and a confidentiality clause) is ultimately put to a greater burden of proof than one who has not. For this reason, Coomaraswamy J thought (as Woo J did in *CCL*) that the restriction laid down in *Stratech* warranted further consideration by the Court of Appeal.

12.102 Given that the defendant had legitimate interests in protecting its trade connection, it was then necessary to consider the reasonableness of the relevant covenant, which was found in cl 13 (reproduced in para 12.110 below) of the plaintiff's employment contract. The court construed this provision as comprising two distinct restrictions: the first enjoined the plaintiff from undertaking any business or employment similar to that of the defendant (the "non-compete restriction"), while the second prohibited her from soliciting the defendant's customers (the "non-solicitation restriction"). Both restrictions were, however, found to be unreasonable. This is because cl 13 had employed the concept of "the relevant Company" to define both the restricted activities as well as their geographical limits, and "the relevant Company" was in turn defined too broadly to include related companies and associates of Noel Gifts for which the plaintiff had "performed duties or carried out work … at any time during the period of nine (9) months prior to the date of termination of employment". This meant, in effect, that the plaintiff could be prohibited from competing against a company related to Noel Gifts even if she had never been employed by or seconded to such company, which, in the learned judge's view, rendered the restriction too broad. Similarly, the restrictions were unreasonable in their geographical limits as they extended to Malaysia and other countries in which the relevant company had offices, even though the defendant itself did not operate, and thus had no relevant interests to protect, in these countries. The court also found the two-year duration of the non-solicitation covenant unreasonable as there was no satisfactory evidence as to why the defendant would need such a long time to rebuild its trade connection after the plaintiff's departure.

12.103 The last, but also the most significant, issue in *Lek Gwee Noi* concerned the possible severance of the offending parts from cl 13. Coomaraswamy J approached this issue by first reviewing the law on the doctrine of severance, making a number of important observations in the process. Beginning with the test for severance, the learned judge noted that the approach now preferred in both England and Singapore is that set out by P J Crawford QC in *Sadler v Imperial Life Assurance Co of Canada Ltd* [1988] IRLR 388 ("*Sadler*"). It prescribes three prerequisites to be satisfied before an offending clause or part thereof can be severed (*Lek Gwee Noi* at [155]):

> (a) the unenforceable provision must be capable of being removed without adding to or modifying the wording of what remains with the remainder continuing to make grammatical sense;
>
> (b) the remaining contractual terms must continue to be supported by adequate consideration; and
>
> (c) the severance must not change the fundamental character of the contract between the parties.

12.104 Importantly, Coomaraswamy J clarified that the *Sadler* test is of general application. This means that it matters not whether severance is pleaded to strike out a whole clause or to excise particular words from a clause. The reason why this must be so lies in the fact that the doctrine is founded on the divisibility of *promises* rather than of words. On this view, severance will only be permitted when the clause or words to be excised comprises a distinct promise separable from other promises. Absent such distinctiveness, the mere fact that the sentence is still grammatical after applying the "blue pencil" (to delete the objectionable words) is not a sufficient reason for allowing severance in the first place. Of course, where the illegality resides in a part (as opposed to the whole) of a clause, severance is only possible if the clause that remains after deleting the offending part still makes grammatical sense. Nevertheless, whether a promise is drafted as a standalone clause or as part of a collocation of promises packaged as one clause is usually a question of drafting preference or accident, and thus cannot be the sole criterion for determining severability. What ultimately has to be shown is that the meaning of the remaining promises, or "contractual meaning", is unaltered by the severance. As Coomaraswamy J explained (at [127]):

> … the doctrine of severance can be applied only if the objectionable promise is, on its proper construction, independent of the remaining promises. If excising the objectionable promise would be to change the meaning of the parties' agreement to something 'different in kind and not only in extent', the objectionable promise is not properly divisible from the remainder of the contract. That is so even if the only change to the wording consists of deletions, as mandated by the blue pencil test, and even if the words which remain have grammatical meaning. … Continuing grammatical meaning is a necessary condition for severance, but it is not a sufficient condition. … It is an equally necessary condition for severance that the parties' agreement be altered in extent but not in kind and, in that sense, contractual meaning is preserved.

12.105 The learned judge found support for this view of the doctrine in *National Aerated Water Co Pte Ltd v Monarh Co, Inc* [2000] 1 SLR(R) 74 ("*Kickapoo JoyJuice*"), a Court of Appeal decision. In that case, the court had construed a covenant restraining the defendant from using the name "Kickapoo Joy Juice" as one comprising distinct and separate

promises in respect of each of those words, so that the offending words "Joy Juice" could be severed leaving unchanged the covenant in respect of "Kickapoo". So although the court was there dealing with the excision of words from a restrictive covenant (and not the deletion of a whole clause), its decision was ultimately based on the distinctiveness of the promises, and not merely on the grammatical integrity of the remaining covenant.

12.106 Turning to *Man Financial (S) Pte Ltd v Wong Bark Chuan David* [2008] 1 SLR(R) 663 ("*Man Financial*"), Coomaraswamy J declined to interpret this case as authority for the view that mere satisfaction of the "blue pencil test" (or preservation of grammatical meaning) would justify the severance of words from a clause. In his view, *Man Financial* is consistent with both *Sadler* and *Kickapoo Joy Juice*, and rightly emphasised the need to limit severance to instances where the "contractual meaning" is preserved. The excision of the objectionable words would not be justified by the mere fact that a sentence remains grammatically sensible if in fact such severance would lead to a contractually senseless outcome.

12.107 Having clarified the test for severance, the court in *Lek Gwee Noi* then had to consider a further submission made by plaintiff's counsel, which was that the doctrine ought to be of a much reduced scope when applied to covenants between employer and employee, so that severance is only permissible in this context when the words to be excised are "of trivial importance, or merely technical, and not a part of the main purport and substance of the clause": *Lek Gwee Noi* at [158], citing *Mason v Provident Clothing and Supply Co Ltd* [1913] AC 724 at 745, *per* Lord Moulton. The reason for this distinction lies in the risk that a liberal doctrine of severance would perversely encourage employers to impose harsh covenants *in terrorem* (*Lek Gwee Noi* at [157]):

> [A] liberal doctrine of severance would allow an employer effectively to hold an employee hostage by exacting unreasonably wide restrictive covenants at the outset of the employment, knowing: (a) that the employee would not generally have the wherewithal or fortitude to resist the covenant before, during and after the employment; and (b) that if the employee did mount a challenge and were to succeed, the worst that could happen from the employer's point of view was that the court would cut down the unreasonably wide covenant to what was reasonable. A liberal doctrine of severance would permit, indeed encourage, employers to extract oppressive restrictive covenants and thereby undermine the policy underlying the law striking down restrictive covenants: that of protecting employees as a class against the inequality of bargaining power and inequality of resources they face as against employers as a class.

12.108 Whilst acknowledging the legitimacy of this concern, Coomaraswamy J nevertheless concluded that it did not necessitate a bifurcation of the doctrine. In his view, the interests of employees may be adequately safeguarded by requiring the court always to relate severance to its underlying policy, which is that (*Lek Gwee Noi* at [171]):

> … the doctrine cannot be applied if the result would be inconsistent with the principles of public policy which mandate avoidance of the excised words.

This may require the court to be more sceptical of attempts (such as the use of cascading restrictive covenants) to take advantage of the doctrine of severance.

12.109 To bolster its case that a more restrictive approach ought to be applied to employee covenants, the plaintiff also relied on the fact that in Canada, an equally restrictive approach has been adopted in the application of the notional severance doctrine. This doctrine, it will be recalled, essentially allows the court to "write down" an unlawful restraint so as to "cure" it of its illegality. It is well established, however, that the doctrine has no application to employment contracts, for much the same policy reasons as those cited in para 12.107 above. Having already decided that there was no necessity for a distinct and more restrictive approach to severance in employment cases, Coomaraswamy J held that these authorities did not further the plaintiff's case. More generally, the learned judge noted that these cases are of no immediate relevance since the doctrine of notional severance is not currently part of our law, and further, that significant difficulties stand in the way of any future attempt to incorporate this doctrine into our law (at [179]):

> A doctrine of notional severance, which permits a thorough and explicit rewriting of the parties' contract, fundamentally defeats the parties' freedom of contract. It is true that the equitable doctrine of rectification also permits a rewriting of the parties' contract. But that rewriting takes place to bring the parties' written instrument into alignment with the parties' actual intention, proved to a very high standard. Notional severance is quite different. Although it makes reference to the parties' intention, it takes place based on the intention which the court imputes to both parties at the urging of one party after a dispute has arisen. To that extent, notional severance amounts to a unilateral variation of the parties' obligations imposed by the court with the benefit of hindsight. … For these reasons, therefore, it seems to me that it is only with great difficulty that the doctrine of notional severance as it is recognised in Canada can be accommodated within our law of contract.

12.110 With the relevant principles clarified, the court could finally consider their application to cl 13. For this purpose, it was necessary to

recall the District Judge's holding that the offending parts of cl 13 could be severed as follows:

> Upon the termination of the Employee's employment for any cause or by any means whatsoever the employee *shall not* for a period of 2 years next thereafter ~~undertake or carry on either alone or in partnership nor be employed or interested directly or indirectly in any capacity whatever in the same or similar business as the relevant Company (as hereunder defined), or in any other business carried on by the relevant Company, in Singapore, and Malaysia and any other countries the relevant Company has offices at the date of such termination within the aforesaid areas and shall not during the like period and within the same areas~~ either personally or by Employee's agent or by letters, circulars or advertisements whether on Employee's behalf or on behalf of any other person, firm or company canvass or solicit orders from or in any way interfere with any person, or company who shall at any time during the continuance of the Employee's employment hereunder have been a customer or customers of the relevant Company & for any cause whatever the Employee *shall not* canvass, solicit or endeavour to take away from the relevant Company the business or any customers or clients who have been customers or clients of the relevant company. [emphasis in original]

12.111 Coomaraswamy J rejected this attempt at saving cl 13 as it did not meet the *Sadler* test. The learned judge noted that while the offending words could indeed be deleted without adding to or modifying the clause, the deletion did in fact fundamentally alter the meaning of the clause by joining parts of two distinct promises (the non-compete and non-solicitation promises) together and by altogether removing the geographical limits of the surviving restraint. The effect is a rewriting of cl 13, which is not permitted under the second and third limbs of the *Sadler* test. In the final analysis, neither the non-compete nor the non-solicitation obligation could, in the learned judge's view, be saved by severance. In so far as the defendant's trade connection constituted the only protectable interest, the imposition of a blanket non-compete obligation was unreasonable, and this was a fundamental defect that could not be saved by severance. Severance of the non-solicitation clause was also precluded by the *Sadler* requirements. First, the definition of the "relevant Company", which accounts for the restraint's unreasonable width, cannot be tightened without adding to or modifying it. Second, the restraint constituted the principal consideration of the employment agreement so its removal would leave the rest of the agreement unsupported by adequate consideration. Third, any attempt to tamper with the definition of "relevant Company" would amount to a rewriting of the contract as the term was used not only in cl 13 but also in other parts of the agreement. Finally, having regard to the particular context of an employment relationship, the cascading non-solicitation restrictions contained in cl 13 (by first prohibiting solicitation of the defendant's customers

during the time of the plaintiff's employment, and subsequently extending to all customers of the defendant) would have an *in terrorem* effect on a reasonable employee in the plaintiff's position. To sever and enforce the restraint in such circumstances would therefore be inconsistent with the underlying policy of protecting the employee from unreasonable restraints.

12.112 *Total English Learning Global Pte Ltd v Kids Counsel Pte Ltd* [2014] SGHC 258 was another High Court decision that considered (but only in *obiter* capacity) whether a number of non-compete and non-solicitation clauses had been breached. The dispute arose in the context of a number of franchise agreements originally entered into by Total Literacy (Singapore) Pte Ltd ("TLS") as franchisor and the defendants as franchisees in relation to an English literacy and phonics programme known as the "I Can Read" ("ICR") system. In July 2012, TLS purportedly assigned the agreements to Total English Learning Global Pte Ltd ("TELG") and its intellectual property rights to Total English Learning International Pte Ltd ("TELI"). The defendants disputed the validity of the assignments and terminated the franchise agreements. Thereafter, some of the defendants carried on a similar business by migrating to a competing English literacy programme known as the "My English School" ("MES") system. TELG and TELI then brought legal actions against the defendants for, *inter alia*, breaches of non-compete and non-solicitation terms in the franchise agreements. In the High Court, Tay Yong Kwang J found that the assignment was invalid. As a result, the plaintiffs had no standing to bring these actions and all their claims were dismissed. Nevertheless, the learned judge went on to consider whether the terms of the franchise agreements would have been breached had the assignment been valid.

12.113 It was not disputed that the defendants had carried on a competing business when they migrated to the MES system upon terminating the franchise agreements. However, this would only breach the relevant non-compete clause if the clause were not void for restraint of trade in the first place. In respect of the second, third, fourth, fifth and eighth defendants, the court found that the non-complete clauses were indeed void on this ground: the restraints in question were far too wide as they were not subject to any geographical limit at all. In respect of the sixth, seventh and eighth defendants, however, the non-compete clauses were reasonable as between the parties because they were applicable only to activities conducted in Singapore and limited to a period of 24 months. In arriving at this conclusion, Tay J took into account (at [95]–[97]) the fact the franchise agreements were essentially business contracts between parties of equal bargaining power. Unlike restraints imposed in employment contracts, in respect of which a stricter approach is applied because the covenantee's livelihood is often at stake, restraints in business contracts do not usually affect the

covenantee to the same degree. Hence, the court is more likely to accept the parties' agreement as reasonable.

12.114 Turning to the non-solicitation clauses, the court proceeded on the assumption that these clauses were valid and binding as the defendants had not in fact argued that these clauses were unlawful restraints on trade. Tay J found that the non-solicitation clause as applicable to *customers* was breached, as the evidence was that the defendants had carried on the competing business with substantially the same students who had previously subscribed for the ICR programme. Interestingly, the franchise agreements also contained covenants against the solicitation of the *franchisee's own employees*. The plaintiffs therefore argued that the defendants had breached these covenants in employing the same teachers who had previously taught the ICR programme to teach the MES programme. Tay J rejected this argument on the ground that there was insufficient evidence of solicitation in the sense of having encouraged, persuaded or even asked the employees to shift to the competing programme. Although the judgment does not make it clear, the assumption appears to be that the defendants would have had to enter into *fresh contracts of employment* with these teachers before the covenant is triggered in the first place. This is because the covenant was not made against solicitation *simpliciter* but solicitation "for the purpose of employing" such employee: at [91]. So if an existing employment contract were already in place, it might have been argued that the mere request to teach the competing programme was not a solicitation for the purpose of employing that particular employee.

Discharge by breach of contract

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

12.115 In *The STX Mumbai* [2014] 3 SLR 1116, the plaintiff, which was a supplier of bunkers, arrested the defendant's vessel, The *STX Mumbai*, on 14 June 2013, two days before a sum which the defendant was to pay to it would become due. The basis for the plaintiff's *in rem* action was a purported anticipatory repudiatory breach by the defendant to pay that sum in light of either, (a) the defendant's failure to make payment in response to an e-mail from the plaintiff demanding immediate payment on 13 June 2013; or (b) the purported insolvency of the defendant's holding company, STX Pan Ocean Pte Ltd.

12.116 In this case, the court allowed the defendant's application that the plaintiff's *in rem* claim be struck out, holding that the arrest of the *STX Mumbai* was wrongful. For one, even leaving aside the fact that the defendant's e-mail demanding immediate repayment had been sent, not

to the plaintiff, but to a company related to it, the defendant's failure to make payment in response to that e-mail could not be taken to evince the requisite repudiatory intent as the plaintiff had no legal basis to make such a demand: at [43]. As to the insolvency of the defendant's holding company, since the plaintiff had not made any attempt to lift the corporate veil, given the doctrine of separate corporate personality, the insolvency of the defendant's holding company did not give rise to any actionable repudiation on the part of the defendant: at [33]–[35]. Indeed, given the authority of *Morgan v Bain* (1874) LR 10 CP 15, even if it had been asserted (which it had not) that the defendant had been insolvent, the mere fact of insolvency did not, in itself, amount to a repudiation by an insolvent corporation of its contractual duties: at [38]–[43].

12.117 Despite having disposed of the dispute, the learned judge went on to make a number of interesting observations in connection with the ambit of the doctrine of anticipatory repudiatory breach. In *obiter dicta* (at [54]–[74]), the learned judge suggested that as a matter of Singapore law, it was undecided whether the doctrine of anticipatory repudiatory breach ought to be applied equally to cases where, at the point of repudiation, the party receiving that repudiation had fully executed all its duties under the terms of the contract and had no outstanding duties to perform under the terms of the contract.

12.118 As recounted by the learned judge, in contrast with the English position, there is some authority in certain states within the US, as well as in Canada and Australia that, exceptionally, the doctrine of anticipatory repudiatory breach is not available where the only outstanding duties under the contract which has been repudiated are those of the repudiating party: at [57]–[68]; see also *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) at pp 1193–1194, fn 87.

12.119 Whilst recognising that there is significant academic opposition in those jurisdictions to such exception (at [69]–[72]), the learned judge suggested that the position in Singapore on the point was still open, given that there appears to be no Singapore authority otherwise. In particular, the learned judge suggested (at [73]) that although the case of *Tan Hock Keng v L & M Group Investments Ltd* [2002] 1 SLR(R) 672 ("*Tan Hock Keng*") has been said to be consistent with the view that no such exception exists as a matter of Singapore law, since the Court of Appeal in that case did not explicitly rule on the point, it remains an open question. Alternatively, the learned judge took the view that it was possible to distinguish *Tan Hock Keng* (*The STX Mumbai* at [73]) because:

> … [t]hat case concerned an obligation to make payment by instalments whereas the present case concerned a unilateral obligation to make a one [*sic*] payment at a fixed date.

12.120 As to this point, it is helpful to revisit the decision in *Tan Hock Keng*. The dispute in *Tan Hock Keng* arose from the acquisition by the appellant ("Tan") of all the shares in Khai Wah-Ferco Pte Ltd ("KWF") from the respondent company ("L&M"). KWF had been a wholly owned subsidiary of L&M, and inter-company loans amounting to $5.5m had been made to it prior to 1997 (when it was acquired by Tan) pursuant to two share-acquisition agreements.

12.121 KWF was to repay the inter-company loans in 12 instalments, each instalment being, "thirty percent (30%) of [KWF's] consolidated net profit after tax or $220,000.00 *per* annum, whichever [was] the higher", commencing from 15 April 1999, and on every anniversary thereafter: *Tan Hock Keng* at [8].

12.122 Pursuant to a provision in the share-acquisition agreements ("cl 15.1"), Tan undertook to "procure" the due repayment of the inter-company loans by KWF. Accordingly, Tan was to "procure" that KWF made annual repayments to L&M from 15 April 1999, with the last payment becoming due and payable on 15 April 2010.

12.123 The report of the Court of Appeal's decision suggests that of the 12 instalments which were to be paid, two were paid by KWF (presumably for 1999 and 2000). When an action was commenced in 2000 by Tan against L&M in alleging it had breached certain terms under the share acquisition agreements, L&M filed a counterclaim for a total of $751,504.13, $440,000 of which pertained to non-payment by KWF of two loan instalments.

12.124 Whilst Tan admitted liability as to $351,504.13 of the $751,504.13 counterclaimed by L&M, he disputed his liability as to the balance $440,000 on the basis that his only duty was to "procure" that KWF paid the loan instalments, and that he had not undertaken personal liability to pay the instalments if the company had failed to do so: see [2001] 3 SLR(R) 47 at [20].

12.125 At first instance, L&M succeeded on its counterclaim, and this was upheld on appeal, the Court of Appeal holding as follows (*Tan Hock Keng* at [28]):

> While we agree that 'procure' in cl 15.1 does not mean that Tan undertakes to pay the loans himself but it does mean that Tan undertakes to ensure that KWF would repay and when KWF does not repay, Tan would have breached his obligation of 'ensuring' or 'seeing to it' that KWF repay.

12.126 It is true that the Court of Appeal did not stipulate at any point in its judgment whether Tan's breach of his duty under cl 15.1 was an actual or anticipatory breach. However, careful consideration of the facts of the case and its progress through the courts reveals that the Court of Appeal must have accepted that the counterclaim pertained, at least partially, to an anticipatory breach on Tan's part.

12.127 As mentioned above, since Tan's claim against L&M was numbered "Suit No 524 of 2000", it would appear that Tan must have filed his claim against L&M sometime in 2000. The first instance judgment was, however, handed down on 3 September 2001. In respect of the counterclaim, L&M claimed $440,000 comprising two instalments that had not been paid by KWF. It would appear the first two instalments of the total of 12 were paid. Presumably, these were the instalments payable on 15 April 1999 and 2000. If so, assuming Tan filed and served his statement of claim against L&M in 2000, at that point in time, KWF could not have committed an actual breach of its duty to make payment of the 15 April 2001 or any subsequent instalment, since they would not have accrued due in 2000.

12.128 Neither of the reports of this case at first instance or on appeal disclose when L&M filed its counterclaim. This could have been filed as part of L&M's defence to Tan's statement of claim – which could well have occurred in 2000 within a few weeks of service of Tan's statement of claim. However, given the power granted to the court to give liberty to amend pleadings even at trial, a counterclaim encompassing the two unpaid instalments making up the $440,000 disputed by Tan might have been filed as late as 3 September 2001, being the date when the claim and counterclaim between the parties were heard by Rajendran J at first instance.

12.129 As at 3 September 2001, the third instalment would have become due and payable on 15 April 2001. However, as at that date, the fourth instalment would not have become due. Accordingly, though it might be possible to conceive of KWF having actually breached its duty to pay the third instalment due on 15 April 2001 to L&M, and therefore, one might also conceive of Tan having actually breached *his* duty to ensure that KWF did so as at that very same date, it is impossible to conceive of KWF (and Tan) doing the same in respect of the fourth instalment, given that payment of that instalment would only be due on 15 April 2002 (which would, incidentally, arise three days after the appeal to the Court of Appeal was heard on 12 April 2002).

12.130 Accordingly, in so far as the Court of Appeal upheld the decision below on L&M's counterclaim, part of which related to *two* unpaid instalments, close examination of these dates suggests that L&M's claims as to damages in respect of non-payment for at least *one*

of these instalments must be regarded as being in respect of an anticipatory breach since it would have been impossible for Tan to commit an actual breach of his duty to ensure that KWF performed its duty to make payment for the fourth instalment due to be paid on 15 April 2002, prior to that date. Thus, at least as to part of the counterclaim, the Court of Appeal must have accepted that Tan had *anticipatorily* repudiated his duty to ensure that KWF would pay the instalments when they became due. It is difficult to see how matters could be otherwise. Further, given that L&M had fully disbursed the inter-company loans to KWF prior to 1999 when KWF's duty to make repayments by instalment started to accrue due, under the terms of the loan, it does not appear that L&M would have been subject to any further outstanding duties *vis-à-vis* KWF; nor is there any mention in either the first instance judgment or on appeal, that L&M was subject to further outstanding duties *vis-à-vis* Tan so far as Tan was duty-bound to L&M to ensure that KWF performed its duty to repay the loan in annual instalments. It would seem, therefore, that the High Court and the Court of Appeal must have accepted that the doctrine of anticipatory repudiatory breach of contract is available even where the only outstanding duties left to be performed under that contract are those of the repudiating party.

12.131 It is of course open to the Court of Appeal to revisit the issue, and to hold that *Tan Hock Keng* was wrongly decided on the point. However, notwithstanding the *obiter* views put forward by the learned judge in *The STX Mumbai*, it is unclear what purpose such an exception might serve. As matters stand, it is suggested that though *Tan Hock Keng* makes no explicit mention of Tan having committed any anticipatory repudiatory breach of his obligations, the Court of Appeal's affirmation of the High Court's decision on L&M's counterclaim against Tan is difficult to explain on any other basis. Consequently, *Tan Hock Keng* is arguably best understood as providing implicit authority for the proposition that, as a matter of Singapore law, an anticipatory repudiatory breach may be invoked even by a contracting party who has no further outstanding duties to perform under the contract.

Discharge by frustration

12.132 In *Alliance Concrete Singapore Pte Ltd v Sato Kogyo (S) Pte Ltd* [2014] 3 SLR 857 ("*Alliance Concrete*"), the latest of the series of cases triggered by the imposition of the sand export ban by the Indonesian government, the Court of Appeal has provided further useful guidance on the operation of the doctrine of discharge by frustration.

12.133 On appeal, reversing the decision at first instance ([2013] SGHC 127), the Court of Appeal held that the imposition of the sand

export ban by the Indonesian government *had* discharged the contract between the parties by frustration.

12.134 The most significant passage of this judgment, setting out the general principles which are to be kept in mind when applying the doctrine of discharge by frustration may, perhaps, be found below (*Alliance Concrete* at [37]):

> The 'radical change in obligation' test involves a multi-factorial approach, as articulated by Rix LJ (with whom Wall and Hooper LJJ agreed) in the English Court of Appeal decision of *Edwinton Commercial Corporation v Tsavliris Russ (Worldwide Salvage & Towage) Ltd (The Sea Angel)* [2007] 2 Lloyd's Rep 517 (at [111]):
>
> > In my judgment, the application of the doctrine of frustration requires a multi-factorial approach. Among the factors which have to be considered are the terms of the contract itself, its matrix or context, the parties' knowledge, expectations, assumptions and contemplations, in particular as to risk, as at the time of contract, at any rate so far as these can be ascribed mutually and objectively, and then the nature of the supervening event, and the parties' reasonable and objectively ascertainable calculations as to the possibilities of future performance in the new circumstances. Since the subject matter of the doctrine of frustration is contract, and contracts are about the allocation of risk, and since the allocation and assumption of risk is not simply a matter of express or implied provision but may also depend on less easily defined matters such as 'the contemplation of the parties', the application of the doctrine can often be a difficult one. In such circumstances, the test of 'radically different' is important: it tells us that the doctrine is not to be lightly invoked; that mere incidence of expense or delay or onerousness is not sufficient; and that there has to be as it were a break in identity between the contract as provided for and contemplated and its performance in the new circumstances.

12.135 This offers some support for the proposition that has been made elsewhere, that to decide whether a contract has indeed been frustrated by the occurrence of a supervening event, the question as to whether the occurrence of that supervening event had been or was foreseeable to a "sufficiently high degree" should be seen to be merely one of a *number* of possible factors, each of which is to be weighed and considered in an exercise of *construction* of the terms of the contract. See, generally, *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) at paras 19.116–19.124.

Remedies

No damages for breach of contract where there is no breach of that contract

12.136 The proposition that no damages are available for breach of a contract where there has been no breach of that contract appears obvious. However, confusion may arise where there are two inter-related contracts, of which breach of one gives rise to an entitlement to invoke a contractual provision allowing for the termination of the other.

12.137 In *Burgundy Global Exploration Corp v Transocean Offshore International Ventures Ltd* [2014] 3 SLR 381, *inter alia*, a dispute arose as to whether damages were available with respect to a contract ("the Drilling Contract") which had been terminated pursuant to a contractual provision ("cl 3.2") set out in a separate agreement ("the Escrow Agreement"). In the Escrow Agreement, the parties had agreed that, if the appellant company (Burgundy Global Exploration Corp) failed to deposit the sum stipulated therein into an escrow account in accordance with a payment schedule set out in the Escrow Agreement, the respondent company (Transocean Offshore International Ventures Ltd) would be entitled to suspend work, and/or "terminate" the Drilling Contract.

12.138 When the appellant company failed to deposit the stipulated sum by way of escrow in accordance with the deadline stipulated in the Escrow Agreement, the respondent company exercised its right under the Escrow Agreement to terminate the Drilling Contract, whilst also claiming that the appellant company had committed a repudiatory breach of the Drilling Contract in failing to comply with the provisions of the Escrow Agreement.

12.139 The Court of Appeal observed (at [44]–[46]) that:

> … it must not be overlooked that the parties had deliberately carved out escrow matters from the transaction and subjected it to a separate agreement. The purpose of the Escrow Agreement, as Transocean says, was to provide Transocean with security so that it could commit to performing the Drilling Contract without having to fear that it might end up being mired in delays if Burgundy defaulted on payment. In other words, Transocean's performance interest under the Escrow Agreement was to obtain security for Burgundy's performance of its payment obligations under the Drilling Contract. This must not be confused with Transocean's performance interest under the Drilling Contract, which was to make profits from carrying out the contracted services.
>
> Therefore, the true damage caused by Burgundy's breach of the Escrow Agreement was the loss of its security, and *not* the loss of

> profits under the Drilling Contract. The latter loss was in fact the result of Transocean's decision not to perform the Drilling Contract without security, and however reasonable a decision that might appear to be, the proper cause of action for recovering those losses must be a claim under the Drilling Contract. Having deliberately chosen to carve out the security aspect of the parties' business relationship and deal with it in a separate contract, Transocean cannot now seek to vindicate its performance interest under the Drilling Contract by bringing a claim founded on breach of the Escrow Agreement.
>
> The fact that cl 3.2 of the Escrow Agreement entitles Transocean to terminate the Drilling Contract upon a breach of the Escrow Agreement does not change the preceding analysis. A breach of the Escrow Agreement is not necessarily a breach of the Drilling Contract, and even if it were, there is no legal basis for allowing Transocean to recover the losses it suffered from a breach of the *Drilling Contract* in an action for breach of the *Escrow Agreement*. The contractual right to terminate the Drilling Contract upon a breach of the Escrow Agreement is just that – a right to terminate; it does not serve to import all the obligations under Drilling Contract into the Escrow Agreement and allow Transocean to treat them as a single composite contract. This is a matter of some significance where, as here, each contract has unique features including distinct dispute resolution mechanisms.
>
> [emphasis in original]

12.140 Given the two contracts before it, the Court of Appeal concluded, in effect, that though there had been a breach of the Escrow Agreement, that breach merely gave the respondent company the contractual power to terminate the Drilling Agreement; there was *no* breach, repudiatory or otherwise, of the latter, though there *was* a breach of the former. Consequently, there could be no damages in respect of the non-existent breach of the latter, and the decision below on this point had to be reversed, although the Court of Appeal went on to allow damages in respect of Transocean's wasted costs and expenses in entering the Escrow Agreement: at [116].

Quantification of Wrotham Park *damages*

12.141 In *Clearlab SG Pte Ltd v Ting Chong Chai* [2015] 1 SLR 163, a dispute arose between the plaintiff company and a number of its ex-employees. *Inter alia*, the plaintiff claimed that its ex-employees had breached the terms of a confidentiality clause in their contracts of employment after leaving the employ of the plaintiff. Interim injunctions had been obtained against the ex-employees with regard to their ability to exploit information which they had gained during their employment with the plaintiff, and on the conclusion of this action, Lee

Seiu Kin J granted the final injunctions against the ex-employees, as sought by the plaintiff.

12.142 Interestingly, the plaintiff company also sought damages, assessed on the *Wrotham Park* basis, from its ex-employees as compensation in respect of its non-pecuniary losses arising from that period of time between its ex-employees' breach of their duties of confidentiality, and the time when the interim injunction had been granted: at [341].

12.143 Summarising the law on the point, Lee J observed as follows (at [337]):

> In the case of *Wrotham Park Estate Co Ltd v Parkside Homes Ltd and others* [1974] 1 WLR 798 ('*Wrotham Park*'), from which the term *Wrotham Park* damages was derived, Brightman J awarded damages as 'a just substitute for a mandatory injunction': at 815D. Instead of ordering a mandatory injunction for the demolition of buildings developed in breach of a restrictive covenant, because that would have been an 'unpardonable waste of much needed houses', Brightman J had assessed damages as a sum which the plaintiffs might reasonably have demanded from the defendant as *quid pro quo* for relaxing the covenant. It assumes a hypothetical negotiation between parties to buy out or to release the relevant obligation.

12.144 Lee J held that such damages were not available on the facts before him. In his view (at [342]–[343]):

> … the argument that *Wrotham Park* damages are available for that specific timeframe is tenuous. It seems to have no regard for commercial reality. The fact is that no agreement could hypothetically have been struck between the parties for a limited use of confidential information in Aquilus that can never come to fruition (*viz*, production and sale of competing products by Aquilus). As Sales J said in *Duncan Edward Vercoe and others v Rutland Fund Management Limited and others* [2010] EWHC 424 (Ch) at [292]:
>
> > On my reading of the authorities, where damages are to be awarded on a *Wrotham Park* type basis, what is required from the court is an assessment of a fair price for release or relaxation of the relevant negative covenant having regard to (i) *the likely parameters given by ordinary commercial considerations bearing on each of the parties (it would not usually be fair for the court to make an award of damages on this basis by reference to a hypothetical agreement outside the bounds of realistic commercial acceptability assessed on an objective basis with reference to the position in which each party is placed*, and see *Pell Frischmann Engineering Ltd* at [53]); (ii) any additional factors particularly affecting the just balance to be struck between the competing interests of the parties (see Brightman J's reference to the conduct of the

> beneficiary of the restrictive covenant *in Wrotham Park* at 815H–816B as a factor tending to moderate the award of damages in its favour and the reference of the Privy Council in *Pell Frischmann Engineering Ltd* at [54] to the relevance of extraordinary and unexplained delay by the claimant); and (iii) the court's overriding obligation to ensure that an award of damages for breach of contract – which falls to be assessed in light of events which have now moved beyond the time the breach of contract occurred and which may have worked themselves out in a way which affects the balance of justice between the parties – does not provide relief out of proportion to the real extent of the claimant's interest in proper performance judged on an objective basis by reference to the situation which presents itself to the court (see the discussion in *Experience Hendrix* at [27]–[30] of the special nature of the interest of the claimant which justified the award of damages in *Blake* equivalent to the profits which Blake had made in publishing his book about his treachery; the general discussion by Lord Nicholls in *Blake* at 282A–285H; and also compare *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344). [emphasis added]
>
> What Clearlab is essentially seeking are *Wrotham Park* damages represented by a licence fee for the use of the confidential information for such time and extent before the products are fully developed for the market. It is a prime example of a hypothetical agreement that is 'outside the bounds of realistic commercial acceptability'. The licensor, Clearlab, has everything to gain, in terms of monetary compensation, for loaning out the confidential information, whereas the licensee, the defendants, are ultimately prevented from benefiting from the use of the confidential information because the licence to use is retracted just before they are ready to sell the products made using the confidential information. The value of a licence for such temporary and restricted use is zero.
>
> [emphasis added by High Court]

Quantification of damages – "Breach-date rule" or mitigation?

12.145 In the case of *Su Ah Tee v Allister Lim and Thrumurgan* [2014] SGHC 159 ("*Su Ah Tee*"), the High Court made certain observations in connection with the application of the "breach-date" rule.

12.146 In this case, the plaintiffs had engaged the defendant firm to act for them as their conveyancing solicitors in the purchase of a HDB shophouse lease from one of the third parties ("Cheng"). Cheng had fraudulently misrepresented to the plaintiffs that the shophouse had an unexpired lease in excess of 60 years, when in reality, there were only 17 years left on the lease. Following the usual searches on title, the defendant became aware that there were only 17 years left on the

shophouse lease which their clients proposed to purchase, but it failed to relay this information to the plaintiffs.

12.147 Although the plaintiffs could have rescinded the contract of sale in light of Cheng's fraudulent misrepresentation, and brought an action against Cheng in the tort of deceit, they elected to merely bring an action against the defendant. As to this action, the learned trial judge held that such failure amounted to a breach of the defendant's duties to its clients: it had failed to discharge its duty as conveyance solicitors for the plaintiffs with reasonable care, such duty arising both as a matter of contract and tort law. Accordingly, the defendant was liable to pay damages to the plaintiffs in respect of its breach of duty. In awarding damages, the court did not distinguish between whether it was awarded contract damages or damages in tort, and rightly so, given that the content of the defendant's duty as a matter of contract or that in the tort of negligence was the same.

12.148 The court took the view that the damages in respect of the defendant's breach were to be quantified by reference to the difference between the price actually paid by the plaintiffs for the lease, and its market value as at the time when the sale was completed. In so doing, the learned judge asserted that she was applying the "breach-date" rule, and was not convinced that it was appropriate to quantify damages by reference to a different date: at [127]–[136].

12.149 This merits some expansion. For one, though the learned judge appears to have assumed that the defendant's breach of duty had occurred at the time when the sale was completed, another view is possible: arguably, the defendant firm could be taken to have breached its duty when, having discovered that there were only 17 years remaining on the lease of the shophouse, it failed to inform the plaintiffs of this fact. If so, the point when the breach would have occurred would have been a point in time *prior* to the date when the sale was completed. Yet this would plainly not have been the appropriate date at which to quantify the appropriate sum of damages to compensate the plaintiffs for their loss since the plaintiffs sustained their claimed-for loss by reason of the defendant's breach only when the purchase of the shophouse was completed at what, in light of the subsequent discovery of the true length of the remaining lease, was an excessively high price.

12.150 In many cases involving contract breaches, actionable loss is sustained *upon* breach, and this provides a reason why, in most cases, contract damages are quantified by reference to the prevailing state of affairs as at the date of breach. In contrast, in cases involving breaches of tortious duties, unless the tort is actionable *per se* (as is the case with the tort of libel where damage is presumed upon breach), since the victim of such torts would have no cause of action until damage arises, and given

that in some instances, the damage arising from the tortfeasor's breach of duty may arise only some time after the occurrence of the breach, damages are typically assessed in light of the state of affairs as at the date when the damage (that is, loss) manifests itself.

12.151 On the facts in *Su Ah Tee*, however, though the defendant firm had arguably breached its duties to the plaintiffs when it failed to bring to the plaintiffs' attention the very short period left on the shophouse lease following their discovery of the same, at that point in time, the plaintiffs had yet to sustain the loss which was subsequently claimed in the action before the court. Therefore, without explicitly acknowledging it, in electing to quantify the plaintiffs' damages by reference to the market value of the shophouse given it had only 17 years left on its lease as at the date when the sale was completed, it might seem that the court had *already* departed from the "breach-date" rule.

12.152 To address this quibble, one could characterise the defendant's breach as being continuing: that for each day following the defendant's discovery of the remaining length of the lease on the shophouse, the defendant was committing a fresh breach of its contractual duty, and that this was the case, right up until the date when the sale was completed. So characterised, it would follow that whether the court was quantifying damages in respect of the defendant's breach of its contractual or tortious duty, the appropriate reference date would indeed be the date of completion of the sale as that would be the date when the *relevant* breach had occurred, leading to the plaintiffs sustaining loss/damage.

12.153 Even so, from the report, it seems unfortunate that insufficient account appears to have been taken of the fact that, upon discovery of the true state of affairs, the plaintiffs had initially planned to liquidate their loss by auctioning off the shophouse, but had then decided to call off the auction, such that they retained legal title to the shophouse as at the time of the proceedings in *Su Ah Tee*.

12.154 In having elected *not* to liquidate their loss upon discovery of the true length of the outstanding lease on the shophouse by selling it, the plaintiffs' retention of title to the lease on the shophouse meant that by the time of the trial, due to the effects of a rising market, the market value of the shophouse with its short remaining lease had appreciated by around 30% over its market value as at the time of completion. Though it could have been so argued, so far as one can tell from the report, it would appear that counsel for the defendant did not present the plaintiffs' decision to hold off on liquidating their loss as being a mitigatory step by way of alternative to his submission as to the appropriateness of departing from the "breach-date rule" (which the court rejected).

12.155 One might have looked at the problem in the following terms. Having elected to mitigate their loss by postponing the sale of the shophouse, and such election having actually reduced the plaintiffs' loss in light of the 30% appreciation in the market value of the shophouse as at the time of the trial, since damages ought not to be awarded in respect of loss *actually avoided*, the damages ordered ought to be discounted in respect of such loss since the purpose of an award of damages is, "to compensate [the plaintiff] for his loss, not to enrich him": *Longden v British Coal Corp* [1998] AC 653 at 662. Similar sentiments are expressed with respect to tort damages: *Dimond v Lovell* [2002] 1 AC 384 at 401–402, *per* Lord Hoffmann.

12.156 Had the point been made, presumably, the court would have had to consider whether the appreciation in the market value of the shophouse in the period between completion and the time of judgment was the "direct result of", or merely "collateral to", the defendant's breach, a distinction highlighted in *Lavarack v Woods of Colchester Ltd* [1967] 1 QB 278. If the latter, it would be open to the court to ignore its effect and no allowance would be given in respect of it, as was held to be the case in *Hussey v Eels* [1990] 2 QB 227 ("*Hussey*"), where landed property, which had been acquired by the plaintiffs due to the defendant's misrepresentation that it was not subject to subsidence, was subsequently sold for one-and-a-half times the purchase price after the house was demolished, and planning permission obtained by the plaintiffs for the land to be redeveloped more intensively. In that case, the court concluded that, even assuming the plaintiffs had generated a profit from this resale, such profit was not to be taken into account to reduce the damages to be awarded in respect of the defendant's misrepresentation since the resale was, "not … part of a continuous transaction of which the purchase was … the inception": *Hussey* at 241.

12.157 Not having been put to the court, one can only speculate how the court would have responded to such a contention, though the court's acceptance that the appreciation in the market value of the shophouse was reasonably foreseeable is suggestive. Ultimately, though, this case probably stands as a cautionary tale to counsel, that though the "breach-date" rule may well be a difficult one to displace, other avenues might usefully be explored so as to honour the overriding principle set out in *Robinson v Harman* (1848) 1 Ex 850 and *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, that damages are to be awarded to place the plaintiff in the position he or she would have been in had the breach not occurred.