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Doctrine and fairness in the law of contract*

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This paper explores, through illustrations from the law of contract, the important central theme to the effect that the rules and principles, which constitute the doctrine *of the law, are not ends in themselves but are, rather, the means through which the courts arrive at* substantively fair *outcomes in the cases before them. The paper focuses on the concept of 'radicalism', which relates to the point at which the courts decide that it is legally permissible to hold that a contract should come to an end because a radical or fundamental 'legal tipping point' has not only been arrived at but has, in fact, been crossed. It explores the role of this concept as embodied in the doctrines of frustration, common mistake, discharge by breach, as well as fundamental breach in the context of exception clauses – in particular, how 'radicalism' with regard to these doctrines can be viewed from the (integrated) perspectives of structure, linkage and fairness. The paper also touches briefly on linkages amongst the doctrines of economic duress, undue influence and unconscionability, as well as the ultimate aim these doctrines share of achieving fair outcomes in the cases concerned.*

INTRODUCTION

I would like to express my gratitude to the Faculty of Law of the University of Hong Kong for according me the singular honour and privilege of delivering a lecture in this very prestigious series.[1] I last visited the Faculty almost two decades

* This is a modified version of a public lecture delivered on 16 April 2009 as part of the Common Law Lecture series held under the auspices of the Faculty of Law, University of Hong Kong (to whom I am grateful for permission to publish the lecture in its present form). I would also like to express my gratitude to Professor Yeo Tiong Min, Yong Pung How Professor of Law, School of Law, Singapore Management University; Professor Hans Tjio, Faculty of Law, National University of Singapore; Mr Goh Yihan, Faculty of Law, National University of Singapore; and Mr Peh Aik Hin, Senior Justices' Law Clerk, Supreme Court of Singapore, for their valuable comments and suggestions. My grateful thanks, also, to Professor Rob Merkin and Professor Jill Poole. However, all errors remain my own. Further, all views expressed in this lecture are personal views only and do not reflect the views of the Supreme Court of Singapore. Still less, of course, do they bind me in any future cases that may come before me! It will be evident from the lecture itself that it is itself a kind of work in progress, having had, in fact, many of its 'roots' in various ideas as well as articles over a period of approximately two decades.
1. I would like, in particular, to express my gratitude to Professor Johannes Chan SC, Dean, Faculty of Law, University of Hong Kong, for his kindness and assistance throughout. I am also very grateful to Ms Rebecca Lee of the Faculty of Law, University of Hong Kong, who, despite her considerable academic as well as other commitments, helped organise my visit with meticulous attention to detail as well as with great kindness and hospitality. My thanks, also, to Ms Jessica Young, Faculty of Law, University of Hong Kong, who extended me much cheerful

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ago.[2] It was then already a hub of intense intellectual discourse and teaching. It has since moved on to even greater heights under the able leadership of the various deans. There are so very many scholars of international repute at the Faculty – many of whom graduated from the Faculty itself. I should also add that the *Hong Kong Law Journal* has always been on the list of current publications which I have requested the Supreme Court Law Library to send to me as soon as they arrive.

I would like to begin this evening by setting out the central theme of the present lecture.

THE CENTRAL THEME OF THE PRESENT LECTURE

Although the topic of this lecture is 'Doctrine and fairness in the law of *contract*', the concepts of doctrine and fairness are not confined to the law of contract alone. On the contrary, they constitute, I suggest, the foundation of any practical and just legal system. That having been said, the law of contract is a particularly appropriate point of focus as well as analysis, simply because it constitutes the foundation of (and is related to) virtually every area of commercial law.

Put simply, the central thesis of the present lecture is this: the rules and principles[3] which constitute the *doctrine* of the law are not ends in themselves but are, rather, the means through which the courts arrive at *substantively fair* outcomes in the cases before them in *every* area of the law.[4]

I should add that neither is more important than the other. In other words, the desire to arrive at a fair outcome does not mean that the courts can manipulate legal doctrine in an arbitrary fashion. Indeed, part of my task in the present lecture is to demonstrate – through illustrations from the law of contract – that legal doctrine is a coherent body of rules and principles which contain many common threads or linkages. Hence, any attempt to manipulate them in order to arrive at a predetermined result would be both artificial as well as unacceptable, and would instead lead to a loss of legitimacy in the

assistance as well. I am also grateful to Mr Kelvin Low and Mr Kelry Loi of the Faculty of Law, University of Hong Kong, for their valuable assistance in both pointing me to – as well as obtaining for me (where necessary) – relevant materials relating to the contract law of Hong Kong.

2. One of the products of that visit was A Phang, 'Convergence and divergence – a preliminary comparative analysis of the Singapore and Hong Kong legal systems' (1993) 23 Hong Kong Law Journal 1, which was (in turn) based on a public lecture delivered at the University of Hong Kong on 31 October 1991.

3. The concept of 'principles' finds its most prominent proponent in Professor Ronald Dworkin (see, in particular, 'Hard cases' in R Dworkin *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, revsd edn, 1978) ch 4). However, I have pointed out elsewhere that Dworkin was, with respect, wrong in arguing, inter alia, that the late Professor HLA Hart had omitted to consider the concept of 'principles' and had focused, instead, only on the concept of 'rules'; see A Phang 'Jurisprudential oaks from mythical acorns: the Hart-Dworkin debate revisited' (1990) 3 Ratio Juris 385 at 386–390.

4. It should be noted that the term 'fair' is utilised in order to distinguish it from a *merely legally* correct result in the technical sense as a result of the application of the relevant legal doctrine. If the latter had to be distinguished from the former, then it is suggested that the term 'just' might be more appropriate. However, in accordance with the main thrust of the present lecture, the application of the relevant legal doctrine ought to enable the court concerned to arrive at a substantively fair result or decision. Viewed in that light, the court ought therefore to arrive at a result that is both 'just' *and* 'fair'.

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law in the eyes of both the legal profession as well as the public alike. I should also mention, at this juncture, that academic literature is also important in the analysis as well as formulation of legal doctrine, especially with regard to the consideration of nascent and/or controversial areas of the law. However, I pause to mention (parenthetically) that, whilst there is the need for the consideration as well as citation of academic writings, there is also the need for such writings to be *relevant* inasmuch as, inter alia, esoteric and/or highly abstract discourse ought to be avoided. In other words, whilst academic writings must always maintain their intellectual rigour, it must never be forgotten that their *highest* calling (and achievement) consists, in the final analysis, in their contribution to the legal profession as a whole.[5]

On the other hand, legal doctrine is not an end itself. Its primary function is to guide the court, in a reasoned fashion, to arrive at *a fair result* in the case before it. Here, too, academic literature has a potentially significant (perhaps even pivotal) role to play. This is because, in some quarters, there has – particularly with the advent of post-modern legal thought – been an increased (and, unfortunately, increasingly) sceptical view taken of the law in general and legal objectivity in particular.[6] Such an approach

5. I have dealt with this point briefly elsewhere; see the Singapore High Court decision of *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric (practising under the name and style of WP Architects)* [2007] 1 SLR 853 (reversed, *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric* [2007] 3 SLR 782, but without considering this particular point).

6. There is copious material in this regard and, which because of their philosophical bent, fall outside the scope of this lecture. Insofar as scepticism in the law is concerned, one is reminded immediately of the profound influence from America that witnessed at least two major movements decades apart: first, the Legal Realist Movement, followed by Critical Legal Studies. For a radically different perspective, see, eg, the work of Professor Ronald Dworkin (eg 'Law, philosophy and interpretation' (1994) 80 Archiv Für Rechts-und Sozialphilosophie 463; 'Objectivity and truth: you'd better believe it' (1996) 25 Philosophy and Public Affairs 87; *Taking Rights Seriously*, above n 3; *A Matter of Principle* (Cambridge, MA: Harvard University Press, 1985); *Law's Empire* (Cambridge, MA: Harvard University Press, 1986); *Sovereign Virtue – The Theory and Practice of Equality* (Cambridge, MA: Harvard University Press, 2000); and *Justice in Robes* (Cambridge, MA: Belknap Press, 2006)). However, such is the nature of legal theory and jurisprudence that we find debates even amongst those who share a similar approach (here, that, inter alia, the law is objective); see, eg, the famous 'Hart-Dworkin Debate' (in addition to the works by Dworkin cited above, see also HLA Hart *The Concept of Law* (Oxford: Clarendon Press, 2nd edn, 1994): see also Phang, above n 3; and, by the same author, ' "The concept of law" revisited' (1995) Tydskrif Vir Die Suid-Afrikaanse Reg 403) as well as the (earlier, but no less famous) 'Hart-Fuller Debate' (see, eg, HLA Hart 'Positivism and the separation of law and morals' (1958) 71 Harvard Law Review 593 and, by the same author, *The Concept of Law*, above; as well as LL Fuller, 'Positivism and fidelity to law – a reply to Hart' (1958) 71 Harvard Law Review 630 and, by the same author, *The Morality of Law* (New Haven, CT: Yale University Press, revsd edn, 1969)).

There is, of course, a myriad of other legal theories and writings (see generally, eg, A Phang 'Theories of law' in RC Beckman, BS Coleman and J Lee *Case Analysis and Statutory Interpretation – Cases and Materials* (Faculty of Law, National University of Singapore, 2nd edn, 2001), pp 8–31 and 574–577). However, this does *not necessarily* mean that there is no objectivity in the law (cf also below n 8). Indeed, the inherently abstract nature of writings in legal theory and jurisprudence contributes, in large part, towards the continued discourse as well as debate. However, the *practice* of the law itself is, of course, quite different, connecting (as it does) with the specific factual matrix as well as the objective decision thereon.

Finally, it should be noted that although the literature cited above deals with *Western* jurisprudence, the arguments contained therein ought – by their very nature – to contain a

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is, on any view, both corrosive as well as destructive. Whilst one cannot deny that the *application* of objective rules and principles is a dynamic process which may therefore give rise (on occasion at least) to some unpredictability as well as uncertainty (particularly in an imperfect world), it is certainly the very antithesis of the law to argue that the law is wholly subjective and that (putting it crudely) 'anything goes'.[7]

Indeed, the view that the law is subjective (and, consequently, arbitrary) would cause an irreparable loss in the legitimacy of the law in the eyes of the public. And, as just mentioned, it would also dispirit as well as disempower lawyers, judges and students alike. And, from just a logical perspective, the very view that all law is subjective is *itself* an 'absolute' proposition that thus involves circularity and (more importantly) self-contradiction.[8]

If I may interpose briefly (albeit informally and personally), when I hear the corrosive – and disorientating as well as dispiriting – sounds of scepticism and cynicism, I am reminded that, often, what is unseen is more important than what is seen. In particular, I am reminded of the *values* that are embodied in the law – in particular, the nobility of the quest for justice and the weighty responsibility we bear (whether as students, lawyers, academics or judges) to pursue this noble aim. These cannot be seen but nevertheless constitute the ideals that are the foundation of the enterprise of the law itself. I am also reminded that, on a deeper level, nobility and goodness in general is not something that we should take lightly. On the contrary, these are qualities which we should treasure. They are the true 'anchors' that will prevent us from being cast adrift in troubled (and troubling) times such as we are experiencing at the moment. I am reminded, here, of how a schoolmate of mine sacrificed himself in the prime of his life to rescue a person who was drowning. In that split second, he lost his life in saving another. In that split second, he accomplished more than I could ever do in a lifetime.

Returning to the concepts of doctrine and fairness, simplistic reductionism must, I should add, be assiduously avoided by all concerned (including the courts) – if nothing else, because life is too complex.[9] I would prefer viewing doctrine and fairness as an *interactive* process, although the attainment of a fair result in each case is the ultimate aim of the court.[10]

universality that extends to (and at least overlaps with) *Eastern* legal theories as well. However, this is an extremely large topic that cannot obviously be dealt with here.

7. See my observations in the Singapore High Court decision of *Forefront Medical Technology (Pte) Ltd v Modern-Pak Private Ltd* [2006] 1 SLR 927 at [26].

8. And on *objectivity* in the law generally, see A Phang 'Security of contract and the pursuit of fairness' (2000) 16 Journal of Contract Law 158 at 166–183 (and the literature cited therein).

9. That is why, eg, even Marxian philosophers such as the late EP Thompson eschew a reductionist approach which views law as mere superstructure (as opposed to having any substantive value in itself): see, eg, EP Thompson *Whigs and Hunters* (London: Pantheon Books, 1975) at pp 258–269.

10. A similar approach obtains with regard to the (closely related) issue of the relationship between procedural and substantive justice (the latter of which coincides with the fair result I refer to in the present lecture). That procedural and substantive justice are inextricably connected and that the latter is the ultimate aim of any judicial process is clear; as I observed in the Singapore High Court decision of *United Overseas Bank Ltd v Ng Huat Foundations Pte Ltd* [2005] 2 SLR 425 (at [8]): 'The quest for justice . . . entails a continuous need to balance the procedural with the substantive. More than that, it is a continuous attempt to ensure that both are *integrated*, as far as that is humanly possible. Both *interact* with each other. One cannot survive without the other. There must, therefore, be – as far as is possible – a fair and just procedure that

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Having stated the central theme, I want to proceed to illustrate it in two ways. I examine, first, how it operates in a few related areas of the law of contract which are, in turn, unified by one central thread – what I term the concept of 'radicalism'. As we shall see, virtually all of these areas also deal with the unravelling of a contract. If all this sounds rather mysterious at this particular juncture, I hope that all will be clear after I set out a basic overview of the concept (of 'radicalism') itself before proceeding to demonstrate how that concept underpins many established areas of the law of contract. I should add that this particular illustration relates, in fact, to what *already exists* and is (to that extent) *uncontroversial*.

However, I do, at this juncture, want to mention a *second* illustration which I will touch upon as well. This, again, concerns (other) related areas in the law of contract. As this second illustration concerns a more controversial theme and I have dealt with it in detail elsewhere in the literature, I will focus virtually all of this lecture on the first illustration instead. It will suffice, for the moment, to reiterate that this particular illustration – unlike the first – is more *controversial* in nature.

Let me turn, now, to the first illustration centring on 'Radicalism in the law of contract'.

A FIRST ILLUSTRATION OF THE CENTRAL THEME – 'RADICALISM' IN THE LAW OF CONTRACT

An overview

Although 'radicalism' is not a term which has been used (to the best of my knowledge) in the common law of contract and is indeed a term associated with political philosophy instead, I have coined it for the purposes of the present lecture to describe *an underlying (indeed, unifying) thread or concept* which occurs in a number of areas of contract law and which relates (with one exception) to the point at which the courts decide that it is legally permissible to find that a contract should come to *an end because a radical or fundamental 'legal tipping point' has not only been arrived at but has, in fact, been crossed*.

This particular underlying thread is important because it demonstrates that, despite the seemingly diverse contractual doctrines which operate to bring a contract to an end, there is, nevertheless, *a coherent and unifying thread which simultaneously demonstrates that the common law in general (and the common law of contract in particular) develops in an integrated and organic fashion.* Put another way, the common law of contract should *not* be viewed as merely a haphazard collection of *instrumental and ad hoc doctrines* that have been 'invented' as a matter of *expedience* to enable courts to arrive at predetermined results.

However, this idea of contractual *doctrine* being *coherently developed* (which coherence is demonstrated by various unifying threads) is *only one part* of the entire story, so to speak. The importance of the development of such doctrine is to ensure that its *application enables* the court concerned to arrive at a *substantively fair result* –

leads to a fair and just result. This is not merely abstract theorising. It is the *very basis* of what the courts do – and ought to do. When in doubt, the courts would do well to keep these bedrock principles in mind. This is especially significant because, in many ways, this is how . . . lay-persons perceive the administration of justice to be. The legitimacy of the law in their eyes must never be compromised. On the contrary, it should, as far as is possible, be enhanced' (original emphasis).

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hence bringing us back to the second aspect of the central theme which I outlined earlier on. I hope to demonstrate that the underlying thread of 'radicalism' was specially chosen by the courts not only because it aided (as I have already argued) in developing the relevant doctrines in a coherent fashion *but also* because 'radicalism' also represented the point at which it was *substantively fair* to the contracting parties for the court concerned to hold that the contract had come to *an end*. Viewed in this light, 'radicalism' has a *dual nature* in relation to *both* doctrine *as well as* fairness.

At this juncture, I want to run a little ahead of the story by observing that, absent the underlying thread of 'radicalism', there would have been no acceptable way (from the perspective of principled doctrine) for courts to find the appropriate balance between the very real tension that exists between two opposed (or competing) ideals in the context of *when* a contract ought to come to *an end*. Let me elaborate.

The *first* ideal is one that is very familiar to us. Indeed, it embodies the very raison d'être of contract law itself – it is only *fair* that contracting parties and courts ought to uphold and honour *the sanctity of a contract*. Indeed, if contracts were allowed to be unravelled at the whim of either contracting party, uncertainty and chaos would ensue.[11] This would, of course, be the very antithesis of what the law of contract seeks to achieve, especially in commercial transactions. A contracting party could, if there were no legal constraints, simply choose to walk away from its contract the moment it discovered that it had made a bad bargain. Put simply, and in a manner that even a layperson can understand, contracting parties must honour the bargain they have entered into.

However, there is a *second* (and *competing*) ideal. There may be situations where a contract has been entered into in (if I may put it in somewhat crude terms) less than savoury and/or particularly unfortunate circumstances or, after the contract has been entered into, there may be so drastic a change in circumstances that to continue to insist on full performance of the contract may cause undue hardship to one of the contracting parties. For example, in this last-mentioned instance, after a contract has been entered into, a catastrophic event might occur which renders the contract a wholly different one from that which the contracting parties had originally contemplated at the time they entered into the contract concerned. Or, parties might have made a genuine error in entering the contract concerned. Or, there might have been extremely serious consequences arising from a breach committed by a contracting party which that party nevertheless argues cannot justify termination of the contract by the innocent party because the term that has been breached is not an important term.[12] In these, as well as many other, situations, it might well be argued that it would be *unfair* for the court concerned to simply hold the contracting parties (in particular, the party adversely affected) to their contract without more. It is therefore not surprising that the courts have developed various doctrines to ensure that such unfairness does not result.

It is nevertheless clear that the *first* ideal (that is to say, that contracting parties ought to be *held to* their bargain) ought to be the *starting-point as well as the general rule* and that the *second* ideal (that in certain situations at least the contracting parties ought to be *released* from their bargain) ought to be the *exception*. It is at this point

11. And see the Singapore Court of Appeal decision of *Tee Soon Kay v Attorney-General* [2007] 3 SLR 133 at [109].

12. Namely a 'condition' (as opposed to a 'warranty') pursuant to the 'condition-warranty approach'. I discuss the role of this approach as well as the '*Hongkong Fir* approach' in more detail below (see the main text accompanying below n 50 et seq).

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that the underlying thread of 'radicalism' aids the court concerned to *balance the tension* between these two competing ideals.

Let me now proceed to examine the role of 'radicalism' in four distinct areas of contract law which not only relate to when a contract comes to an end in law but also (and more importantly) illustrate the central theme of this lecture.[13] These areas are, respectively, the doctrine of frustration, the doctrine of common mistake, the law relating to discharge of the contract by breach and (closely related to the preceding area) the law relating to fundamental breach in the context of exception clauses. I should mention that there is, in fact, also a fifth doctrine which, whilst not related (solely, at least) to the end of the contract concerned as such, nevertheless plays an important role as well – the doctrine of implied terms. Significantly, perhaps, the doctrine of implied terms, whilst described by the late RE Megarry as 'so often the last desperate resort of counsel in distress',[14] also often aids the court in achieving a fair result.

I will proceed by first outlining the areas of contract law just mentioned. As the law of contract is such a basic subject, everyone will, I am sure, be familiar with them. So I do not propose to deal with them in any detail. However, I will highlight the main characteristics that justify describing the respective doctrines as each being related to the concept of 'radicalism'.

Radicalism (1) – the doctrine of frustration

Turning, first, to the doctrine of frustration, this particular doctrine relates to the discharge of the contract concerned by *operation of law*. More importantly, perhaps, this doctrine – perhaps more than any other – refers *directly* to the concept of 'radicalism'. Indeed, in the leading House of Lords decision of *Davis Contractors Ltd v Fareham Urban District Council*,[15] Lord Radcliffe observed thus:[16]

> '[F]rustration occurs whenever the law recognizes that *without default of either party* a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing *radically different* from that which was undertaken by the contract.'

The two italicised phrases above refer, respectively, to the fact that the doctrine of frustration operates to discharge the contract concerned by operation of law because neither party is at fault and, secondly (and more importantly), that that discharge occurs as a result of a *radical* change in the obligation undertaken by the parties. It is also significant to note that this particular formulation by Lord Radcliffe continues to be used to the present day – as evidenced, for example, by the reference to it in the

13. Some of the ideas to be discussed have been dealt with by me elsewhere: see A Phang 'Undue influence – methodology, sources and linkages' [1995] Journal of Business Law 552 and, by the same author, 'On linkages in contract law – mistake, frustration and implied terms reconsidered' (1996) 15 Trading Law 481 and 'On architecture and justice in twentieth century contract law' (2003) 19 Journal of Contract Law 229. However, this lecture deals with more ideas as well as materials and (more importantly) attempts to draw the various threads together.
14. See RE Megarry *Miscellany-at-Law* (London: Stevens & Sons Ltd, 1955) at p 210; and cited in the Singapore Court of Appeal decision of *Panwah Steel Pte Ltd v Koh Brothers Building & Civil Engineering Contractor (Pte) Ltd* [2006] 4 SLR 571 at [8].
15. [1956] 1 AC 696.
16. Ibid, at 729 (emphasis added).

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Singapore Court of Appeal decision of *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd*.[17] It has also been cited in decisions in Hong Kong.[18] Indeed, one learned author recently observed that:[19]

> '*Taylor v Caldwell* marked a starting point for the development of *a new doctrine that was not fully developed until* the House of Lords' decisions in *Davis Contractors Ltd v Fareham UDC*, in which Lord Radcliffe recognised that the doctrine of frustration did not depend upon a condition implied by the parties but upon the operation of a rule of law and *National Carriers Ltd v Panalpina (Northern) Ltd*, in which it was recognised that the doctrine of frustration extended to leases.'

Taylor v Caldwell[20] is, of course, often cited as the seminal decision in the law of frustration[21] but, as we have just noted, it is in the formulation by Lord Radcliffe almost a century later that we find a succinct *modern* statement of the doctrine itself.

The doctrine of frustration itself is a fascinating one.[22] It generates both theoretical[23] as well as practical difficulties.[24] That these issues are still very relevant in the modern day is illustrated by the recent decision of the Singapore Court of Appeal (in the *RDC Concrete* case) where issues relating to *force majeure* clauses were considered.[25] However, I must resist the temptation to explore them because they do not impact directly on the central theme of the present lecture.[26] The point that is relevant for our present purposes is simply this: that the doctrine of frustration is a quintessential example of what I mean by 'radicalism' in the context of the present lecture. It is also an example of how 'radicalism' leads to a *fair* result inasmuch as in a situation where the doctrine of frustration operates, it would (in the circumstances) be fair to permit the parties (by operation of law) to be discharged from the contract in question. It should also be noted that one fundamental principle of the doctrine of frustration is that it will not be applied liberally, lest the principle of sanctity of contract is undermined. At this juncture, I should reiterate what I had mentioned earlier – that this last-mentioned principle of sanctity of contract itself embodies a concept of fairness

17. [2007] 4 SLR 413 at [59]. See also, eg, the recent English Court of Appeal decision of *CTI Group Inc v Transclear SA* [2008] 2 Lloyd's Rep 526 at [13].
18. See, eg, the Hong Kong High Court decision of *Yung Kee Co v Cheung So Yin Kee* [1983] 1 HKC 386 at 393 and the Hong Kong Court of Appeal decision of *Jan Albert (HK) Ltd v Shu Kong Garment Factory Ltd* [1989] 2 HKC 156 at 162. See also generally S Hall *Law of Contract in Hong Kong – Cases and Commentary* (London: LexisNexis, 2nd edn, 2008) pp 704–708.
19. See C MacMillan '*Taylor v Caldwell* (1863)' in C Mitchell and P Mitchell (eds) *Landmark Cases in the Law of Contract* (Oxford: Hart Publishing, 2008) ch 6 at p 203 (emphasis added).
20. (1863) 3 B & S 826 (for an historical perspective of the case itself, see MacMillan, ibid).
21. And see MacMillan, ibid, at p 203.
22. The leading work must surely be Professor Treitel's monumental treatise: GH Treitel *Frustration and Force Majeure* (London: Sweet & Maxwell, 2nd edn, 2004).
23. Simply put, what is the precise juridical basis of the doctrine? And see generally the present author's views on this particular issue in A Phang 'Frustration in English law – a reappraisal' (1992) 21 Anglo-American Law Review 278 at 284–285.
24. A brief list would include the following: the issue of increased costs, the role of foreseeability as well as *force majeure* clauses, and the issue of self-induced frustration.
25. This particular case is discussed in more detail below with regard to the doctrine of discharge by breach (see generally the main text to n 50 et seq below).
26. I have, in fact, dealt with them elsewhere; see generally Phang, above n 23.

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inasmuch as it is fair, ceteris paribus, to hold the parties to their original bargain. Hence, there are, in fact, different conceptions of the concept of fairness,[27] and the court's duty is to ascertain when the conception of fairness embodied in discharging the parties from their contract should come into play because of the 'radicalism' inherent in a successful invocation of the doctrine of frustration. Let me now proceed to consider the next contractual doctrine which also exemplifies and embodies this concept of 'radicalism', namely, the doctrine of common mistake.

Radicalism (2) – the doctrine of common mistake

It should be noted, by way of a not insignificant preliminary observation, that there has been controversy as to whether or not there is a doctrine of mistake – let alone common mistake – in the first instance.[28] That the leading contract textbooks and (more importantly) cases continue to endorse the doctrine[29] is, I suggest, sufficient cause – for the purposes of this lecture, at least – not to be further detained by such controversy.

That having been said, there has (on a more specific level) also been another relatively recent controversy as to whether or not there are indeed two categories of common mistake – one at common law and the other in equity. It might in fact be stated that there is presently *no* controversy in the *English* context because there is clear authority that the latter does *not* exist. This authority is embodied, of course, in the English Court of Appeal decision of *Great Peace Shipping Limited v Tsavliris Salvage (International) Limited*.[30] Having commented (rather negatively, I am afraid)

27. This device has, in the context of jurisprudence, been used to great effect by Professor Ronald Dworkin; see, eg, Dworkin, above n 3, ch 4. However, the actual concept centring on 'conceptions of the same concept' is to be located in an earlier work which is also cited by Dworkin (in *Taking Rights Seriously*, above n 3, p 103): see WB Gallie, 'Essentially contested concepts' (1956) 56 Proceedings of the Aristotelian Society 167 (which essay is reprinted in ch 8 of the author's book, *Philosophy and the Historical Understanding* (New York: Schocken Books, 2nd edn, 1968)).

28. See generally, eg, CJ Slade 'The myth of mistake in the English law of contract' (1954) 70 Law Quarterly Review 385; PS Atiyah '*Couturier v Hastie* and the sale of non-existent goods' (1957) 73 Law Quarterly Review 340; PS Atiyah and FAR Bennion 'Mistake in the construction of contracts' (1961) 24 Modern Law Review 421; as well as (more recently) JC Smith 'Contracts – mistake, frustration and implied terms' (1994) 110 Law Quarterly Review 400, amongst other pieces.

29. Though cf the category of *mutual* mistake, where it was observed, in the Singapore High Court decision of *Wellmix Organics (International) Pte Ltd v Lau Yu Man* [2006] 2 SLR 117, as follows (at [58]): 'The doctrine of mutual mistake *overlaps completely* . . . with the doctrine of offer and acceptance, dealing with the issue of the *formation* of a pre-existing transaction as opposed to a mistaken payment *simpliciter* (and see, for this last-mentioned distinction, *per* Lai Kew Chai J in the Singapore High Court decision of *Info-communications Development Authority of Singapore v Singapore Telecommunications Ltd (No 2)* [2002] 3 SLR 488, especially at [85]–[89]). Put simply, this particular aspect of the law relating to mistake is simply the result of *a lack of coincidence between offer and acceptance*. In other words, both parties are at *cross-purposes* and, hence, *no* agreement or contract has been formed as a result' (original emphasis).

30. [2003] QB 679; and not following the well-established English Court of Appeal decision of *Solle v Butcher* [1950] 1 KB 671 (in particular, the observations of Denning LJ (as he then was); and for an historical perspective of the case itself, see C MacMillan '*Solle v Butcher*

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on this particular decision prior to my appointment to the Bench,[31] I should perhaps refrain from saying more, save that I would obviously not be bound by these views should the issue arise before me in a judicial capacity. That having been said, I am still by no means convinced that my earlier views were clearly off the mark.[32] Indeed, since those views were expressed, the Singapore Court of Appeal has in fact (and without any participation on my part, I should hasten to add) confirmed that the doctrine of common mistake in equity is, indeed, alive and well in the Singapore context.[33] The position in Hong Kong, with perhaps the (apparent) exception of one decision,[34] appears to be the same.[35] Certainly, the test at *common law* (at least) is, to the best of my knowledge, the same in all Commonwealth jurisdictions.

Be that as it may, even *that* controversy need not detain us in the context of the present lecture. This is because, whichever view one endorses, a close perusal of the formulations of common mistake both at common law and in equity will reveal that there is, in substance at least, no difference between them. Indeed, they are so close that

(1950)' in C Mitchell and P Mitchell *Landmark Cases in the Law of Restitution* (Oxford: Hart Publishing, 2006) ch 12). Not surprisingly, this particular decision has attracted much commentary; see, eg, FMB Reynolds 'Reconsider the contract textbooks' (2003) 119 Law Quarterly Review 177; SB Midwinder '*The Great Peace* and precedent' (2003) 119 Law Quarterly Review 180; C Hare 'Inequitable mistake' [2003] Cambridge Law Journal 29; A Chandler, J Devenney and J Poole 'Common mistake: theoretical justification and remedial inflexibility' [2004] Journal of Business Law 34; JD McCamus 'Mistaken assumptions in equity: sound doctrine or chimera?' (2004) 40 Canadian Business Law Journal 46; KFK Low 'Coming to terms with *The Great Peace* in common mistake' in JW Nyers, R Bronaugh and SGA Pitel (eds) *Exploring Contract Law* (Oxford: Hart Publishing, 2009) ch 13; and A Phang 'Controversy in common mistake' [2003] Conveyancer and Property Lawyer 247.

31. See Phang, ibid.

32. Briefly put, the House of Lords decision in *Bell v Lever Brothers Ltd* [1932] AC 161 did not, by any means, establish a clear and unambiguous doctrine of common mistake at common law in the first instance. There is, indeed, some case-law (the Australian High Court decision in *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377) and an influential body of academic literature (see the articles cited above n 28) that suggest that there is no substantive doctrine of common mistake at common law in the first instance and that it is all, in the final analysis, a question of construction of the contract concerned. Further, a leading textbook expressed doubt as to whether or not, even assuming that there was a substantive doctrine of common mistake at common law in the first instance, such a doctrine was *practically viable*, given the almost absolute strictness with which it was applied in *Bell v Lever Brothers Ltd* itself (see MP Furmston *Cheshire, Fifoot and Furmston's Law of Contract* (Oxford: Oxford University Press, 17th edn, 2007) at pp 291–293). See also the recent and exhaustive historical survey as well as analysis by C MacMillan 'How temptation led to mistake: an explanation of *Bell v Lever Brothers, Ltd*' (2003) 119 Law Quarterly Review 625.

33. See the Singapore Court of Appeal decision of *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2005] 1 SLR 502 (noted by TM Yeo '*Great Peace*: a distant disturbance' (2005) 121 Law Quarterly Review 393; KFK Low 'Unilateral mistake at common law and in equity' [2005] Lloyd's Maritime and Commercial Law Quarterly 423; and PW Lee 'Unilateral mistake in common law and equity – *Solle v Butcher* reinstated' (2006) 22 Journal of Contract Law 81).

34. Cf the Hong Kong Court of First Instance decision of *Tony Investments Ltd v Fung Sun Kwan* [2006] 1 HKLRD 835, where the court cited the *Great Peace Shipping* case (above n 30).

35. See, eg, the Hong Kong High Court decision of *China Resources Metals & Minerals Co Ltd v Ananda Non-Ferrous Metals Ltd* [1994] 3 HKC 526, where the doctrines of common mistake at common law and in equity were considered. This decision antedates, of course, that in the *Great Peace Shipping* case. A recent work appears to adopt a more neutral position on this particular issue (see Hall, above n 18, pp 529–538).

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I suggested (two decades ago) that there ought to be a *merger* between the two doctrines.[36] In the light of the *Great Peace Shipping* case, however, such a view is not only heresy, at least under English law, but would be impossible to implement since there is no doctrine of common mistake in equity to merge with it in the first instance. However, I should keep, as it were, to the 'straight and narrow path' of this lecture. And that path reveals one simple and fundamental proposition: that the doctrine of common mistake (whether at common law or in equity) is (like the doctrine of frustration) premised on the concept of 'radicalism'. Indeed, the test for common mistake (both at common law and in equity) is (in *substance*) the *same* as that for frustration.[37]

To take but a few examples from the case-law, in the leading House of Lords decision of *Bell v Lever Brothers Ltd*[38] (which dealt with common mistake at common law), Lord Atkin observed thus:[39]

> '[A] mistake will not affect assent unless it is the mistake of both parties, and is as to the existence of some quality which makes the thing without the quality *essentially different* from the thing as it was believed to be.'

And, in the same case, Lord Thankerton was of the view that an operative common mistake 'can only properly relate to something which both must necessarily have accepted in their minds as *an essential and integral element* of the subject matter'.[40]

Indeed, as I pointed out – in an extrajudicial context some 20 years ago – '[b]oth [these] formulations bear an uncanny resemblance to, and affinity with, the doctrine of frustration'.[41]

Turning to a more 'modern' precedent, Steyn J (as he then was) observed thus (in the English High Court decision of *Associated Japanese Bank (International) Ltd v Credit du Nord SA*):[42]

> 'The first imperative must be that the law ought to uphold rather than destroy apparent contracts. Secondly, the common law rules as to a mistake regarding the quality of the subject matter, *like the common law rules regarding commercial frustration*, are designed to cope with the impact of unexpected and wholly exceptional circumstances on apparent contracts. Thirdly, such a mistake in order to attract legal consequences *must substantially be shared by both parties, and must relate to facts as they existed at the time the contract was made*. Fourthly, and this is the point established by *Bell v. Lever Brothers Ltd* [1932] AC 161, the mistake must render the subject matter of the contract *essentially and radically different from* the subject matter which the parties believed to exist. . . . Fifthly, there is a requirement which was not specifically discussed in *Bell v. Lever Brothers*

36. See A Phang 'Common mistake in English law: the proposed merger of common law and equity' (1989) 9 Legal Studies 291.
37. As to which see above n 16. Cf also the tests for unilateral mistake as well as mistaken identity (and see generally, eg, Furmston, above n 33, pp 309–317 as well as (insofar as the former is concerned) *Chwee Kin Keong v Digilandmall.com Pte Ltd*, above n 33).
38. Above n 32.
39. Ibid, at 218 (emphasis added).
40. Ibid, at 235 (emphasis added).
41. See Phang, above n 36, at 294.
42. [1989] 1 WLR 255 at 268–269 (emphasis added); noted by GH Treitel, 'Mistake in contract' (1988) 104 Law Quarterly Review 501; G Marston 'Common mistake – whether guarantee transaction void ab initio' [1988] Cambridge Law Journal 173; and JW Carter 'An uncommon mistake' (1991) 3 Journal of Contract Law 237.

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Ltd. . . . In my judgment a party cannot be allowed to rely on a common mistake where the mistake consists of a belief which is entertained by him without any reasonable grounds for such belief . . .'

The observations speak for themselves. The judge not only refers *directly* to the linkage between common mistake and frustration but also summarises the basic test in relation to common mistake (which is, in substance, the same as that for frustration).

Yet another example can be found in the *Great Peace Shipping* case itself, where Lord Phillips of Worth Matravers MR (as he then was), delivering the judgment of the court, observed, as follows:[43]

> 'At the time of *Bell v Lever Bros Ltd* . . . the law of frustration *and* common mistake *had advanced hand in hand on the foundation of a common principle*. Thereafter frustration proved a more fertile ground for the development of this principle than common mistake, *and consideration of the development of the law of frustration assists with the analysis of the law of common mistake*.'

The classic formulation of common mistake in *equity* (a jurisdiction that, as I have mentioned, has been abolished in England, albeit not in Singapore) is to be found in Denning LJ's (as he then was) observations in the English Court of Appeal decision of *Solle v Butcher*, as follows:[44]

> 'A contract is also liable *in equity* to be set aside if the parties were under a common misapprehension either as to facts or as to their relative and respective rights, *provided that the misapprehension was fundamental and that the party seeking to set it aside was not himself at fault.*'

It will be immediately seen that, although slightly different language is used with regard to the formulations at both common law and in equity, their substance is essentially the same.[45]

The fact that both common mistake and frustration are premised on the concept of 'radicalism' is therefore not surprising in the least because (as we have just seen) the respective formulations for the doctrines of common mistake and frustration are, in substance, the same – the only significant difference being that common mistake occurs *at or before* the time the contract concerned is entered into, whereas frustration occurs *after* the contract has been entered into. Put simply, the doctrine of common mistake *vitiates* the contract in the context of its very *formation*, whereas the doctrine of frustration operates to *discharge* the parties from the contract because of an *external, catastrophic* event (due, ex hypothesi, to the fault of *none* of the contracting parties) that has *supervened after* the *formation* of the contract, thus so drastically (or, more accurately in the context of this lecture, *radically*) altering the contractual arrangements agreed upon between the parties that to insist upon continuation of performance would, in effect, be to hold the parties to a *radically or fundamentally different contract* altogether[46] – a fundamental point that holds good throughout the

43. Above n 30, at [61] (emphasis added). See also the analysis ibid, at [62] et seq.
44. Above n 30, at 693 (emphasis added). Though cf J Cartwright '*Solle v Butcher* and the doctrine of mistake in contract' (1987) 103 Law Quarterly Review 594.
45. And see generally Phang, above n 36, at 295–297.
46. A classic illustration of this distinction can be found in the 'Coronation cases', where cases involving the doctrine of frustration (see, eg, the English Court of Appeal decisions of *Krell v Henry* [1903] 2 KB 740 and *Chandler v Webster* [1904] 1 KB 493) and those involving the doctrine of common mistake (see, eg, the English High Court decision of *Griffith v Brymer*

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common law of contract in the Commonwealth, including Hong Kong (where the Hong Kong Court of Appeal decision of *Jan Albert (HK) Ltd v Shu Kong Garment Factory Ltd*[47] may be especially noted). Notice, at this juncture, that the courts, by employing both these doctrines as a 'legal tipping point' (so to speak) in order to 'free' the parties from the contract concerned, have not ignored the very important and fundamental principle of sanctity of contract. As alluded to at the outset of this lecture, it is simply unfair in circumstances that justify the invocation of the doctrines of common mistake and frustration, to insist on holding the parties to their contract. However, because of the radical effect that these doctrines have, the courts will invoke them only in exceptional circumstances (which is particularly the case with regard to common mistake at common law[48]). This is, in my view, not so much a legal rule or principle in the conventional sense of the word but is, rather, a legal *attitude* which keeps in clear view the fact that, absent exceptional circumstances, the fundamental principle (and, indeed, ideal) of sanctity of contract ought to be observed. Indeed, as just observed, the concept of sanctity of contract itself embodies a conception of fairness (albeit a different one from that embodied, for example, in the doctrine of frustration, to which it must give way, so to speak, in a situation of 'radicalism').

There is one other point; as I observed elsewhere:[49]

> 'It ought . . . to be observed that there is one further (and possible) point of similarity between [the doctrines of frustration and common mistake], which is entirely consistent with the fundamental similarity between the tests for each, *viz. the requirement that there be no fault on the part of the party pleading the doctrine*. Under the doctrine of frustration, this takes the form of the requirement to the effect that frustration cannot be "self-induced". Insofar as the doctrine of common mistake at common law is concerned, this is reflected in the fifth of Steyn J's legal propositions in the *Associated Japanese Bank* case, *viz.*, that a party will not be allowed to rely on the doctrine of mistake "where the mistake consists of a belief which is entertained by him without any reasonable grounds for such belief".'

Let us now consider briefly the next contractual doctrine which also exemplifies and embodies the concept of 'radicialism', namely, discharge by breach of contract.

Radicalism (3) – discharge by breach

I should point out, at the outset, that the topic of discharge by breach is one of the most confused (and confusing) areas of the common law of contract. This is due principally to the fact that there are various tests which the courts employ in ascertaining whether or not the innocent party can elect to treat itself as discharged from the contract as a

(1903) 19 TLR 434) concerned *precisely* the *same* event, namely the hiring of a room along the route of the Coronation procession which was cancelled owing to the sudden illness of King Edward. In particular, the case of *Griffith v Brymer*, above, was decided on the basis of the doctrine of common mistake as the parties had made the contract in common ignorance of the decision to cancel the procession one hour earlier.

47. Above n 18; noted in A Phang 'Common mistake and frustration in Hong Kong' [1991] Lloyd's Maritime and Commercial Law Quarterly 297. See also generally Hall, above n 18, pp 518–538 and 728–731.

48. And see generally Phang, above n 36, at 297–301.

49. See Phang 'On linkages in contract law – mistake, frustration and implied terms reconsidered', above n 13, at 486–487 (emphasis added).

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Table 1 Situations entitling an innocent party to terminate the contract at common law

Situation	Circumstances in which termination is legally justified	Relationship to other situations
I ***Express*** **reference** to the right to terminate **and** what will entitle the innocent party to terminate the contract		
(1)	The contractual term breached clearly states that, in the event of certain event or events occurring, the innocent party is entitled to terminate the contract	None – it operates *independently of all other* situations. In other words: Situations (2), (3)(a) and (3)(b) (ie all the situations in II, below) are *not* relevant
II ***No*** **express reference** to the right to terminate **and** what will entitle the innocent party to terminate the contract		
(2)	Party in breach ***renounces*** the contract by clearly conveying to the innocent party that it ***will not perform*** *its contractual obligations* ***at all*** ***Quaere*** whether the innocent party can terminate the contract if the party in breach *deliberately* chooses to perform its part of the contract in a manner that amounts to a *substantial breach*	None – it operates *independently* of *all other* situations. In other words: Situation (1) is *not* relevant Situations (3)(a) and (3)(b) are *not* relevant
(3)(a)	**'Condition-warranty approach'** – party in breach has breached a *condition* of the contract (as opposed to a *warranty*)	Should be applied ***before*** the '***Hongkong Fir*** approach' in situation (3)(b) Situation (1) is *not* relevant Situation (2) is *not* relevant
(3)(b)	'***Hongkong Fir*** **approach**' – party in breach which has committed a breach, the ***consequences*** of which *will* ***deprive the innocent party of substantially the whole benefit*** *which it was intended that the innocent party should obtain from the contract*	Should be applied only ***after*** the 'condition-warranty approach' in situation (3)(a) *and* if the term breached is *not* found to be a *condition* Situation (1) is *not* relevant Situation (2) is *not* relevant

result of a breach by the other party of one or more of the terms of the contract concerned; more importantly, the *precise relationship* amongst the tests is (as we shall see) none to clear, to say the least.

An attempt to summarise the tests judicially in the Singapore context was made in the Court of Appeal decision of *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd*;[50] the summary was, in fact, also rendered in *diagrammatic* form and is reproduced in table 1 above.

The Singapore Court of Appeal subsequently delivered a similar summary (albeit in non-diagrammatic form) in *Man Financial (S) Pte Ltd (formerly known as ED & F Man International (S) Pte Ltd) v Wong Bark Chuan David*,[51] as follows:[52]

50. Above n 17, at [113].
51. [2008] 1 SLR 663.
52. See ibid, at [153]–[158] (original emphasis).

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'153 As stated in *RDC Concrete*, there are four situations which entitle the innocent party (here, the appellant) to elect to treat the contract as discharged as a result of the other party's (here, the respondent's) breach.

154 The *first* ("Situation 1") is where the contractual term in question clearly and unambiguously states that, should an event or certain events occur, the innocent party would be entitled to terminate the contract (see *RDC Concrete* at [91]).

155 The *second* ("Situation 2") is where the party in breach of contract ("the guilty party"), by its words or conduct, simply *renounces* the contract inasmuch as it clearly conveys to the innocent party that it will not perform its contractual obligations at all (see *RDC Concrete* at [93]).

156 The *third* ("Situation 3(a)") is where the term breached (here, Clause C.1) is a *condition* of the contract. Under what has been termed the "condition-warranty approach", the innocent party is entitled to terminate the contract if the term which is breached is a condition (as opposed to a warranty): see *RDC Concrete* at [97]. The focus here, unlike that in the next situation discussed below, is not so much on the (actual) consequences of the breach, but, rather, on the *nature of the term* breached.

157 The *fourth* ("Situation 3(b)") is where the breach of a term deprives the innocent party of substantially the whole benefit which it was intended to obtain from the contract (see *RDC Concrete* at [99]). (This approach is also commonly termed the "*Hongkong Fir* approach" after the leading English Court of Appeal decision of *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26; see especially *id* at 70.) The focus here, unlike that in Situation 3(a), is not so much on the nature of the term breached, but, rather, on the *nature and consequences of the breach*.

158 Because of the different perspectives adopted in Situation 3(a) and Situation 3(b), respectively (as briefly noted above), which differences might, depending on the precise factual matrix, yield different results when applied to the fact situation, this court in *RDC Concrete* concluded that, as between both the aforementioned situations, the approach in Situation 3(a) should be *applied first*, as follows (*id* at [112]):

"If the term is a *condition*, then the innocent party would be entitled to terminate the contract. *However*, if the term is a *warranty* (instead of a condition), then the court should nevertheless proceed to apply the approach in Situation 3(b) (*viz*, the *Hongkong Fir* approach)." [original emphasis]'

Returning to the diagrammatic summary, it will be seen that there are virtually no difficulties with *heading I* (a situation in which there *is express* reference to the right to terminate the contract and what will entitle the innocent party to terminate the contract, ie, where the contractual term breached clearly states that, in the event of certain event or events occurring, the innocent party is entitled to terminate the contract). Indeed, the relative straightforwardness means that *heading* I comprises (and is, in fact, coterminous with) *situation* 1. It need only be added that although it has been pointed out in the above diagram that situation 1 operates independently of all the other situations, it will be seen that the term operates, in *substance*, as a *'condition'*. Indeed, it might even be argued that such a term is *clearer* than one which simply states (without more) that it is a 'condition'. In the House of Lords decision of

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L Schuler AG v Wickman Machine Tool Sales Ltd,[53] for example, the majority held that, although the word 'condition' was expressly utilised, that word was being utilised not as a term of legal art, but, rather, in a lay sense. However, it was observed, by the Singapore Court of Appeal, in the *Man Financial* case, that the decision in the *Schuler* case might well have been, in *substance*, an *indirect* application of the '*Hongkong Fir* approach' instead.[54] However, it should also be noted, at this juncture, that it is arguable that such a term could nevertheless be broader than a 'condition' inasmuch as it might permit termination of the contract, notwithstanding that there might not be a right to terminate under the common law – although what is the precise position is not wholly free from doubt and much would also depend on the precise language as well as context of the term concerned.[55] Nevertheless, it could also be argued that, even in such a broader situation, the *effect* continues, in substance, to be the *same* as that of a 'condition'. It is also unclear whether such a term might be subject to judicial control.[56] More importantly, perhaps, termination of the contract under 'situation 1' might result in a different measure of damages as opposed to termination of the contract under 'situation 3'.[57] It should also be observed, for reasons that will be clear in a moment,[58] that the *corollary* of heading 1 (read together with situation 1) is where the term concerned states *expressly* the *opposite* (namely, that the breach of that term will *never* entitle the innocent party to terminate the contract) – a situation which will be referred to only in the briefest of fashions in a moment.

Difficulties arise, however, in relation to *heading II* (where there is *no express* reference to the right to terminate the contract and what will entitle the innocent party to terminate the contract). Under this broad heading are *three* situations which are set out in the above diagram (as situations 2, 3(a) and 3(b), respectively). Situation 2 is relatively straightforward as there is a *complete renunciation* by the party in breach of the contract itself.[59]

Where, however, there has not been such a complete rejection of the contract as such (which is, presumably, indeed the situation in most cases), complications arise. In this regard, there are two alternative tests. To recapitulate, the 'condition-warranty

53. [1974] AC 235.

54. See above n 51, at [167]–[169].

55. Cf, eg, the House of Lords' decision of *Afovos Shipping Co SA v Romano Pagnan and Pietro Pagnan* [1983] 1 WLR 195 at 203 and the New South Wales Court of Appeal decision of *Hewitt v Debus* (2004) 39 NSWLR 617 with the High Court of Australia decisions of *Shevill v The Builders Licensing Board* (1982) 149 CLR 620 at 627–628 and (perhaps) *Legione v Hateley* (1983) 152 CLR 406 at 445, as well as the New South Wales Court of Appeal decision of *Honner v Ashton* (1979) 1 BPR 9478 at 9483. See also generally JW Carter 'Termination clauses' (1990) 3 Journal of Contract Law 90 at 104–105.

56. See generally S Whittaker 'Termination clauses' in A Burrows and E Peel (eds) *Contract Terms* (Oxford: Oxford University Press, 2007) ch 13 and H Beale 'Penalties in termination provisions' (1988) 104 Law Quarterly Review 355.

57. See the English Court of Appeal decision of *Financings Ltd v Baldock* [1963] 2 QB 104; though cf the (also) English Court of Appeal decision of *Lombard North Central Plc v Butterworth* [1987] 1 QB 527 (noted in GH Treitel, 'Damages on rescission for breach of contract' [1987] Lloyd's Maritime and Commercial Law Quarterly 143 and Beale, above n 56). Cf also the interesting articles by Carter, above n 55, and BR Opeskin 'Damages for breach of contract terminated under express terms' (1990) 106 Law Quarterly Review 293.

58. See the main text accompanying below nn 63–67.

59. Though cf the query (set out in the table above) as to whether or not the innocent party can terminate the contract if the party in breach *deliberately* chooses to perform its part of the contract in a manner that amounts to a *substantial breach*.

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approach' (which is 'situation 3(a)' in the *RDC Concrete* case) focuses on the *nature of the term* breached, whereas the '*Hongkong Fir* approach' (which is 'situation 3(b)' in the *RDC Concrete* case) focuses on the *consequences* of the breach.

As was explained in the *RDC Concrete* case, these two tests might yield the *same* result, *although* this would depend upon *the precise fact situation concerned*.[60] Where, however, the tests yield a *different* result, the very important issue arises as to which test (ie, 'situation 3(a)' or 'situation 3(b)') is to prevail. Again, the court in the *RDC Concrete* case set out an approach that is reflected in the diagram above. Briefly put, the 'condition-warranty approach'[61] in situation 3(a) should be applied *before* the '*Hongkong Fir* approach'[62] in situation 3(b); indeed, the '*Hongkong Fir* approach' should only be applied if the term breached is found *not* to be a *condition* under the 'condition-warranty approach'.

For the purposes of today's lecture, we need not delve into the various legal difficulties because our concern is really with the test pursuant to the '*Hongkong Fir* approach'. Indeed, there have been commentaries on the *RDC Concrete* case itself and one principal difficulty which at least two learned commentators have expressed with the decision was the fact that there appeared to be no provision for the situation where the contracting parties *provided* that the term (which had been breached) was to be *a warranty*.[63] This is an interesting critique.

There are, in fact, at least two ways (or situations) in which a 'warranty' can arise (as defined under the 'condition-warranty approach').

The *first* is where *the court itself* finds that the term concerned is not a 'condition' (this would be pursuant to 'situation 3' in the *RDC Concrete* case); it would, ex hypothesi (and pursuant to the 'condition-warranty approach'), then be a 'warranty'.

The *second* is where the parties themselves *expressly* designate the term concerned as a 'warranty' (this would be the converse of 'situation 1' in the *RDC Concrete* case).[64]

60. See above n 17, at [102]–[103].

61. Where the focus is on the *nature* of the term (as opposed, as in the '*Hongkong Fir* approach', to the *actual consequences* of the breach). Reference may also be made to the oft-cited observations by Bowen LJ (as he then was) in the English Court of Appeal decision of *Bentsen v Taylor, Sons & Co* [1893] 2 QB 274 at 281.

62. This approach was first enunciated by Diplock LJ (as he then was) in the English Court of Appeal decision of *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26, and is elaborated upon below (see the text to n 79 et seq, below).

63. See generally JW Carter 'Intermediate terms arrive in Australia and Singapore' (2008) 24 Journal of Contract Law 226 and Y Goh 'Towards a consistent approach in breach and termination of contract at common law: *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd*' (2008) 24 Journal of Contract Law 251. Reference may also be made to D Nolan '*Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd, The Hongkong Fir* (1961)' in Mitchell and Mitchell, above n 19, ch 9 at pp 293–294, where, however, the learned author focuses (in the final analysis) on what is (in substance) the '*Hongkong Fir* approach' (see also FMB Reynolds 'Warranty, condition and fundamental term' (1963) 79 Law Quarterly Review 534).

64. Bearing in mind the approach of the House of Lords in *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235 (where it will be recalled that the court held that, despite the fact that the parties had expressly utilised the word 'condition', that word was merely used in a lay sense and not as a legal term of art), I am assuming here that the parties would (in such a situation) utilise clear and unambiguous language that goes beyond merely stating that the term concerned is a 'warranty'.

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To give effect to the first situation (as has been suggested by one writer)[65] would be to deny any 'legal space' to the '*Hongkong Fir* approach' (which, in fact, embodies its own conception of fairness[66]). Indeed, in the *RDC Concrete* case itself, such 'legal space' was, in fact, created for the '*Hongkong Fir* approach' under situation 3 itself. The issue remains, however, as to whether effect should be given to the intention of the parties in the *second* situation – one which I shall not express a view on as it is (as already mentioned) outside the purview of the present lecture. Suffice it to state that a term in this particular situation (which, as we have just noted, is the converse of 'situation 1' in the *RDC Concrete* case) would operate, in *substance*, as a 'warranty'.[67]

So much by way of an extremely brief reference (only) to the commentary on the *RDC Concrete* case in relation to the doctrine of discharge by breach in the Singapore context. It is significant, perhaps, that the position in other Commonwealth jurisdictions is not much clearer. For example, in the *Australian* context, the High Court of Australia only recently endorsed the '*Hongkong Fir* approach' in *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd*.[68] Indeed, the majority of the judges (Gleeson CJ, Gummow J, Heydon J and Crennan J) did not (in a joint judgment) rest their decision on the ground that the terms concerned comprised 'conditions',[69] but held, instead, that pursuant to the '*Hongkong Fir* approach', the breaches had been serious enough to entitle the innocent party to terminate the contract.[70] There was therefore no need for the court to consider the precise (and problematic) *relationship* between the 'condition-warranty approach', on the one hand, and the '*Hongkong Fir* approach', on the other. The position in *Canada*, it should be noted, does not appear

65. See Goh, above n 63. Not surprisingly, the learned author also argues that effect should be given to the intention of the parties in the *second* situation as well (ie where the parties have *expressly* designated the term concerned as a 'warranty').
66. See, eg, Reynolds, above n 63 (where it is argued that the focus should be on the nature of the breach, rather than the nature of the term broken); Prof GH Treitel's inaugural lecture delivered before the University of Oxford in *Doctrine and Discretion in the Law of Contract* (Oxford: Clarendon Press, 1981) p 6 (where it is pointed out that the law relating to discharge by breach was focused, *originally*, on the *seriousness* of the breach (which is, in substance, the '*Hongkong Fir* approach'), although it later developed to focus on the *nature of the term* (which is the 'condition-warranty approach'); and Nolan, above n 63, pp 270–276 (as well as p 294).
67. Reference may also be made to the English High Court decision of *M & J Polymers Ltd v Imerys Minerals Ltd* [2008] 1 Lloyd's Rep 541 at 547. Since this lecture was delivered, the Singapore Court of Appeal has handed down its judgment in *Sports Connection Private Limited v Deuter Sports GmbH* [2009] SGCA 22, where the approach laid down in the *RDC Concrete* case (above n 17) was reaffirmed, but 'with the *extremely limited exception* that, where the term itself states expressly (as well as clearly and unambiguously) that *any* breach of it, *regardless* of the seriousness of the consequences that follow from that breach, will *never* entitle the innocent party to terminate the contract, then *the court will give effect to this particular type of term* (*viz*, a warranty *expressly* intended by the parties)' (at [57]; original emphasis); see also ibid, at [48]–[50].
68. (2007) 233 CLR 115; noted in K Dharmananda and A Papamatheos 'Termination and the third term: discharge and repudiation' (2008) 124 Law Quarterly Review 373 as well as in PG Turner 'The *Hongkong Fir* docks in Australia' [2008] Lloyd's Maritime and Commercial Law Quarterly 432.
69. Ibid, at [53] and [70].
70. Contra, Kirby J who, whilst arriving at the same *result* as the majority, was nevertheless of the view that the '*Hongkong Fir* approach' ought *not* to be part of Australian law – a somewhat controversial view which, however, does not represent Singapore law and has received a mixed reception in the commentaries cited above (n 68).

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to be much clearer – at least with regard to this last-mentioned issue (centring on the *relationship* between the two main approaches).[71] The position in *Hong Kong* is also not unambiguously clear, where, however, at least two decisions appear to have adopted (in substance) the approach in the *RDC Concrete* case[72] – although it should also be mentioned that in one decision, the appellate court did not appear (unambiguously at least) to have adopted the same approach.[73]

However, what *is* relevant for today's lecture is the fact that one of the most important tests (namely, the '*Hongkong Fir* approach') *is premised on the concept of radicalism*. We have, in fact, already set out the observations of the Singapore Court of Appeal in the *RDC Concrete* case. However, the classic formulation of this approach is, in the final analysis, to be found in the following statement of principle by Diplock LJ (as he then was) in the English Court of Appeal decision of *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd*,[74] as follows:[75]

> 'The test whether an event has this effect or not has been stated in a number of metaphors all of which I think amount to the same thing: does the occurrence of the event *deprive the party who has further undertakings still to perform of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain* as the consideration for performing those undertakings?'

The focus, unlike the 'condition-warranty approach', is on the actual *consequences* of the breach of the term concerned (and *not* on the *nature* of the term breached). The result of such an approach on the concepts of a 'condition' and a 'warranty' (as understood in the context of the 'condition-warranty approach') was, in Diplock LJ's words, as follows:[76]

> 'Once it is appreciated that it is the event and not the fact that the event is a result of a breach of contract which relieves the party not in default of further

71. The Canadian courts appear to have endorsed the '*Hongkong Fir* approach': see, eg, the Ontario Court of Appeal decision of *Jorian Properties Ltd v Zellenrath* (1984) 46 OR (2d) 775; the British Columbia Court of Appeal decision of *Lehndorff Canadian Pension Properties Ltd v Davis Management Ltd* (1989) 59 DLR (4th) 1; the Alberta Court of Appeal decision of *First City Trust Co v Triple Five Corp Ltd* (1989) 57 DLR (4th) 554; the British Columbia Court of Appeal decision of *Ramrod Investments Ltd v Matsumoto Shipyards Limited* (1990) 47 BCLR (2d) 86; and the Alberta Provincial Court decision of *Krawchuk v Ulrychova* (1996) 40 Alta LR (3d) 196 (and cf the Supreme Court of Canada decision of *Field v Zien* (1963) 42 DLR (2d) 703, as well as the Ontario Court of Appeal decision of *968703 Ontario Ltd v Vernon* (2002) 58 OR (3d) 215).

72. See the Hong Kong Court of Final Appeal decision of *Mariner International Hotels Ltd v Atlas Ltd* (2007) 10 HKCFAR 1 and the Hong Kong Court of First Instance decision of *Okachi (Hong Kong) Co Ltd v Nominee (Holding) Ltd* [2005] 3 HKC 408.

73. See the Hong Kong Court of Appeal decision of *Okachi (Hong Kong) Co Ltd v Nominee (Holding) Ltd* [2006] HKCU 1932 (and for related proceedings, – with regard to application for leave to appeal to the Hong Kong Court of Final Appeal – see the Hong Kong Court of Appeal decision of *Okachi (Hong Kong) Co Ltd v Nominee (Holding) Ltd* [2007] HKCU 1942). See also generally Hall, above n 18, ch 10.

74. Above n 62. And for Lord Diplock's own (and extremely interesting) views (from an extrajudicial perspective), see Lord Diplock 'The law of contract in the eighties' (1981) 15 University of British Columbia Law Review 371 at 374–377.

75. See above n 62, at 66 (emphasis added).

76. See ibid, at 69–70 (original emphasis).

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performance of his obligations, two consequences follow. (1) The test whether the event relied upon has this consequence is the same whether the event is the result of the other party's breach of contract or not, as Devlin J. pointed out in *Universal Cargo Carriers Corporation v. Citati*. (2) The question whether an event which is the result of the other party's breach of contract has this consequence cannot be answered by treating all contractual undertakings as falling into one of two separate categories: "conditions" the breach of which gives rise to an event which relieves the party not in default of further performance of his obligations, and "warranties" the breach of which does not give rise to such an event.

Lawyers tend to speak of this classification as if it were comprehensive, partly for the historical reasons which I have already mentioned and partly because Parliament itself adopted it in the Sale of Goods Act, 1893 . . . But it is by no means true of contractual undertakings in general at common law.

No doubt there are many simple contractual undertakings, sometimes express but more often because of their very simplicity ("It goes without saying") to be implied, of which it can be predicated that every breach of such an undertaking must give rise to an event which will deprive the party not in default of substantially the whole benefit which it was intended that he should obtain from the contract. And such a stipulation, unless the parties have agreed that breach of it shall not entitle the non-defaulting party to treat the contract as repudiated, is a "condition". So too there may be other simple contractual undertakings of which it can be predicated that *no* breach can give rise to an event which will deprive the party not in default of substantially the whole benefit which it was intended that he should obtain from the contract; and such a stipulation, unless the parties have agreed that breach of it shall entitle the non-defaulting party to treat the contract as repudiated, is a "warranty".

There are, however, many contractual undertakings of a more complex character which cannot be categorised as being "conditions" or "warranties", if the late nineteenth-century meaning adopted in the Sale of Goods Act, 1893, and used by Bowen LJ in *Bentsen v Taylor, Sons & Co* be given to those terms. Of such undertakings all that can be predicated is that some breaches will and others will not give rise to an event which will deprive the party not in default of substantially the whole benefit which it was intended that he should obtain from the contract; and the legal consequences of a breach of such an undertaking, unless provided for expressly in the contract, depend upon the nature of the event to which the breach gives rise and do not follow automatically from a prior classification of the undertaking as a "condition" or a "warranty". For instance, to take Bramwell B.'s example in *Jackson v Union Marine Insurance Co Ltd* itself, breach of an undertaking by a shipowner to sail with all possible dispatch to a named port does not necessarily relieve the charterer of further performance of his obligation under the charterparty, but if the breach is so prolonged that the contemplated voyage is frustrated it does have this effect.'

Lord Diplock's analysis in the *Hongkong Fir* case has received the highest praise. In the leading House of Lords decision of *Bunge Corporation, New York v Tradax Export SA, Panama*,[77] Lord Wilberforce referred to it as a 'seminal judgment',[78] whilst Lord

77. [1981] 1 WLR 711.
78. Ibid, at 714.

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Roskill expressed the view that 'the judgment of Diplock LJ in the *Hongkong Fir* case is, if I may respectfully say so, a landmark in the development of one part of our law of contract in the latter part of this century'.[79] The result of Lord Diplock's analysis, in substantive terms, is clear: 'conditions' and 'warranties' now have a much more limited scope under the '*Hongkong Fir* approach' as compared to the 'condition-warranty approach'. The former now involves the breach of a term that *must always* result in depriving the innocent party of substantially the whole benefit of the contract that it was intended that that party should have, whilst the latter now involves the breach of a term which would *never* result in depriving the innocent party of substantially the whole benefit of the contract that it was intended that that party should have. A term, the breach of which might or might not have the result of depriving the innocent party of substantially the whole benefit of the contract that it was intended that that party should have is now popularly known as an '*intermediate* term'. The reality was that, if the '*Hongkong Fir* approach' was the *only* approach applicable, 'conditions' and 'warranties' would, in accordance with the limited nature they possessed under that particular approach, be relegated to the periphery.

Again, however, we are straying from the central pathway of the present lecture. Returning to that route, it should be noted, first, that the requirement of a *substantial* deprivation of benefit under the '*Hongkong Fir* approach' is wholly consistent with (and is, indeed, a concrete manifestation of) the concept of 'radicalism'. Secondly – and this is an extremely important as well as related point – Diplock LJ himself *drew close linkages with the doctrine of frustration* which (as we have seen) is the quintessential example of 'radicalism'. Indeed, the judge was of the view that the *test* for discharge of contract was, in essence, the *same* with regard to both discharge by breach as well as frustration (although the consequences would, of course, be different). In his words:[80]

> 'This test is applicable *whether or not the event occurs as a result of the default of one of the parties to the contract*, *but the consequences* of the event are *different* in the two cases. Where the event occurs as a result of the default of one party, the party in default cannot rely upon it as relieving himself of the performance of any further undertakings on his part, and the innocent party, although entitled to, need not treat the event as relieving him of the further performance of his own undertakings. This is only a specific application of the fundamental legal and moral rule that a man should not be allowed to take advantage of his own wrong. Where the event occurs as a result of the default of neither party, each is relieved of the further performance of his own undertakings, and their rights in respect of undertakings previously performed are now regulated by the Law Reform (Frustrated Contracts) Act, 1943.
>
> This branch of the common law has reached its present stage by the normal process of historical growth, and the fallacy in Mr. Ashton Roskill's contention that a different test is applicable when the event occurs as a result of the default of one party from that applicable in cases of frustration where the event occurs as a result of the default of neither party lies, in my view, from a failure to view the cases in their historical context. The problem: in what event will a party to a contract be relieved of his undertaking to do that which he has agreed to do but has not yet done? has exercised the English courts for centuries, probably ever since assumpsit

79. Ibid, at 725.
80. Above n 62, at 66–67 (emphasis added).

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emerged as a form of action distinct from covenant and debt and long before even the earliest cases which we have been invited to examine; but until the rigour of the rule in *Paradine v Jane* was mitigated in the middle of the last century by the classic judgments of Blackburn J. in *Taylor v. Caldwell* and Bramwell B. in *Jackson v. Union Marine Insurance Co. Ltd.*, it was in general only events resulting from one party's failure to perform his contractual obligations which were regarded as capable of relieving the other party from continuing to perform that which he had undertaken to do.'

The cases cited in the second paragraph of the above quotation are, of course, classic decisions in the early law relating to the doctrine of *frustration*.[81]

Lord Diplock developed, in fact, this linkage in later case-law as well (see, for example, the House of Lords decision of *United Scientific Holdings Ltd v Burnley Borough Council*[82]).

It should, however, be noted that the linkage just drawn is by no means a modern development only – particularly where the case-law is concerned. We have already referred to the leading (and seminal) authority relating to frustration – the decision in *Taylor v Caldwell*, which was decided in 1863 (in which Blackburn J (as he then was) delivered the judgment of the court). A mere four years later, in 1867, the Court of Queen's Bench decision in *Kennedy v The Panama, New Zealand and Australian Royal Mail Company (Limited)*[83] was handed down.[84] As in the *Taylor* case, once again, *Blackburn J.* delivered the judgment of the court. This is interesting because of the parallel that may be drawn between this very judge and another (namely, Lord Diplock) who was to perform a similar function in not only laying down central principles of the law of contract but also in establishing linkages between various doctrines (albeit approximately a century later). Returning to the *Kennedy* case, we find in it the first substantive 'traces' of a doctrine of *common mistake*. More importantly, perhaps, is the fact that the principles laid down by Blackburn J are reminiscent of those which obtain in the context of the doctrine of *frustration*.[85] This is not surprising (and not only because the judge delivered, as we have just noted, the judgment of the court in both this particular case as well as in the *Taylor* case). The fact that the *Kennedy* case also figured prominently in the leading (and seminal) House of Lords decision in *Bell v Lever Brothers Ltd* should also not surprise us. Of some interest, too, is the fact that Blackburn J, as in the *Taylor* case,[86] also had recourse to the civil law.[87]

Indeed, it is also apposite to note that the close linkage between the '*Hongkong Fir* approach', on the one hand, and the doctrine of frustration,[88] on the other, has not gone

81. Though cf the observations in the *Great Peace Shipping* case with regard to the relationship between common mistake *at common law* and the '*Hongkong Fir* approach', above n 30, at [82]–[83].
82. [1978] AC 904.
83. (1867) LR 2 QB 580.
84. See also MacMillan, above n 19, p 191.
85. See generally above n 83, at 586–588.
86. And see the main text accompanying below, nn 117–118.
87. As embodied in the relevant parts of Justinian's *Digest*; see above n 83, at 587–588.
88. Reference may also be made to the judgment of Devlin J (as he then was) in the English High Court decision of *Universal Cargo Carriers Corporation v Citati* [1957] 2 QB 401 at 430 et seq (which is also cited by Diplock LJ in the *Hongkong Fir* case (see above n 76); see also JE Stannard 'Frustrating delay' (1983) 46 Modern Law Review 738 and, by the same author,

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unnoticed by legal scholars. It is even more significant, in my view, that such linkage has, in fact, been noted by the foremost legal scholars in the field.[89] More recently, Donal Nolan has, in fact, had occasion to observe (in relation to the *Hongkong Fir* case), as follows:[90]

> 'Diplock LJ [in the *Hongkong Fir* case] *could not have asserted more clearly the consistency of the rules governing discharge by frustration and discharge for breach*. It is therefore all the more remarkable that this *central tenet* of his analysis seems so often to be overlooked today.'

The learned author repeats this 'lament' towards the end of his essay, expressing (once again) surprise inasmuch as 'the very strong connection between discharge for breach and discharge by frustration' was (in his view) 'a central pillar of Diplock LJ's analysis' in the *Hongkong Fir* case.[91] He also points to the fact (which I have noted above) that prior case-law also endorsed this linkage.[92] In the circumstances, he viewed the downplaying of such linkage as 'unfortunate';[93] in his view:[94]

> 'This is unfortunate, because it serves to obscure the common thread which runs between the two doctrines, namely the idea that (in the absence of contrary agreement) a person is generally discharged from his contractual obligations only if to require continued performance would in effect be to hold him to an obligation into which he did not enter in the first place. Furthermore, the connection is of practical significance, because it demonstrates that the *Hongkong Fir* test of discharge is a very difficult one to satisfy.'

Nolan then proceeds to ask whether the test embodied in the '*Hongkong Fir* approach' is 'too severe'.[95] This concern is, perhaps, a little exaggerated because, whilst this test and that embodied in the doctrine of frustration[96] are similar, there would appear to be some differences in the application and attitude of the courts in relation to both doctrines. However, subject to this, I am in full agreement with Nolan's views with regard to the linkage between the doctrine embodied in the '*Hongkong Fir* approach' and the doctrine of frustration. Indeed, I have cited his essay at some length because it appears to be one of the more extended treatments of such linkage in the available literature.

Let us turn now to the doctrine of fundamental breach in the context of exception clauses.

Delay in the Performance of Contractual Obligations (Oxford: Oxford University Press, 2007) pp 143–147 and (especially) ch 12).

89. See, eg, Reynolds, above n 63, at 540; JW Carter, GJ Tolhurst and E Peden 'Developing the intermediate term concept' (2006) 22 Journal of Contract Law 268 at 272; and Carter, above n 63, at 248–249. The latter author, however, raised the question as to whether or not the test laid down by Diplock LJ pursuant to the '*Hongkong Fir* approach' is too strict (see ibid).

90. See Nolan, above n 63, p 286 (emphasis added). See also ibid, p 292.

91. Ibid, p 295.

92. Ibid.

93. Ibid.

94. Ibid, pp 295–296.

95. Ibid, p 296. See also Carter et al, above n 89.

96. And see above n 16.

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Radicalism (4) – fundamental breach and exception clauses

The doctrine of fundamental breach has had a somewhat chequered – some would even say convoluted – history insofar as its effect on exception clauses[97] is concerned. It is appropriate at the outset to note that a fundamental breach can – without too much difficulty, in my view – be treated as being, in substance at least, the *same* as a breach that would satisfy the criteria laid down by the '*Hongkong Fir* approach'[98] in relation to the doctrine of discharge by breach. I do not wish to complicate matters by considering the further issue as to whether or not there is a difference between a 'fundamental *breach*' and 'the breach of a fundamental *term*', although the most straightforward approach might be to treat a 'fundamental *term*' as a '*condition*' (pursuant to the 'condition-warranty approach' considered briefly in the preceding section of this lecture).[99] If so, then, although both phrases appear to have been used interchangeably, the former (namely, 'fundamental *breach*') finds (as just mentioned) its correlative in the '*Hongkong Fir* approach' (focusing, as it does, on the *consequences* of the breach), whilst the latter (namely, the breach of a fundamental *term*) finds its correlative in the concept of a 'condition' pursuant to the 'condition-warranty approach'.[100]

We have already touched on the significant role that the concept of fundamental breach plays in the context of the law relating to breach of contract – in particular, with regard to the '*Hongkong Fir* approach'. We now turn to the role which the concept plays with regard to the law relating to *exception clauses*. In this regard, there was – for a period of time[101] – not inconsiderable controversy with regard to this particular area of the law of contract as a result of two contrasting approaches towards the role of fundamental breach in the context of exception clauses. These approaches were popularly known as the 'rule of *law*' approach and the 'rule of *construction*' approach, respectively. Under the former approach, a fundamental breach *automatically* destroys the efficacy of the exception clause, whereas, under the latter approach, a fundamental breach does not have this effect and the court's task is to *construe* the exception clause concerned in the context of the contract as a whole, in order to ascertain whether the contracting parties *intended* that the exception clause cover the events that have actually happened. If they did, then the exception clause would be given effect to by the court, notwithstanding the fact that a fundamental breach has occurred.

The position adopted in the seminal House of Lords decision of *Photo Production Ltd v Securicor Transport Ltd*[102] is to the effect that the doctrine of fundamental breach in the context of exception clauses is a 'rule of construction'. Such an approach has

97. See generally the seminal work by Professor Brian Coote *Exception Clauses* (London: Sweet & Maxwell, 1964). Indeed, the term 'exception clause' is a more appropriate *generic* term, which would cover more specific categories such as total exclusion of liability clauses and limitation clauses.
98. See generally the discussion in the preceding section of this lecture.
99. Contra, in this last-mentioned regard, JL Montrose 'Some problems about fundamental terms' [1964] Cambridge Law Journal 60 at 80.
100. See also A Phang 'Exploring and expanding horizons: the influence and scholarship of Professor JL Montrose' (1997) 18 Singapore Law Review 15 at 50–53.
101. Principally, in the 1960s and 1970s.
102. [1980] AC 827.

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not only been adopted in Singapore[103] but also in other Commonwealth jurisdictions as well (including Hong Kong[104]).

What is relevant for the purposes of the present lecture is that the concept of 'radicalism' has – via the application of the doctrine of fundamental breach – also influenced the law relating to exception clauses as well. Indeed, the linkage between the '*Hongkong Fir* approach' (under the law relating to discharge by breach), on the one hand, and the law relating to fundamental breach in the context of exception clauses, on the other, was touched on by Lord Diplock himself in an extrajudicial context. This is significant because the learned law lord was a member of the court in *both* the *Hongkong Fir* case *as well as* the seminal House of Lords decision in the *Photo Production* case (which, as we have just seen, reinstated the 'rule of construction' in the context of exception clauses and which, as is evident from the preceding discussion, represents the law in Singapore as well). In the Cecil and Ida Green lecture delivered at the Faculty of Law in the University of British Columbia, this is what Lord Diplock had to say (in the context of his assessment of the impact of the decision in the *Hongkong Fir* case):[105]

> 'Focussing the court's attention on the breach instead of limiting it to the construction of the contract opened the door to an analysis of contractual obligations that was no longer limited to the primary obligations of each party to perform the contract according to its terms and the right of the other party to such performance. It extended to the secondary rights and obligations of each party that arise when primary obligations are not performed. Prima facie the non-performance of any primary obligation gives rise to a secondary obligation on the party in default to pay to the other party monetary compensation in an amount which will put him in the same position, so far as money can do this, as if the primary obligation had been performed.'

The distinction, of course, between primary and secondary obligations forms (in Lord Diplock's view at least) part of the basis of the 'rule of construction' in the context of exception clauses. It will be recalled that when a contract comes to an end, the *secondary* obligations (which are *remedial* in nature) remain. So, also (in the context of exception clauses), a fundamental breach does not *necessarily* negate the exception clause concerned. Whether or not it does have this effect is a question of the *construction* of the exception clause in the context of the contract as a whole. I should observe, however, at this juncture that this particular topic does not (unlike the other topics considered thus far) deal with the *end* of the contract as such but, rather, with the fate (so to speak) of exception clauses in the contract concerned which might (or might not) 'survive' the effects of a fundamental breach.

103. See the Singapore Court of Appeal decision of *Sun Technosystems Pte Ltd v Federal Express Services (M) Sdn Bhd* [2007] 1 SLR 411 and the Singapore High Court decision of *Emjay Enterprises Pte Ltd v Skylift Consolidator (Pte) Ltd (Direct Services (HK) Ltd, Third Party)* [2006] 2 SLR 268.
104. See, eg, the Hong Kong Court of Appeal decisions of *OTB International Credit Card Ltd v Au Sai Chak Michael* [1980] HKC 219; *Kalimantan Timbers Co (A Firm) v Mighty Dragon Shipping Co SA* [1980] HKC 228; and *Yeu Shing Construction Co Ltd v Pioneer Concrete (HK) Ltd* [1987] 2 HKC 187, as well as the Hong Kong Court of First Instance decision of *Carewins Development (China) Ltd v Bright Fortune Shipping Ltd* [2006] 4 HKC 1 and the Hong Kong District Court decision of *Yu Fat Piece Goods Co Ltd v Peter Mercantile Co Ltd* [2006] HKCU 459. Reference may also be made to Hall, above n 18, pp 460–464.
105. See Lord Diplock, above n 74, at 377.

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Before proceeding to summarise this part of the lecture (relating to 'radicalism' in the law of contract), I would like to touch briefly upon a related concept that has operated in the background, so to speak, and whose rationale of fairness is consistent with that with respect to 'radicalism' as well. This is the concept of the 'implied term' – to which our attention now briefly turns.

An interlude – the role of the implied term

(i) Introduction

Although it does not appear to relate (directly at least) to the concept of 'radicalism' as such, you might have noticed by now that the implied term is 'an ubiquitous creature' which is to be found in virtually every doctrine that we have discussed. Before discussing this phenomenon further, it should be pointed out that the implied term does bear *some* similarity to 'radicalism' insofar as it is also concerned with line-drawing, in general, and achieving a *fair result*, in particular. *Unlike* 'radicalism', however, the implied term is more concrete and specific. It tends, if one views concepts along a continuum from the universal or general to the specific, towards the specific. If nothing else, unlike 'radicalism' (which is rather more *general* in nature), the implied term is a *specific* legal *doctrine*.

It may be appropriate at this juncture to observe that, even as a legal doctrine, the implied term is used sparingly. Indeed, it is appropriate to reiterate RE Megarry's apt observation referred to earlier that the implied term is 'so often the last desperate resort of counsel in distress'.[106] Once again, our familiar 'friend', the principle of *sanctity of contract*, must not be undermined unnecessarily. However, as just mentioned, the implied term is, on occasion, useful in permitting the courts a justified basis upon which to arrive at a *fair* result. The *doctrinal* 'picture' in relation to implied terms has, however, become a little bit more complex, especially in recent times. At present, it is accepted that there are *two* broad categories of implied terms, namely, 'terms implied *in fact*' and 'terms implied *in law*', respectively.

(ii) 'Terms implied in fact'

There are, in fact, *two* tests for ascertaining whether or not a term should be implied 'in fact'. These are the 'business efficacy' and the 'officious bystander' tests, respectively.

Under the 'business efficacy' test, a court will imply a term only if it is necessary to give 'business efficacy' to the contract concerned. This test is to be found in the classic formulation by Bowen LJ (as he then was) in the English Court of Appeal decision of *The Moorcock*.[107]

The 'officious bystander' test is to be found within the (also classic) formulation by MacKinnon LJ in another English Court of Appeal decision, *Shirlaw v Southern Foundries (1926) Limited*.[108]

106. See above n 14.
107. (1889) 14 PD 64 at 68.
108. [1939] 2 KB 206 at 227 (affirmed, [1940] AC 701).

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However, as was pointed out in *Forefront Medical Technology* case, '[t]he relationship . . . between the tests is not wholly clear'.[109] In that particular case, it was held that the tests were *complementary*, with 'the "officious bystander" test [being] the *practical mode by which* the "business efficacy" test is implemented'.[110]

More importantly, perhaps (for the purposes of the present lecture), 'terms implied *in fact*' have been described, in the *Forefront Medical Technology* case,[111] as relating to:[112]

> '. . . the possible implication of a *particular* term or terms into *particular* contracts. In other words, the court concerned would examine the *particular factual matrix* concerned in order to ascertain whether or not a term ought to be implied.'

The court proceeded in the case just cited to observe thus:[113]

> There are practical consequences to such an approach, the most important of which is that the implication of a term or terms in a particular contract *creates no precedent for future cases.* In other words, the court is only concerned about arriving at a just and fair result via implication of the term or terms in question in that case – *and that case alone*. The court is only concerned about the presumed intention of the particular contracting parties – *and those particular parties alone*.'

(iii) 'TERMS IMPLIED IN LAW'

On the other hand, the implication of terms 'in law' is premised on broader policy grounds. 'Terms implied *in law*' have, in fact, been described in the *Forefront Medical Technology* case, as follows:[114]

> 'The *rationale as well as test* for this broader category of implied terms is, not surprisingly, quite *different* from that which obtains for terms implied under the "business efficacy" and "officious bystander" tests. In the first instance, the category is much broader inasmuch (as we have seen) the *potential* for application *extends* to *future* cases relating to the same issue with respect to the *same category*

109. Above n 7, at [33].
110. Ibid, at [36] (original emphasis); and see generally ibid, at [34]–[40].
111. Above n 7. For Hong Kong decisions, see, eg, the Hong Kong Court of Final Appeal decision of *Bewise Motors Co Ltd v Hoi Kong Container Services Ltd* [1998] 4 HKC 377, as well as the Hong Kong Court of Appeal decisions of *Lo Kwai Chun (Administratrix of the Estate of Cheung Hoi, Decd) v Hong Kong Oxygen & Acetylene Co Ltd* [1980] HKC 123 and *Luk Wing Chin t/a Signtech Co v Chan Chi Shing* [2008] HKCU 887. Reference may also be made to the Hong Kong Court of Appeal decision of *Faranah Ltd v Cherry Garments Co Ltd* [2005] HKCU 907 (where Le Pichon JA referred to the composite test in the Australian Privy Council decision of *BP Refinery (Westernport) Pty Ltd v President, Councillors and Ratepayers of the Shire of Hastings* (1978) 52 ALJR 20, which, however, Stock JA interpreted as embodying the 'officious bystander test'(although, it should be mentioned, the learned judge does refer to the concept of business efficacy as well)). See also generally Hall, above n 18, ch 9.
112. Above n 7, at [41] (original emphasis).
113. Ibid, at [41] (original emphasis).
114. Ibid, at [44] (original emphasis). And cf, in the Hong Kong context, the Hong Kong Court of Final Appeal decision of *Twinkle Step Investment Ltd v Smart International Industrial Ltd* [1999] 4 HKC 441 (affirming *Smart International Industrial Ltd v Twinkle Step Investment Ltd* [1999] 1 HKC 767). Reference may also be made to Hall, above n 18, pp 394–403.

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> of contracts. In other words, the decision of the court concerned to imply a contract "in law" in a particular case *establishes a precedent* for similar cases in the future for *all* contracts of *that particular type*, unless of course a higher court overrules this specific decision. Hence, . . . courts ought to be as – if not more – careful in implying terms on this basis, compared to the implication of terms under the "business efficacy" and "officious bystander" tests which relate to the *particular contract and parties only*. Secondly, the test for implying a term "in law" is broader than the tests for implying a term "in fact". This gives rise to difficulties that have existed for some time, but which have only begun to be articulated relatively recently in the judicial context, not least as a result of the various analyses in the academic literature (see, for example, the English Court of Appeal decision of *Crossley v Faithful & Gould Holdings Ltd* [2004] 4 All ER 447 at [33]–[46]).'

Given the potential uncertainty that 'terms implied *in law*' could generate, it is important not to imply them lightly, as doing so would (in the absence of subsequent reversal by the court) set a precedent for all future cases relating to that same category of contracts. Perhaps paradoxically, therefore, although the reach as well as basis for implying terms 'in law' is broader than that for implying terms 'in fact', the need for caution is even greater.

(iv) OF IMPLIED TERMS, RADICALISM AND CONTRACT DOCTRINES

Introduction

Returning to the role of the implied term in the context of the various doctrines considered thus far in the present lecture and if I may be permitted to indulge in some speculation, although the implied term was useful in pointing the way towards a fair result, the courts probably did not find the implied term as sufficient (in itself) to respond (in a *doctrinal* manner) to the situations which we have considered. This is not surprising as all these situations relate to factual matrices which are 'radical' in nature. Indeed, this ambiguity in approach towards the function of the implied term probably led it to be *conflated* with an *underlying (and general) concept or even rationale*, rather than being utilised in the manner it was originally conceived (namely, as a *legal doctrine* in order to fill in 'gaps' in contracts, albeit on an exceptional basis).[115]

An important point (from an historical perspective) is that virtually all the doctrines we have considered thus far originated at a time when there was, in effect, *only one* category of implied terms, namely, 'terms implied *in fact*'. The significance of this point will, it is hoped, become evident in due course. Let us now turn to a brief survey of the role of the implied term in general and its relative inability to function in a doctrinal fashion in particular.

Implied terms and frustration

Turning, first to the doctrine of frustration, it should be noted that the implied term was originally considered to be the basis of the doctrine. However, as one learned writer has aptly put it, this view has 'received little favour from the courts in modern

115. And cf with regard to the analogous situation vis-à-vis the distinction between unconscionability as a *doctrine* and as a *rationale* (see below n 159).

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times'.[116] Nevertheless, even when the implied term was in the ascendancy as a *rationale* for the doctrine of frustration during the nascent phase of development of that doctrine itself, this was not, admittedly, unambiguously clear. In the seminal English decision of *Taylor v Caldwell*, for example, Blackburn J, whilst referring to the implied term, also referred to the *civil law* – in particular, an English translation of a work by the noted French jurist, Pothier.[117] The modern view, of course, is that the basis of the doctrine is a matter of construction.[118]

However, I have argued elsewhere – and this is where the historical perspective I mentioned a moment ago is relevant – that, whilst the implied term was (as we have seen in the preceding paragraph) of limited assistance under the rubric of 'terms implied *in fact*', there is no reason in principle or logic why it might not be of some (albeit limited) assistance under the more modern rubric of 'terms implied *in law*' instead.[119] Nevertheless, it should be noted, first, that it will (because of its very nature) be a very rare instance in which a term will be implied 'in law'; indeed, the entire category of 'terms implied *in law*' is one which (as we have seen) is to be approached with some care.[120] More importantly, the category of 'terms implied in law' is – in this particular instance – one that constitutes *only a possible rationale* for the *doctrine* of *frustration* in any event.

Implied terms and the other doctrines

It is unnecessary, for present purposes, to consider how the concept of the implied term relates – if at all – to the other doctrines that fall within the rubric of 'radicalism'. This is because none of them expressly refers to the concept of the implied term as such. Yet, in fairness, none is wholly unrelated to that concept. Let me elaborate.

First, as we have seen, the doctrine of frustration and that of common mistake are very closely related and differ – for all intents and purposes – *only* with respect to the issue of *timing*. If you will recall, the doctrine of frustration relates to the discharge of the contract after its formation, whereas the doctrine of common mistake relates to difficulties vis-à-vis the very formation of the contract itself. Therefore, to the extent that the doctrine of frustration is related to the concept of the implied term, there is (to

116. See Smith, above n 28, at 402. See also the *Great Peace Shipping* case, above n 30, especially at [73] and [82].
117. Above n 20. This translation was, in fact, cited in a treatise which the learned judge wrote himself; see C Blackburn *A Treatise on the Effect of the Contract of Sale; On the Legal Rights and Property and Possession in Goods, Wares and Merchandize* (1845) p 173. The learned judge also referred to Justinian's *Digest*. See also AWB Simpson 'Innovation in nineteenth century contract law' (1975) 91 Law Quarterly Review 247 at 271. Professor Simpson also refers to the earlier (also English) decision of *Hall v Wright* (1858) El Bl & El 746 (at 765) which, in his view, 'may well have been [the] immediate source of the device [of the implied term] used' in *Taylor v Caldwell* (see Simpson, above at 270). Interestingly, Pothier's views were also considered in *Hall v Wright*, albeit not by all the judges. On the influence of Pothier generally, see PS Atiyah *The Rise and Fall of Freedom of Contract* (Oxford: Clarendon Press, 1979) pp 399–400. Reference may also be made to WW Buckland '*Casus* and frustration in Roman and common law' (1932–1933) 46 Harvard Law Review 1281, especially at 1287–1288 and MacMillan, above n 19, pp 193–194.
118. And see generally Phang, above n 23, at 284–285.
119. See generally Phang, 'On linkages in contract law – mistake, frustration and implied terms reconsidered', above n 13, at 481–484.
120. See the main text accompanying above n 118.

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that extent) some relationship between the concept of the implied term and the doctrine of common mistake. More radically, however, it has been argued that the doctrine of the implied term could be used *in place of* the doctrine of common mistake[121] – especially if one has regard to the broader category of 'terms implied *in law*'.[122] The radical bent of the argument just mentioned was tempered – somewhat at least – by the further argument that there was no necessary conflict between the utilisation of 'terms implied in law', on the one hand, and the doctrine of common mistake, on the other, inasmuch as the former would constitute the *juridical basis* of the latter.[123] One learned author, however, utilises the implied term in a quite different manner – to argue, inter alia, that the failure to satisfy an implied condition precedent (and not a substantive doctrine of mistake as such) might operate to negate the existence of a contract.[124] Again it is not my task today to canvass the further conceptual and practical issues as well as difficulties that arise from this particular argument. It suffices for the purposes of this lecture to note that all this merely underscores (once again) the *linkages* amongst the various doctrines (including, in this specific instance, the linkage between the doctrine relating to implied terms and that relating to common mistake).

Indeed, a similar argument could be made with the remaining doctrines – having regard to the relationship between both the '*Hongkong Fir* approach' pursuant to the doctrine of discharge by breach,[125] as well as the (related) doctrine of fundamental breach pursuant to the law relating to exception clauses, on the one hand, and the doctrine of frustration, on the other.

Nevertheless, to the extent that the concept of the implied term has since become discredited under general law in relation to the doctrine of frustration, its importance – already (as we have seen) one step further removed with respect to the other contractual doctrines which we have examined in this lecture – is also (correspondingly) discredited. However, to the extent that the concept of the implied term, on the one hand, and these other doctrines (which fall under the rubric of 'radicalism'), on the other, *both* attempt to achieve *fairness* in the case concerned, there is a shared value. Indeed, it is important to reiterate that the concept of the implied term – whilst relatively rarely applied by the courts in order not to undermine the principle of the sanctity of contract – is nevertheless in fact a useful legal doctrine that allows (as we have seen) the court to arrive at a fair result in the case at hand.

A summary – radicalism as structure, linkage and fairness

So much by way of a brief interlude in relation to the concept of the implied term. Let me now leave that particular concept aside and attempt to summarise our discussion, thus far, of 'radicalism' in the context of the law of contract.

It will be recalled that there are *two* levels which *interact* with each other. These are epitomised in the title of this lecture.

121. See generally Phang, 'On linkages in contract law – mistake, frustration and implied terms reconsidered', above n 13, at 484–486.
122. See ibid, at 485–486; and, insofar as 'terms implied *in law*' are concerned, see the main text accompanying above n 114.
123. See ibid, at 486.
124. See generally Smith, above n 28, as well as generally above n 28.
125. See also the reference by Diplock LJ in the *Hongkong Fir* case to the concept of the implied term ('in fact'), above n 80.

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At the *first* level, that of *doctrine*, the concept of 'radicalism' serves as *structure*. As we have seen, it is an integral (indeed, embedded) part of many doctrines in the common law of contract. It also serves as *linkage*. Indeed, it may be said that the concept of 'radicalism' not only links these various doctrines together but is also *itself* the process by which the doctrines themselves have *developed* at an almost organic level. For example, the concept of 'radicalism' has not only influenced the development of the tests in frustration and common mistake but has resulted in the same test being developed for both – the only difference lying in the timing at which the respective doctrines are applied. It should also be noted that Diplock LJ, in the *Hongkong Fir* case, also viewed the test for discharge by breach and for frustration as being the same.

At the *second* level, that of *fairness*, we find that the structure and linkages provided by the concept of 'radicalism' under the first level of doctrine *simultaneously engender fair results*. Indeed, as we have seen, 'radicalism' often *justifies concepts of fairness* that are *balanced against an alternative concept of fairness* embodied in the general ideal of *sanctity of contract*. Put simply, at a certain 'legal tipping point' (whether it be in the context of frustration, common mistake, discharge by breach or fundamental breach in relation to exception clauses), courts will (owing to considerations of *fairness*) permit (with the exception (because of its very nature) of the doctrine of fundamental breach in relation to exception clauses) a contract to be *legally unravelled*. Such legal unravelling is permitted simply because the principle of fairness embodied in the general principle of sanctity of contract (to the effect that parties ought to observe the original bargain) no longer obtains. This could be due to a *radical* change in circumstances for which neither party is responsible (ie, frustration). *Or* it could be due to a *radical* difference in the understanding of the contractual subject matter which was unknown to both parties at the time they entered into the contract (ie, common mistake). *Or* it could be due to a breach that has resulted in *radical* consequences that have deprived the innocent party of the benefit of the contract that it was intended that it should have (ie, discharge by breach in the context of the '*Hongkong Fir* approach'). *Or* it could be due to a *radical* breach which the parties did *not* intend an exception clause to cover (ie, fundamental breach and exception clauses). The underlying – indeed, fundamental – rationale is that it is only *fair* to permit the legal unravelling *provided that* the *key doctrinal requirements* are indeed satisfied pursuant to the *first level* (relating to *doctrine*).

As I mentioned earlier in this lecture, there is a second illustration of the central theme which I do not want to deal with in any detail. It would, in the first place, take a lot more time. But that is not the only reason. It also involves somewhat more *controversial* arguments. Further, this particular illustration has been dealt with in some detail in an earlier article of mine (or, more accurately, a part thereof).[126] Indeed, since that article was published, the controversy has apparently decreased if citations of it in a fair number of articles[127] (at least one in which makes parallel (albeit not

126. See generally Phang, 'Undue influence – methodology, sources and linkages', above n 13, at 563–574.

127. See, eg, H Tjio 'Undue influence, unconscionability and good faith' (1996) 8 Singapore Academy of Law Journal 429 at 430 and 433; D Webb 'A proposed decision-making process for oppressive credit contracts' [1997] New Zealand Law Review 394 at 418; D Capper 'Undue influence and unconscionability: a rationalisation' (1998) 114 Law Quarterly Review 479 at 480, 484 and 487; J Phillips 'Setting aside guarantees: another approach' (2002) 2 Oxford

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identical) arguments)[128] as well as in books[129] are anything to go by. Interestingly, also, Ward LJ, in the English Court of Appeal decision of *Portman Building Society v Dusangh*,[130] referred to the issue relating to the possible relationship between undue influence and unconscionability. Unfortunately, though, the judge was of the view that it was unnecessary to resolve this particular issue.[131] That having been said, it should be noted that Kirby P (as he then was) did, in the New South Wales Court of Appeal decision of *Equiticorp Finance Ltd v Bank of New Zealand*,[132] express the view (significantly, in my view) that '[t]he doctrine of economic duress may be better seen as an aspect of the doctrines of undue influence and unconscionability respectively'.[133] There are also relevant Hong Kong decisions which I will elaborate upon in a moment.

Nevertheless, this second illustration still remains, on the whole, controversial, especially when viewed through the lenses of *judicial* development. This is especially so because one of the doctrines involved, that of unconscionability, is itself still very much in a state of flux insofar as the contract law in the Commonwealth is concerned. Although I see no reason (at the present time at least) to resile from most of the propositions made in that article (which was published over a decade ago), it is wise that (as a judge) I make no further pronouncement at this time, notwithstanding the fact that it is unlikely that the issues which the article raises will, because of their somewhat theoretical nature, be raised squarely in judicial proceedings as such. Nevertheless, for the sake of closure, I will deal, in the briefest of fashions, with the outline of the arguments and leave it to the audience/reader to pursue the arguments in more detail should any be minded to do so.

University Commonwealth Law Journal 47 at 51; FR Burns 'Elders and undue influence inter vivos: lessons from the United Kingdom?' (2003) 24 Adelaide Law Review 37 at 49; M Pawlowski 'Unconscionability as a unifying concept in equity' (2001–2003) 16 Denning Law Journal 79 at 87; and R Bigwood 'Curbing unconscionability: *Berbatis* in the High Court of Australia' (2004) 28 Melbourne University Law Review 203 at 225.

128. See Capper, ibid.

129. See, eg, R Bigwood *Exploitative Contracts* (Oxford: Oxford University Press, 2003) p 230; EP Ellinger, E Lomnicka and RJA Hooley *Modern Banking Law* (Oxford: Oxford University Press, 3rd edn, 2002) p 117 (although the citation appears to be absent in the 4th edn (Oxford: Oxford University Press, 2006)!); M Pawlowski and J Brown *Undue Influence and the Family Home* (Oxford: Cavendish, 2002) p 89; P Cartwright *Banks, Consumers and Regulation* (Oxford: Hart Publishing, 2004) p 160; H MacQueen and R Zimmerman (eds) *European Contract Law: Scots and South African Perspectives* (Edinburgh: Edinburgh Studies in Law, 2006) p 168; OO Cherednychenko *Fundamental Rights, Contract Law and the Protection of the Weaker Party* (Munich: Sellier, European Law Publishers, 2007) p 345; and N Enonchong *Duress, Undue Influence and Unconscionable Dealing* (London: Sweet & Maxwell, 2006) p 323.

130. [2000] 2 All ER (Comm) 221.

131. Ibid, at 233. Though cf the (also) English Court of Appeal decision of *Irvani v Irvani* [2000] 1 Lloyd's Rep 412 at 425, where a distinction is drawn between the doctrine of undue influence, on the one hand, and that of unconscionability, on the other – but, it should be added, without any substantive analysis as such.

132. (1993) 32 NSWLR 50.

133. Ibid, at 107.

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A (VERY BRIEF) SECOND ILLUSTRATION OF THE CENTRAL THEME – LINKAGES WITHIN THE DOCTRINE OF UNDUE INFLUENCE AS WELL AS AMONGST THE DOCTRINES OF ECONOMIC DURESS, UNDUE INFLUENCE AND UNCONSCIONABILITY

Introduction

Turning, then, to the article just mentioned,[134] the brief contours of the main points made therein were as follows.

First, it was argued that there were linkages *within* the various categories of *undue influence* itself. By way of brief background, these categories comprise class 1, class 2A and class 2B undue influence, respectively.

Class 1 undue influence refers to *actual* undue influence which the claimant must prove. The remaining two categories of undue influence are, in fact, subcategories of the other main branch of (class 2) undue influence.

Class 2 undue influence refers to *presumed* undue influence which (unlike class 1 undue influence) does not require proof by the claimant of the (actual) exercise of undue influence. All that the claimant need show is a relationship of trust of confidence such that it is fair to presume that the alleged wrongdoer had exercised undue influence on the claimant with regard to the transaction concerned. As just mentioned, the two subcategories of undue influence under class 2 undue influence are class 2A and class 2B undue influence. Class 2A undue influence relates to established relationships in law which, in and of themselves, raise the presumption which the alleged wrongdoer has to rebut. Class 2B undue influence, on the other hand, requires the claimant to prove the existence of a relationship whereby trust and confidence were reposed by him or her in the alleged wrongdoer – a relationship which raises the presumption which the latter has then to rebut. In contrast to class 2A undue influence (which relates to (established) legal relationships), class 2B undue influence is a factual inquiry.

Secondly, it was argued that there were linkages *amongst* the doctrines of undue influence, economic duress and unconscionability.[135]

I turn now – and first – to linkages *within* the various categories of the doctrine of undue influence itself. However, before proceeding to do so, it should be observed briefly that the leading House of Lords decision of *Royal Bank of Scotland plc v Etridge (No 2)*,[136] whilst retaining (in substance) the various categories just mentioned, adopted somewhat different terminology.[137] One *apparently* significant

134. For another interesting article – albeit not from the specific standpoint of linkages as such – see Tjio, above n 127. Though cf, by the same author, '*O'Brien* and unconscionability' (1997) 113 Law Quarterly Review 10.

135. But cf P Birks and C Nyuk Yin 'On the nature of undue influence' in J Beatson and D Friedmann (eds) *Good Faith and Fault in Contract Law* (Oxford: Clarendon Press, 1995) ch 3.

136. [2002] 2 AC 773; noted, inter alia, by A Phang and H Tjio 'The uncertain boundaries of undue influence' [2002] Lloyd's Maritime and Commercial Law Quarterly 231.

137. See, in particular, the judgment of Lord Nicholls of Birkenhead in the *Etridge* case, above n 136, especially at [13]–[18], where the learned Law Lord drew a distinction between situations where the courts adopt a 'sternly protective attitude towards certain types of relationship in which one party acquires influence over another who is vulnerable and dependent and where, moreover, substantial gifts by the influenced or vulnerable person are not normally to be expected' and other situations where such relationships do not exist; (which correspond to class

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difference, though, relates to Lord Nicholls of Birkenhead's characterisation of class 2A undue influence as involving an *irrebuttable* presumption resulting from proof of 'the existence of the type of relationship'.[138] However, as Lord Nicholls himself points out, this is 'a different form of presumption' from the evidential presumption (which applies more generally to both class 2A and class 2B undue influence, *and which (it is important to note) is the presumption that is referred to in this lecture*). Under the *former* presumption, because of an established relationship, 'the law presumes, irrebuttably, that one party had influence over the other' *and* (as a consequence) '[t]he complainant need not prove he actually reposed trust and confidence over the other party', it being 'sufficient for [the complainant] to prove the existence of the type of relationship [which is recognised in law]';[139] this is, in substance and effect, no different from the distinction between class 2A and class 2B undue influence which has been briefly outlined above.[140] As there is (as just mentioned) no difference in substance and as I draw heavily upon the article mentioned above, I will retain the terminology therein. Indeed, in my view, the classification of categories as embodied in that particular article make (because of their very nature as well as succinctness) for clearer exposition, particularly in the context of a lecture (and, perhaps, even in a judgment). In this regard, it is significant that, in the *Etridge* case, although the other law lords agreed with the judgment of Lord Nicholls, some of them did nevertheless still refer to the previous terminology in the course of their respective judgments.[141]

Linkages within the various categories of undue influence[142]

Class 1 and class 2 undue influence used to be even closer to each other inasmuch as the requirement of *manifest disadvantage* was thought to apply to both these

2A and class 2B undue influence, respectively); there existed (in respect of the former (class 2A undue influence) situation) 'a different form of presumption' which is irrebuttable and which is, in fact, dealt with in the main text immediately following. The learned Law Lord also emphasised a very different type of presumption, which related to the *evidential* nature of the presumption of undue influence (under the general rubric of class 2 (or presumed) undue influence), which presumption is a rebuttable one (as to which, see generally Phang and Tjio, above n 136, at 232–234, and which is the presumption that is referred to in this lecture). The difference between the two presumptions is perceptively and succinctly summarised in a leading textbook as follows (see E Peel *Treitel's Law of Contract* (Oxford: Sweet & Maxwell, 12th edn, 2007) p 452):

'The "irrebuttable" presumption is not itself a ground for relief: it is merely a way of establishing *one* of the basic facts of the "evidential" presumption. . . . The irrebuttable presumption relates to the *existence* of the influence, the rebuttable evidential presumption to its *exercise*. The distinction is obscured by the unfortunate use of the ambiguous phrase "presumption *of* undue influence", which is capable of referring to either or both of these operations.' (original emphasis).

138. See the *Etridge* case, above n 136, at [18]. However, the problems with regard to the *source* of such an irrebuttable presumption remain; see the main text accompanying below nn 147–149.

139. See ibid. See also Phang and Tjio, above n 136, at 233.

140. Cf also Peel, above n 137, p 454.

141. See, eg, per Lord Hobhouse of Woodborough, above n 136, at [105] and [107] and per Lord Scott of Foscote, ibid, at [151]–[153] and [157]–[161].

142. See, generally, Phang 'Undue influence – methodology, sources and linkages', above n 13, at 563–565.

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categories of undue influence. However, in the House of Lords, in *CIBC Mortgages plc v Pitt*,[143] it was held that the requirement of manifest advantage did *not* apply to *class 1* undue influence.[144] Notwithstanding this decision, I have, in fact, argued that manifest disadvantage would necessarily be present in most situations of class 1 undue influence in any event (although it should be noted that, after the *Etridge* case, manifest disadvantage is viewed as performing a sifting function with respect to presumed undue influence by constituting a catalyst for the invocation of the evidential presumption).[145] In particular, whilst the wrongdoer would invariably benefit from the exercise of (actual) undue influence over the innocent party, it would also almost invariably be the case that the innocent party would (simultaneously) suffer a manifest disadvantage. Indeed, even in the rare instance where there appears to be no manifest disadvantage suffered by the innocent party:[146]

> 'one could still make a persuasive argument that manifest disadvantage has nevertheless resulted to the innocent party since he or she would not have parted with the subject-matter of the transaction had he or she not been subject to the actual undue influence exerted by the wrongdoer'.

The upshot of this analysis is that there remains a blurring of the lines between class 1 and class 2 undue influence even after the decision in the *Pitt* case.

Further, there appears to be very little real difference between class 1 and class 2B undue influence. The apparent difference (in law) lies in the burden of proof. As already noted, class 1 undue influence entails proof by the claimant that the defendant had exercised actual undue influence over him or her, whereas class 2 undue influence raises a presumption in the claimant's favour right at the outset. However, that having been said, from a *practical* perspective, the difference just stated may be more apparent than real inasmuch as, pursuant to Class 2B undue influence, the claimant must first establish the existence of a relationship whereby trust and confidence are reposed by the donor (namely, the claimant) in the alleged wrongdoer before a presumption of undue influence can arise. I have argued that this process would – in the majority of cases at least – entail, *simultaneously*, the proof of the exercise of a dominating influence by the alleged wrongdoer over the donor.[147] If so, then there is – in the *practical* sphere at least – little (or no) difference between class 1 and class 2B undue influence.

However, that leaves us with class 2A undue influence. It will be recalled that this particular category (or, more accurately, subcategory) of undue influence is premised on *an existing legal relationship*. As I also pointed out in the earlier article, 'the criteria for arriving at a conclusion as to whether or not a particular category of situation fell within the rubric of class 2A undue influence are by no means clear'.[148] I continued to observe, as follows:[149]

143. [1993] 3 WLR 802.
144. Overruling the English Court of Appeal decision of *Bank of Credit and Commerce International SA v Aboody* [1990] 1 QB 923, which had held to the contrary.
145. See, generally, Phang 'Undue influence – methodology, sources and linkages', above n 13, at 562. Insofar as the last-mentioned point made with respect to the *Etridge* case is concerned, see also generally Phang and Tjio, above n 136, at 234–236; see, further, below n 186.
146. See Phang, 'Undue influence – methodology, sources and linkages', above n 13, at 562.
147. See ibid, at 564, n 44, and submitting that, in this particular regard, the English decision of *Goldsworthy v Brickell* [1987] Ch 378 ought not to be followed.
148. See ibid.
149. See ibid, at 564–565.

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> 'The only apparently clear criterion centres on the weight of precedents holding that a particular category should be classified under the heading of class 2A undue influence but, unfortunately, does not really solve the problem pertaining to the substantive criteria contributing to such weight. The result appears to be that the courts have developed (and would, presumably, continue to develop) such criteria judicially on a case-by-case basis, with such development probably premised on policy grounds. The question then arises as to whether or not the legislature is the more appropriate vehicle for working out as well as implementing such policy issues, subject to the (related) observation made in the preceding Part. Admittedly "established" categories continue, but even these are basically the result of policy decisions. On the other hand, it could be argued that such uncertainty in criteria (an consequent guidance) is not as critical as, for example, the corresponding absence insofar as terms implied in law are concerned, simply because the former relates only to the burden of proof whereas the latter entails more substantive effects. However, it should be pointed out that a shift in the burden of proof could (and often does) have substantive effects.'

In the circumstances, there is (radical though it may appear) to be a compelling case for the *abolition* of class 2A undue influence *and/or* that this particular subcategory of undue influence be subject to *legislative definition* – although such a suggestion is (as just mentioned) rather radical.[150] If so, this would leave us with class 1 and class 2B undue influence. However, as we have seen above, there is very little (at least practical) difference between these two (remaining) categories of undue influence. There is, in fact, one further point that can be made with regard to class 2B undue influence, which I also pointed out in the earlier article, as follows:[151]

> 'To exacerbate the problems, it is difficult to see why the courts recognize the category of class 2B undue influence. As we have already seen, there is very little real difference between class 1 and class 2B undue influence and this might still be the case, notwithstanding the holding in *Pitt* to the effect that manifest disadvantage is not a requisite element in class 1 undue influence. On a related (and perhaps more important) note, it is difficult to see why these two (very similar) situations should differ so much in terms of the burden of proof, the burden lying on the innocent party in class 1 undue influence but on the wrongdoer in class 2B undue influence. Indeed, we have already mentioned that a shift in the burden of proof can affect the substantive outcome of the case at hand. Finally, class 2B undue influence, whilst useful as a "residuary category" which allows the court flexibility to achieve justice, is, by its very nature, rather ad hoc and uncertain.'

If, of course, as the above passage suggests, class 2B undue influence itself is suspect and should be abolished,[152] that would effectively leave us with class 1 undue influence. If so, this would, as I shall explain in a moment, be very significant indeed.

In *summary*, there is a close linkage between class 1 and class 2B undue influence. Further, the remaining category (relating to class 2A undue influence) could, arguably,

150. See ibid, at 565.
151. See ibid.
152. See also ibid.

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be abolished and/or be dealt with by way of legislative definition (although it is admitted that this suggestion is itself rather radical in nature). Finally, it could be argued that even class 2B undue influence could be abolished. If so, this would leave us only with class 1 undue influence – a result that is buttressed by the very close linkage between both these categories and is, in fact, also achieved (in substance) if there should be a merger between class 1 and class 2B undue influence.

I turn now briefly to linkages amongst the doctrines of undue influence, economic duress and unconscionability.[153]

Linkages amongst the doctrines of undue influence, economic duress and unconscionability[154]

The law relating to *economic duress* is of relatively recent origin.[155] By its very nature, this particular doctrine is very similar to class 1 undue influence, not least because the latter involves the exercise of actual undue influence of a dominating kind.[156] The doctrine of economic duress itself involves (also by its very nature) a similar coercive effect. Further, both doctrines render the contract voidable. This close similarity between economic duress and class 1 undue influence has not, in fact, escaped the notice of academic writers.[157] In the circumstances, I have suggested (in my article) that 'there is no real problem in *combining* the two doctrines into one'.[158]

The *doctrine* of *unconscionability*, on the other hand, is (as already alluded to above) still a fledgling one in the context of Commonwealth contract law, in general, and the contract law of Singapore and England, in particular (it is important, in this regard, to emphasise, parenthetically, that I am concerned here with unconscionability as a *doctrine*, as opposed to an underlying *rationale*[159]). The only exceptions in this regard appear to be the Australian[160] and perhaps Canadian contexts,[161] although I do

153. And moving *beyond* the linkages *within* the doctrine of undue influence itself.
154. See generally Phang 'Undue influence – methodology, sources and linkages', above n 13, at 565–574. For the Hong Kong position, see generally Hall, above n 18, ch 14.
155. See the English High Court decision of *Occidental Worldwide Investment Corp v Skibs A/S Avainti, Skibs A/S Glarona, Skibs A/S Navalis (The 'Siboen' and the 'Sibotre')* [1976] 1 Lloyd's Rep 293, as well as J Beatson 'Duress as a vitiating factor in contract' [1974] Cambridge Law Journal 97. And for the Hong Kong position, see, eg, Hall, above n 18, pp 575–593.
156. See *Goldsworthy v Brickell*, above n 147.
157. See, eg, the works cited in Phang 'Undue influence – methodology, sources and linkages', above n 13, at 566, n 48.
158. See ibid, at 566 (original emphasis).
159. And see, eg, A Phang 'The uses of unconscionability', (1995) 111 Law Quarterly Review 559 at 561–562. For a recent perceptive as well as thought-provoking article surveying the role of unconscionability in the law of equity, see H Delany and D Ryan 'Unconscionability: a unifying theme in equity?' [2008] Conveyancer and Property Lawyer 401. Indeed, some of the ideas and arguments in this article certainly warrant further exploration along the lines as well as general approach adopted in the present lecture.
160. See the leading Australian High Court decision of *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447. Reference may also be made to the (also) Australian High Court decisions of *Blomley v Ryan* (1954–1956) 99 CLR 362 and *Louth v Diprose* (1992) 175 CLR 621.
161. See, eg, the British Columbia Court of Appeal decisions of *Morrison v Coast Finance Ltd* (1965) 55 DLR (2d) 710 and *Harry v Kreutziger* (1978) 95 DLR (3d) 231. Reference may also

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note that there have (significantly, in my view) been a number of decisions on the doctrine of unconscionability in the Hong Kong context as well.[162] The issue that arises in the present context is whether or not the doctrines of economic duress as well as undue influence can be *subsumed under a broader doctrine of unconscionability*. Foremost amongst the difficulties facing such a proposal are the possible differences amongst these various doctrines. I have dealt with the difficulties arising from these differences in more detail in the earlier article[163] and constraints of space prevent me from rehearsing them once more. Suffice it to state that the similarities between economic duress and undue influence, on the one hand, and unconscionability, on the other, are remarkable. For example, the doctrine of undue influence does indeed entail the wrongdoer unconscientiously taking advantage of the disadvantageous situation in which the innocent party has been placed. And economic duress shares – with the doctrine of unconscionability – the element of domination of the will of the innocent party.

However, one possible objection to reliance on the doctrine of unconscionability as an umbrella doctrine centres on the possible introduction of excessive uncertainty into the judicial process. In addition to the arguments I have proffered in the earlier article to the effect that such fears are unfounded,[164] I would also refer to the observations made earlier on in this lecture as to why objectivity in the law is necessary.[165]

Conclusion on the second illustration

Admittedly, however (and as I have already alluded to above), the suggestions with respect to this second illustration are not only more radical but also more theoretical in nature. Nevertheless, and not unlike the first illustration (which centred on the concept of 'radicalism'), this illustration does demonstrate (once again) how particular areas of the law are linked, as it were, to each other on a doctrinal level. It would be appropriate to add that the doctrines of economic duress, undue influence and unconscionability also have everything to do with ensuring a *fair* result (which is, of course, one of the integral parts of the central theme of this lecture). Indeed, these

be made to the Report of the Ontario Law Reform Commission, *Report on Amendment of the Law of Contract* (1987) ch 6.

162. See, eg, the Hong Kong Court of Final Appeal decision of *Ming Shiu Chung v Ming Shiu Sum* [2006] 2 HKLRD 831 (a general reference only) and the Hong Kong Court of Appeal decisions of *Semana Bachicha v Poon Shiu Man* [2000] 3 HKC 452 and *Lo Wo v Cheung Chan Ka Joseph* [2001] 3 HKC 70 (affirming *Lo Wo, Lo Tai and Lo Lan v Cheung Chan Ka, Joseph (also known as Cheung Chan Ka), Bond Star Development Limited* [2000] HKCU 436). See also generally the relevant decisions cited below at nn 166, 171 and 175, as well as Hall, above n 18, pp 621–642 (which also includes, at pp 633–642, a discussion of the Hong Kong Unconscionable Contracts Ordinance (Cap 458) as well as the relevant case-law).

163. See, generally, Phang 'Undue influence – methodology, sources and linkages', above n 13, at 567–570. And, on why the doctrine of unconscionability ought to be preferred to that of good faith, see Phang, above n 8, especially at 186–188. Reference may also be made to the recent Singapore Court of Appeal decision of *Ng Giap Hon v Westcomb Securities Pte Ltd* [2009] 3 SLR 518, where an attempt to imply a duty of good faith on the basis of a 'term implied in law' was rejected (and on 'terms implied in law' generally, see the main text accompanying above n 114).

164. See, generally, Phang 'Undue influence – methodology, sources and linkages', above n 13, at 570–572.

165. See the main text accompanying above nn 6–8.

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doctrines are part of the law relating to *vitiating factors* in contract law. The primary aim of most of these factors is, of course, to ensure that the doctrine of sanctity of contract (which itself embodies, as I have mentioned, a specific conception of fairness) does not result in what is the antithesis of that doctrine (namely an unfair result).

However, I should note, at this juncture, that the issues of linkages as well as fairness which I have just canvassed were, in fact, alluded to (albeit briefly) in the *Hong Kong* context. In the Hong Kong Court of First Instance decision of *Esquire (Electronics) Ltd v The Hong Kong and Shanghai Banking Corporation Ltd*,[166] Waung J held, inter alia, that both the doctrines of economic duress and (significantly) actual (or class 1) undue influence applied in the case at hand. More significantly perhaps (for the purposes of the present lecture), the judge referred to various academic writings[167] (including one by myself,[168] albeit not the article I am presently focusing on), and arrived at the conclusion that '[t]he diversity of academic views simply *highlights the closeness of the two rules, economic duress and undue influence*'.[169] I have, of course, already mentioned that there is an extremely close linkage – if not coincidence – between the doctrine of economic duress,, on the one hand and the doctrine of actual (or class 1) undue influence, on the other.[170] Although this particular case was reversed on appeal,[171] at least two members of the Hong Kong Court of Appeal significantly observed that as the case with respect to economic duress failed, the case with respect to actual (or class 1) undue influence necessarily also failed[172] – thus suggesting (albeit not conclusively) a close linkage between the two doctrines. It is also interesting to note that Stock JA considered the possible relationship between the doctrine of economic duress and the concept of unconscionability, although he did not express a conclusive view on the issue.[173] It could, however, be argued that, in this particular instance, the judge was, in fact, referring to unconscionability as a *rationale* (as opposed to a full-fledged *doctrine* as such[174]).

Interestingly, though, in another decision, also that of the Hong Kong Court of First Instance in *Standard Chartered Bank v Shem Yin Fun*,[175] there is a passing reference[176] to, inter alia, the judgment of Deane J in the High Court of Australia decision of *Commercial Bank of Australia v Amadio*,[177] where a distinction is drawn between situations of undue influence and unconscionability, respectively. I have, in fact, dealt with this particular proposition by, inter alia, Deane J in the *Amadio* case in my article,[178] and will therefore not repeat them here. It will suffice for present purposes to state the main point – that such a distinction neglects viewing both doctrines from

166. [2005] HKCU 971.
167. Ibid, at [206].
168. See A Phang 'Economic duress: recent difficulties and possible alternatives' [1997] Restitution Law Review 53.
169. Above n 166, at [206] (emphasis added).
170. See the main text accompanying above nn 156–158.
171. See *Esquire (Electronics) Ltd v The Hong Kong and Shanghai Corporation Ltd* [2006] HKCU 1705.
172. Ibid, at [167] and [240]–[242], per Stock JA and Tang JA, respectively.
173. Ibid, at [156].
174. See also above n 159.
175. [2002] HKCU 575.
176. Ibid, at [141].
177. (1983) 151 CLR 447.
178. See Phang 'Undue influence – methodology, sources and linkages', above n 13, at 569–570.

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an *integrated as well as holistic perspective*. Once that is done, the apparent differences which Deane J refers to in the *Amadio* case disappear.

So, despite my initial remarks to the effect that this second illustration appears to be more theoretical than practical, it appears, nevertheless, that there *has* been at least some consideration of the issues raised by it in not only the English and Australian contexts[179] as well as in the academic literature,[180] but also in the Hong Kong context as well. That having been said, however, the position in Hong Kong (as in Singapore) remains premised very much upon the existing law in the respective areas (including, in the context of undue influence, that embodied in the leading House of Lords' decision of *Royal Bank of Scotland plc v Etridge (No 2)*[181]). The *Etridge* case has, in fact, been cited in a great many decisions, although the first to consider it in the Hong Kong context was the important judgment by Recorder Geoffrey Ma SC (as he then was) in the Hong Kong Court of First Instance decision of *Bank of China (Hong Kong) Ltd v Wong King Sing*[182] – a decision which has since itself been cited in numerous Hong Kong decisions.[183] I should also observe, parenthetically, that the *Etridge* case in fact supports many of the suggestions with respect to the second illustration in this lecture; indeed, there are, inter alia, direct pronouncements in that case itself which allude to a possible overlap between duress and undue influence[184] and which cast some doubt upon class 2B undue influence or even question the division between actual and presumed undue influence itself,[185] as well as pronouncements that at least hint at (and may even support) a broader umbrella doctrine of unconscionability.[186]

I should also observe that, although this point is by no means conclusive, the fact that many of these decisions involve more than one of the doctrines which we have just considered does at least hint at the overlaps I have referred to.[187] This is clearly the case across the Commonwealth, including Hong Kong.[188]

179. See above at nn 130 and 132, respectively.
180. See above nn 127 and 129.
181. Above n 136. See also generally Hall, above n 18, pp 593–621 with regard to the position in Hong Kong.
182. [2002] 1 HKC 83. See also a decision of the same judge in the Hong Kong Court of First Instance decision of *Wing Hang Bank Ltd v Lau Kam Ying* [2002] 2 HKC 57.
183. See, eg, the Hong Kong Court of Final Appeal decision of *Li Sau Ying v Bank of China (Hong Kong) Ltd* [2005] 1 HKLRD 106 and the Hong Kong Court of Appeal decision of *Bank of China (Hong Kong) Ltd v Leung Ngai Hang t/a Masterpiece Interior Design* [2006] HKCU 78.
184. See per Lord Nicholls of Birkenhead, above n 136, at [8]. Cf also per Lord Bingham of Cornhill, ibid, at [3].
185. See per Lord Hobhouse of Woodborough and Lord Scott of Foscote (with regard to the former) and per Lord Clyde (with regard to the latter), ibid,, at [107], [161] and [92], respectively. And see generally Phang and Tjio, above n 136, at 233–234.
186. See generally Phang and Tjio, ibid, at 241–243. Though cf with regard to the requirement of manifest disadvantage, where the House in the *Etridge* case view that requirement as performing a sifting function with respect to presumed undue influence by constituting a catalyst for the invocation of the evidential presumption (see generally Phang and Tjio, ibid, at 234–236; see also above n 145).
187. See also the main text to above nn 171 and 172.
188. See, eg, the Hong Kong Court of Final Appeal decision of *Bank of China (Hong Kong) Ltd v Fung Chin Kan* [2002] HKCU 1416 as well as the cases discussed above at nn 166, 171 and 175.

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It is also interesting to note that one other doctrine discussed in relation to the first illustration also comprises one of the vitiating factors (namely the doctrine of mistake). Indeed, both the illustrations utilised in the present lecture cover the majority of the vitiating factors in the law of contract (with the exception of misrepresentation as well as illegality and public policy). It may, in fact, be observed (albeit in passing) that both of the last-mentioned vitiating factors may (to some extent at least) be regarded as being sui generis. This is, in my view, certainly the case with regard to the doctrine of illegality and public policy which (as the very title of the topic suggests) is related to the issue of *public policy* (whether this is laid down by statute or at common law). The doctrine of misrepresentation, on the other hand, appears to be related somewhat to the doctrines of economic duress, undue influence and unconscionability, inasmuch as it also involves some fault or wrongdoing on the part of the misrepresentor. However, whilst the doctrine of *fraudulent* misrepresentation does indeed *clearly* involve such fault or wrongdoing,[189] this is much less obvious insofar as the other categories of misrepresentation are concerned (in particular, *wholly innocent* misrepresentation,[190] although, even in such a situation, there is a possible linkage to the doctrine of undue influence as well[191]).

CONCLUSION

This has been a lengthy lecture. Indeed, one might be tempted even to state that it is overly lengthy, given the apparent simplicity of its themes. However, the appellation 'apparent' is crucial in this regard. The themes may well appear to be simple but, because they represent universal truths about the law and its process, their analysis – here, through the lenses of the common law of contract – is far from simple. I cannot pretend to have mined the material and presented the ensuing analysis in anything resembling a thorough or comprehensive manner. That would constitute a book-length project. However, I hope to have demonstrated that the common law of contract is an organic development and, hence, is ever-developing. And, like any other living organism, its various doctrines or components are by no means separate and distinct from each other. On the contrary, at the level of doctrine, we witnessed many linkages amongst the various doctrines. This has, on occasion, been facilitated by particular judges (of whom, in the context of the present lecture, Blackburn J and Lord Diplock[192] come readily to mind). All this contributes to a 'healthy' *body* of doctrinal law. Indeed, an irrational and disparate doctrinal framework is, by the same token, an extremely 'unhealthy' body – a development which we must therefore avoid at all

189. And see *per* Lord Steyn in the House of Lords decision of *Smith New Court Securities Ltd v Citibank NA* [1996] 3 WLR 1051 at 1072–1073.
190. The remaining categories being negligent misrepresentation at common law (the seminal decision being that of the House of Lords in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465) and 'statutory negligence' pursuant to s 2(1) of the (Singapore) Misrepresentation Act (Cap 390, 1994 revsd edn) (which is the UK Misrepresentation Act 1967 (Cap 7), received via the Singapore Reception of English Law Act (Cap 7A, 1994 revsd edn)).
191. See, eg, the English Court of Appeal decision of *Hammond v Osborn* [2002] EWCA Civ 885 (where it was held that the presumption under class 2 undue influence would apply even if the conduct of the party against whom undue influence was alleged was unimpeachable (which was not, in any event, the case on the facts before that court)).
192. See also generally B Dickson 'The contribution of Lord Diplock to the general law of contract' (1989) 9 Oxford Journal of Legal Studies 441.

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cost. However, having a 'healthy' body of doctrinal law, whilst necessary, is not sufficient if one is concerned about the *ultimate aim* of the law and legal process – which is the attainment of a *fair* result in the case at hand.

To this end, therefore, there is what I would term the '*spirit of fairness*' which 'breathes', as it were, *life* and, *above all*, *fairness* into the body of the law itself. Indeed, sound and logical doctrine without such a spirit may be productive of great unfairness and inequity. We must never forget that *fairness* is what the law is ultimately all about. To be sure, the *process* leading to a fair *result* ought not to be neglected. That is why I have also emphasised the fundamental role and significance of sound *doctrine*. However, that, in and of itself, is *not* sufficient.[193] The attainment of *fairness* constitutes the very pith and marrow of the central mission of the law student, lawyer and judge alike. It is what contributes very significantly (probably vitally) to the *legitimacy* of the law in the eyes of *the public*. We choose to ignore this at our peril. We must, rather, forge ahead, building upon the intricate and 'organic' doctrines through which the spirit of fairness flows in both a systematic as well as practical manner. To this end, we must never give up. Neither must we succumb to the cynicism and scepticism which is so rampant in the world today. When the law is doctrinally sound and integrated, it shines forth as a beacon of light which dispels the darkness of unfairness and inequity and (above all) gives (or renews, as the case may be) hope for us all.

193. See also above n 10.

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