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The law of remedies – The importance of comparative and integrated analysis

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THE LAW OF REMEDIES

The Importance of Comparative and Integrated Analysis*

Two simple – and related – theses are advanced in this essay. The first is that, in the search for principle (whether in the law of remedies in particular or in the law in general), comparative analysis is extremely important. Secondly, this essay seeks to explain as well as demonstrate the importance of integrating academic scholarship with practical analysis. While both these theses are deceptively simple, they are by no means easy to accomplish and (perhaps as, if not more) importantly, might even entail a change in one's mindset.

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I. Introduction

1 The importance of the law relating to remedies cannot be overstated. Indeed, when counsel or litigants collect judgments from the court, I am told that – on virtually every such occasion – they turn immediately to the last page of the judgment in order to ascertain the result of the case. Not surprisingly, litigants are interested in the *result* of both potential as well as actual litigation. More specifically, they would like to know what *remedies* they are – or are unable – to obtain. Such remedies often take the form of common law damages but they could include equitable remedies (such as specific performance and injunctions).[1] It is also not surprising, therefore, to find an increasing number of learned texts on the topic of remedies across the common law world.[2] This special issue of the *Singapore Academy of Law Journal* is

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1 I refer, in the main, to private (as opposed to public) law claims. It should also be noted that there are remedies pursuant to *statute* – for example, under the Misrepresentation Act (Cap 390, 1994 Rev Ed) (and see, in this regard, the Singapore Court of Appeal decision of *RBC Properties Pte Ltd v Defu Furniture Pte Ltd* [2015] 1 SLR 997, discussed at paras 17–18 below).

2 See not only the relevant chapters on remedies in various leading texts across the Commonwealth in specific fields of the law of obligations (such as contract, tort, equity and trusts and unjust enrichment) but also, more specifically (and, for

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an extremely valuable addition to this body of literature and, in this short reflection, I would like to say something about how the scholarly literature in the field has influenced – and can continue to influence – the development of the law in this important area of the law by the courts. Indeed, I hope to persuade the reader that this is an important collaborative enterprise that needs to be treasured as well as nurtured. As we shall see, this was not always the case. There is also the danger that this may no longer be the case if all concerned become arrogant and/or complacent. Before proceeding to do so, however, I would like to take this opportunity to congratulate all the writers on their perceptive scholarly contributions not only to this volume but also (and more importantly) to the development of the law in the foreseeable future in courts and legal systems across the Commonwealth (and beyond). Special congratulations are due to the guest editor of this volume, Prof Elise Bant. She is an internationally renowned legal scholar whose works grace the shelves of libraries (both private and public) across the globe.[3] The high quality of the present volume is due, in no small measure, to her prodigious as well as insightful efforts.

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example), the leading work on damages by Harvey McGregor, *McGregor on Damages* (London: Sweet & Maxwell, 19th Ed, 2014). For the leading works on equitable remedies, see, for example, Ian C F Spry, *The Principles of Equitable Remedies – Specific Performance, Injunctions, Rectification and Equitable Damages* (Australia: Lawbook Co, 9th Ed, 2014); John Dyson Heydon, Mark J Leeming & Peter G Turner, *Meagher, Gummow & Lehane's Equity – Doctrines & Remedies* (Australia: LexisNexis Butterworths, 5th Ed, 2015); and Robert J Sharpe, *Injunctions and Specific Performance* (Canada Law Book, 3rd Ed, 1999; looseleaf since 2012). See also (again only by way of a sampling) Gareth Jones & William Goodhart, *Specific Performance* (London: Butterworths, 2nd Ed, 1996); James Edelman, *Gain-Based Damages – Contract, Tort, Equity and Intellectual Property* (Oxford: Hart Publishing, 2002); Andrew Burrows, *Remedies for Tort and Breach of Contract* (Oxford: Oxford University Press, 3rd Ed, 2004); Donald Harris, David Campbell & Roger Halson, *Remedies in Contract & Tort* (Cambridge: Cambridge University Press, 2nd Ed, 2010); Sirko Harder, *Measuring Damages in the Law of Obligations – The Search for Harmonised Principles* (Oxford: Hart Publishing, 2010); Adam Kramer, *The Law of Contract Damages* (Oxford: Hart Publishing, 2014); Stephen M Waddams, *The Law of Damages* (Toronto: Canada Law Book, 5th Ed, 2012); David Winterton, *Money Awards in Contract Law* (Oxford: Hart Publishing, 2015); *Comparative Remedies for Breach of Contract* (Nili Cohen & Ewan McKendrick gen eds) (Oxford: Hart Publishing, 2005); Solène Rowan, *Remedies for Breach of Contract – A Comparative Analysis of the Protection of Performance* (Oxford: Oxford University Press, 2012); *Principles of Proprietary Remedies* (Elise Bant & Michael Bryan gen eds) (Australia: Lawbook Co, 2013); and Katy Barnett & Sirko Harder, *Remedies in Australian Private Law* (Cambridge University Press, 2014).

3 Her publications are far too numerous to list here, although her excellent volume (and the leading exposition on the doctrine), *The Change of Position Defence* (Oxford: Hart Publishing, 2009) comes readily to mind. Reference may also be made to her jointly authored volume with Prof James Edelman (now a judge of the Federal Court of Australia) entitled *Unjust Enrichment in Australia* (Oxford University Press, 2006) (and which was cited in the local context in the

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2 Although this piece focuses on the integrative efforts required from both academia on the one hand and the profession as well as the courts on the other, I would like to commence this short reflection by *first* focusing on yet another theme which I also consider to be of great significance – the importance of *comparative* legal analysis.

II. The importance of comparative analysis

3 It is now axiomatic that the common law is no longer as common as we once thought it to be.[4] Indeed, there have – all over the globe – been efforts by courts to develop autochthonous legal systems which more appropriately reflect the culture and mores of the society concerned.[5] As the Singapore High Court observed in *Tang Kin Hwa v Traditional Chinese Medicine Practitioners Board*:[6]

> … English law, having been 'exported' to so very many colonies in the past, has now to be cultivated with an acute awareness of the soil in which it has been transplanted. It must also be closely scrutinised for appropriateness on a more general level – that of general persuasiveness in so far as logic and reasoning are concerned. This is the essence of the ideal of developing an autochthonous or indigenous legal system sensitive to the needs and mores of the society of which it is a part. Only thus can the society concerned develop and even flourish. …
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> It is therefore to be welcomed that English law is no longer accepted blindly. This is not to state that it has not served jurisdictions such as Singapore, even outstandingly well. But there ought to be departures where either local conditions and/or reason and logic dictate otherwise. Indeed, the essence of the former is embodied within s 3(2) of the Application of English Law Act (Cap 7A, 1994 Rev Ed).

Singapore Court of Appeal decision of *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve* [2013] 3 SLR 801 at [122] and [158]); and see now, by the same authors, *Unjust Enrichment* (Oxford: Hart Publishing, 2016), which seeks to build upon the last-mentioned work by broadening the scope of coverage to the decisions from the highest courts of other jurisdictions.

4 See, for example, Peter Wesley-Smith, "The Effect of *de Lasala* in Hong Kong" (1986) 28 Mal Law Rev 50 and Robert C Beckman, "Divergent Development of the Common Law in Jurisdictions which Retain Appeals to the Privy Council" (1987) 29 Mal Law Rev 254.

5 See generally, for example, Andrew Phang Boon Leong, *From Foundation to Legacy: The Second Charter of Justice* (Academy Publishing, 2006) at pp 52–64 (and the literature cited therein).

6 [2005] 4 SLR(R) 604 at [27]–[28]. Reference may also be made to the excellent essays in *Singapore Law – 50 Years in the Making* (Goh Yihan & Paul Tan gen eds) (Academy Publishing, 2015).

4 The need to develop an autochthonous legal system must, of course, be balanced against the need to eschew legal parochialism.[7] This is especially the case in relation to commercial law in general and the law of remedies in particular. That having been said, there can be no doubt that courts in different jurisdictions can develop the law differently – even in the law of remedies. Such difference may not, in my view, be a bad thing. Indeed, for jurisdictions which are in the process of developing their own law in the same area, diversity can be a boon rather than a bane. In Singapore, for example, the law of contract has been characterised by a search for principle in which the need to develop the law in view of local circumstances is balanced with the need to eschew unnecessary and undesirable parochialism. Courts have frequently drawn upon or adopted established English law, but have also sometimes entirely departed from it, or distinguished it to reflect and accommodate the local context. There is thus no mechanistic approach towards received English law but an integrated and comparative enquiry in which considerations of doctrine and fairness interact.[8] Singaporean courts engaged in this "search for principle" also – in appropriate instances – consider and cite decisions from jurisdictions outside Singapore and England. This arguably reflects a desire to distil the best legal principles available in the relevant area of the common law, regardless of their jurisdictional origin.[9]

5 Although what I have just described relates specifically to the Singapore experience, there is no reason in principle why it could not apply in the context of other jurisdictions as well.[10]

6 Beyond the role of courts in developing comparative analysis in the development of legal principle, it is always desirable (in my

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7 As has been observed in the Singapore Court of Appeal decision of *Man Financial (S) Pte Ltd v Wong Bark Chuan David* [2008] 1 SLR(R) 663 at [132]:

> [I]n an increasingly interconnected world, local courts ought to eschew legal parochialism and look beyond their shores for relevant precedents – particularly where controversial or (as was the case here) potentially outmoded legal doctrines are concerned.

8 See Andrew Phang, "Recent Developments in Singapore Contract Law – The Search for Principle" (2011) 28 JCL 3 at 30. The reader is also referred to the excellent chapter by Peh Aik Hin, "Contract Law: A Rationalisation Process towards Coherence and Fairness" in *Singapore Law – 50 Years in the Making* (Goh Yihan & Paul Tan gen eds) (Academy Publishing, 2015) ch 10.

9 See Andrew Phang, "Recent Developments in Singapore Contract Law – The Search for Principle" (2011) 28 JCL 3 at 6–7.

10 See also, for example, The Rt Hon Lord Goff, "Judge, Jurist and Legislature" [1987] Denning LJ 79 at 92–94 as well as, by the same author, "The Future of the Common Law" (1997) 46 ICLQ 745, especially at 747–748. See also (in a judicial context) the House of Lords decision of *White v Jones* [1995] 2 AC 207 at 262–264, *per* Lord Goff of Chieveley (referring to the German experience in the context of liability to third parties).

respectful view at least) for *legal scholars* to adopt (wherever possible) *a comparative approach* in their research and writing (and, I would hasten to add, teaching as well). Their scholarship can become only more textured as a result.[11] Indeed, I would go further and suggest that case law from another jurisdiction might – on occasion at least – even constitute the catalyst for reconceptualising existing ideas or even creating new ones. On a *practical* level, however, such (comparative) scholarship would *simultaneously* aid courts in their "search for principle". Put simply, courts would be aided in this search *not only* by relevant foreign *decisions but also* by relevant foreign *scholarship* as well.

7 I believe that what I have described applies with equal – if not more – force to the law of remedies. There is so very much that we can learn from other jurisdictions – particularly in developing areas of law such as that relating to unjust enrichment (a recent example of which is the Singapore Court of Appeal decision of *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve*).[12] However, even in more "traditional" areas, the recourse to *comparative* material is invaluable. One relatively recent illustration may be found in relation to the law of remoteness of damage in contract law in Singapore. In particular, the Singapore Court of Appeal, in *MFM Restaurants Pte Ltd v Fish & Co Restaurants Pte Ltd*[13] ("*MFM Restaurants*"), clarified that the apparently new legal criterion introduced by Lord Hoffmann in the House of Lords decision of *Transfield Shipping Inc v Mercator Shipping Inc*[14] ("*The Achilleas*") in the context of the test for remoteness of damage in the law of contract did not represent the law in the Singapore context. *MFM Restaurants* is also significant in the context of the present piece because it is also directly relevant to the second theme which I would like to deal with – the importance of integrating academic scholarship with practical analysis. I will therefore turn to that theme, generally, first before discussing *MFM Restaurants* in relation to both those themes. However, before

11 Indeed, since an initial draft of this essay was prepared, two excellent (and companion) volumes along these lines have, in fact, been published: see *The Common Law of Obligations – Divergence and Unity* (Andrew Robertson & Michael Tilbury eds) (Oxford: Hart Publishing, 2016) and *Divergences in Private Law* (Andrew Robertson & Michael Tilbury eds) (Oxford: Hart Publishing, 2016).

12 [2013] 3 SLR 801 at [97]–[168]. See also the following observations by Lord Neuberger of Abbotsbury PSC, delivering the judgment of the UK Supreme Court in *FHR European Ventures LLP v Cedar Capital Partners LLC* [2015] AC 250 at [45]:

> As overseas countries secede from the jurisdiction of the Privy Council, it is inevitable that inconsistencies in the common law will develop between different jurisdictions. However, it seems to us highly desirable for all those jurisdictions to learn from each other, and at least to lean in favour of harmonising the development of the common law round the world.

13 [2011] 1 SLR 150.

14 [2009] 1 AC 61.

proceeding to do so, it is important to note, if only in the briefest of terms, that the first theme (which deals with the use of comparative materials) can – and often does – *overlap* with the second theme (that of integrating academic scholarship with practical analysis) inasmuch as the academic scholarship itself often hails from different jurisdictions as well.

III. The importance of integrating academic scholarship with practical analysis

8 In the not too distant past, citation of secondary literature (at least under English law) was extremely rare (if not virtually non-existent). Indeed, it was traditionally thought (by some judges at least) that such literature could not be cited unless the author himself or herself had passed on.[15] Fortunately, that is no longer the case.[16] Even allowing for any bias I might have as a former academic, it is clear that courts eschew the consideration and citation of relevant academic scholarship at their peril. This is especially the case in developing areas of the law such as unjust enrichment. However, that having been said, it is important to emphasise the word "relevant". Put simply, there is also academic scholarship that is too divorced from practical reality and application and is therefore of little – or no – use to the courts. In this particular regard, I once observed thus:[17]

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15 See Robert E Megarry, "The Trail of the Calf" in Robert E Megarry, *Miscellany-at-Law – A Diversion for Lawyers and Others* (London: Stevens & Sons Ltd, 1955) at pp 326–329. See also the work cited at n 16 below.

16 For an excellent account of the English position from the past to modern times, see generally Neil Duxbury, *Jurists and Judges – An Essay on Influence* (Hart Publishing, 2001) ch 5.

17 See the Singapore High Court of decision of *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric* [2007] 1 SLR(R) 853 at [41]–[44] (reversed in [2007] 3 SLR(R) 782, but without considering this particular point). Reference may also be made to a book which was published after an initial draft of this essay had been prepared: see Richard A Posner, *Divergent Paths – The Academy and the Judiciary* (Harvard University Press, 2016), especially at pp 6, 42–46 and 274–286. See also p 24, where the learned author refers (albeit in the American context) to the fact that "some judges openly regard much academic legal scholarship as navel-gazing". And, at p 296, he observes (albeit once again in the American context) thus:

> I wish finally to emphasize that it would go far to bridge the gap between the academy and the judiciary if only law professors could decide to write for a broad audience and not just for each other. A radical step in this direction, but one long overdue, is for faculty to wrest control of law reviews from the students, enamored as law students are of length, detail, jargon, and format, provincial as they are in their conception of the value of different types of legal scholarship, and ignorant as they are of the potential audience for such scholarship – a potential audience that includes judges, as the current audience of the student-run law reviews for the most part does not.

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> [The] strict dichotomy occasionally drawn between academic work on the one hand and court judgments on the other is, in the medium and longer terms, a recipe for disaster. This is because theory cannot be divorced from practice. Each interacts with – and needs – the other. Shorn of their theoretical roots, the relevant rules and principles will become ossified. On the other hand, if one stays only in the rarefied atmosphere of 'high theory', the danger of collapsing for want of the 'oxygen' of practical reality is not only possible; it would be imminent. But extreme positions have always had this effect and should therefore be assiduously eschewed. More to the point, they do not reflect reality and, if they should become reality, the legal system would be much the poorer for it. However, the conflict between theory and practice just referred to is, in my view, a false one. As I have already emphasised, the process is, instead, an *interactive* one. Whilst one must, in the main, have one's legal feet firmly planted on the *terra firma* of practical reality (and this means, *inter alia*, paying close attention to the facts of the case at hand), one must (occasionally, at least) adopt a 'helicopter view' which the theoretical roots afford in order to survey the legal terrain in perspective, lest the wood be lost for the trees. However, the process is, in the final analysis, an interactive one inasmuch as there is no dogmatic rule that the court can only do one to the exclusion of the other, or that one or the other can only be done at designated times only. Much depends on the applicable rules and principles, as well as the precise factual matrix concerned.
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> Put simply, academics must not indulge in impractical 'hobby horses', but must write for that wider legal audience (comprising not merely students and fellow academics but also practitioners and judges) which is willing to consider their arguments and ideas, and even put them into practice. On the other hand, courts ought, in my view, to incorporate such arguments and ideas whenever to do so would not only aid in resolving the case at hand in a just and fair manner but would also aid in the development of the law in that particular area.
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> Having regard to the views I have just expressed, I must, with respect, differ (at least somewhat) from the views expressed by Lord Goff of Chieveley in his perceptive and thought-provoking Maccabaean Lecture entitled "The Search for Principle" (1983) 69 *Proceedings of the British Academy* 169 (reprinted in *The Search for Principle – Essays in Honour of Lord Goff of Chieveley* (William Swadling & Gareth Jones eds) (Oxford University Press, 1999) at pp 313–329 (citation will be from this latter reference)), where the learned law lord spoke, *inter alia*, on the respective functions of both judge and jurist; in

Reference may also be made to Neil Duxbury, *Jurists and Judges – An Essay on Influence* (Hart Publishing, 2001) at pp 39–46 (also referring to the American context). Indeed, the former work focuses on the American context, whereas the latter is an excellent (yet succinct) comparative study, covering jurisdictions as diverse as the US, France and England. The following essay by Lord Rodger also makes several pertinent points: see Lord Rodger of Earlsferry, "Judges and Academics in the United Kingdom" (2010) 29 Univ Queensland LJ 29.

particular, he pointed to the fact that the roles of both are not the same and that the former focuses on the facts of the particular case whereas the latter focuses on the idea. In other words, the judge focuses on the particular whereas the jurist focuses on the universal; the former approach is really more 'fragmented' whereas the latter approach is broader. Lord Goff proceeded to observe thus (at pp 327–328):

> It is sometimes asked – who should be dominant, judge or jurist? … Dominance can be considered in many forms, and in terms of power or influence. However, in the one matter which I regard as important for present purposes, which is the development of legal principles, the dominant power should, I believe, be that of the judge. This is not because the judge is likely to be a better lawyer than the jurist; far from it. It is because it is important that the dominant element in the development of the law should be professional reaction to the individual fact-situations, rather than theoretical development of legal principles. Pragmatism must be the watchword.

The dichotomy drawn above between judge and jurist is perhaps a little too stark. Whilst the learned author does allude briefly to the fact that the work of judge and jurist is complementary, the element of *interaction* is, with respect, not emphasised *sufficiently*. It is precisely the conceptual as well as logical analysis contained in the synthesis of academic writings that provides the necessary material for judges to apply to the facts at hand and, on occasion and in appropriate cases, to advance the law (albeit, in the nature of things, incrementally, at least for the most part). It is through the crystallisation of these broader and more general principles that the law gains coherence in its application to discrete situations. Moreover, certain academic writings (in particular, comments and notes on particular cases) will contain much more specific analysis of legal issues that might not 'qualify' as synthesis as such but would nevertheless be extremely helpful to a court faced with the same (or similar) issues. However, there is also a need for academic writings to have regard to issues that are – or are likely to be – faced by courts in actual cases; academic scholars should not go off on fanciful 'academic frolics' of their own. These would, for example, include esoteric theories tailored for hypothetical situations which are wholly divorced from any sort of reality whatsoever. This is not to state that such hypothetical situations might not be invoked very occasionally to emphasise a point. However, a moderate – let alone excessive – indulgence in such an approach is both undesirable and tends to undermine the utility as well as credibility of the academic writing concerned. Nevertheless, the reasonable postulation of hypothetical situations that might arise before the courts and the legal analysis that flows therefrom might not only have useful normative value for the courts but might also assist in the resolution of current fact situations by analogy.

[emphasis in original]

9 I have set out what I have said in full because it forms an appropriate point of departure for further reflections on the important issue of how academic scholarship can contribute in a very real and practical way to the development of the law by the courts.

10 I would like to commence with an important observation – that whereas it was thought in the not too distant past that *secondary legal literature* (including books as well as articles and case notes) ought *not* to be cited by *the courts* (at least in so far as the author concerned was still *alive*), such literature is now being increasingly cited by the courts wherever relevant. This is certainly the case in the Singapore context. Indeed, one of the "pioneers" in this regard was – not surprisingly – Lord Denning, who in a book review of the third edition of the famous textbook by Prof Winfield,[18] observed thus:[19]

> The reason why such books are so useful in the Courts is that they are not digests of cases but *repositories of* ***principles***. They are written by men who have studied the law as a science with more detachment than is possible to men engaged in busy practice. *The influence of the* ***academic lawyers*** *is greater now than it has ever been and is greater than they themselves realise. Their influence is largely through their writings. The notion that their works are not of authority except after the author's death has long exploded. Indeed, the more recent the work, the more persuasive it is, especially when it is a work of such an authority as Professor Winfield: because it considers and takes into account modern developments in case law and current literature. Winfield* is now cited in place of *Pollock* and *Cheshire and Fifoot* in place of *Anson*. The essays of Professor Goodhart have had a decisive influence in many important decisions. The vast tomes written and edited *by* ***practitioners*** *for practitioners fulfil* ***a different purpose***. They are valuable works of reference. *They are cited not for principles but for* ***detailed rules*** *on special subjects.* They are most important in day to day practice, but do not compare with books such as *Winfield* when it comes to ***fundamental principles***. [emphasis added in italics and bold italics]

11 The observations of Lord Denning are broadly consistent with those of Lord Goff of Chieveley rendered in his famous Maccabaean Lecture (entitled "The Search for Principle")[20] which I had also cited in

18 Percy H Winfield, *A Text-book of the Law of Tort* (London: Sweet & Maxwell Ltd, 3rd Ed, 1946). This particular textbook, which is now world renowned, is in its *19th* edition: see Edwin Peel & James Goudkamp, *Winfield & Jolowicz on Tort* (London: Sweet & Maxwell, 19th Ed, 2014).

19 Alfred T Denning, *Book Review* (1947) 63 LQR 516 at 516.

20 Lord Goff of Chieveley, "The Search for Principle" (1983) 69 *Proceedings of the British Academy* 169 (reprinted in *The Search for Principle – Essays in Honour of Lord Goff of Chieveley* (William Swadling & Gareth Jones eds) (Oxford University Press, 1999) at pp 313–329); the citation hereafter will be from this latter reference.

my judgment quoted above.[21] Put briefly, the learned law lord was of the following view:[22]

> Certainly, the primary function of judges is not the formulation of legal principles. Their main task, more workaday, more humdrum, is to try cases: in civil cases, to adjudicate upon disputes between litigants, and in criminal cases, to secure a fair trial of the accused by jury. But in the exercise of their functions, judges have from time to time to expound on the law. For obvious reasons, this duty falls primarily upon appellate courts. But it is one which, occasionally, even puisne judges have to undertake. …
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> For jurists, on the other hand, the formulation of legal principles is one of their main functions. Another is, of course, to instruct; and few academic lawyers are content with their lot unless they possess a vocation to teach. Judge and jurist, conditioned by their experience, adopt a very different attitude to their work. For the one, the overwhelming influence is the facts of the particular case; for the other, it is the idea – often received, but sometimes an original brainchild. That is one of my principal themes tonight. Another is that, different though the judge and jurist may be, their work is complementary; and that today it is the fusion of their work which begets the tough, adaptable system which is called the common law.

12 In my respectful view, the distinction which Lord Goff draws between judge and jurist is probably more persuasive where the former

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21 See *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric* [2007] 1 SLR(R) 853 at [43]–[44] (and reproduced at n 17 above).

22 Lord Goff of Chieveley, "The Search for Principle" in *The Search for Principle – Essays in Honour of Lord Goff of Chieveley* (William Swadling & Gareth Jones eds) (Oxford University Press, 1999) at p 314. On the specific issue of complementarity in roles, see also, by the same author, The Rt Hon Lord Goff, "Judge, Jurist and Legislature" [1987] Denning LJ 79 at 92 and 94. Indeed, the learned law lord also observed as follows in a postscript in the leading House of Lords decision on *forum non conveniens* in *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 at 488:

> I feel that I cannot conclude without paying tribute to the writings of jurists which have assisted me in the preparation of this opinion. Although it may be invidious to do so, I wish to single out for special mention articles by Mr. Adrian Briggs in (1983) 3 Legal Studies 74 and in [1984] L.M.C.L.Q. 227, and the article by Miss Rhona Schuz in (1986) 35 I.C.L.Q. 374. They will observe that I have not agreed with them on all points; but even when I have disagreed with them, I have found their work to be of assistance. *For jurists are pilgrims with us on the endless road to unattainable perfection; and we have it on the excellent authority of Geoffrey Chaucer than conversations among pilgrims can be most rewarding.* [emphasis added]

Reference may also be made to Alexandra Braun, "Judges and Academics: Features of a Partnership" in *From House of Lords to Supreme Court – Judges, Jurists and the Process of Judging* (James Lee ed) (Hart Publishing, 2011) ch 11 and Jack Beatson, "Legal Academics: Forgotten Players or Interlopers?" in *Judge and Jurist – Essays in Memory of Lord Rodger of Earlsferry* (Andrew Burrows, David Johnston & Reinhard Zimmermann eds) (Oxford University Press, 2013) ch 40.

relates to a *trial* judge – and is, in fact, acknowledged by the learned law lord himself in the passage just quoted. Indeed, the task of a trial judge is – in the main – not to expound on principles of law, except to the extent that they are relevant to the *facts* of the case at hand. There may of course be occasions when a novel point of law is involved, in which case the judge will have no choice but to expound on the principles of law he or she thinks are relevant to the facts of the case in question. An *appellate* court, on the other hand, does tend to expound relatively *more* on principles of law. One reason is that it is laying down the law in a particular sphere of the law for the future guidance of future cases for all courts in that particular jurisdiction. Even then, an appellate court cannot, as it were, go off on a "frolic" of its own. The principles of law it expounds on must bear some relevance to the facts before it.

13 To this extent, the jurist is not similarly bound – he or she can (to a certain or even very large extent) extrapolate (and even speculate) on what the principles of law in a particular area of the law ought to be in *a very broad and general way*. Indeed, in so far as the jurist is writing a *textbook*, this is only to be *expected*, as a textbook does (by its very nature) attempt to *synthesise* the law in that area of law and such synthesis does (again, by its very nature) tend to be *more general and universal*. By contrast, when judges and lawyers consult such a work *for practical purposes*, they would tend to look for *particular cases that are part of (but do not constitute) that area of the law*. That is why the (oft-time copious) *case references* in the *footnotes* are so very important to the judge and/or lawyer – although they appear to be like "clutter" to the jurist or law student who are only interested in the *broad propositions of law* that are (in the nature of things) to be located in the *main text*. Whilst the *broad* proposition of law which the *specific* cases *illustrate and embody* is important, it is *precisely because* the courts and lawyers deal with *specific facts* that they have to look – *more closely* – at the individual cases that are located within not only the main text but also the footnotes as well. Indeed, it is probably of most assistance to the judge or lawyer if they locate a particular case which is "on all fours" in so far as *the (substantive) facts* are concerned. In *contrast*, the jurist is (as already mentioned) more interested in the *broad propositions of law* and (in particular) with the coherence of the individual propositions and/or how they *ought* to be developed or improved. This is not to state that the courts are wholly uninterested in such an exercise. However (and, again, as already mentioned), they are only interested to the extent that such an exercise is *relevant* to the *facts* before the court itself. It is of course true that not all academic writings are works of synthesis – as I pointed out in my judgment:[23]

23 See *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric* [2007] 1 SLR(R) 853 at [44] (and reproduced at n 17 above).

> … certain academic writings (in particular, comments and notes on particular cases) will contain much more specific analysis of legal issues that might not 'qualify' as synthesis as such but would nevertheless be extremely helpful to a court faced with the same (or similar) issues.

Looked at in this collective light, there is much merit in the distinction which Lord Goff drew in his lecture between judge and jurist. *However*, it is equally true that – as I have pointed out in my judgment[24] – there is much *interaction* between the work of both judge and jurist. Nevertheless (and this leads me to my next point), "there is also a need for academic writings to have regard to issues that are – or are likely to be – faced by courts in actual cases; academic scholars should not go off on fanciful 'academic frolics' of their own".[25] In this regard, I have elaborated as follows:[26]

> These would, for example, include esoteric theories tailored for hypothetical situations which are wholly divorced from any sort of reality whatsoever. This is not to state that such hypothetical situations might not be invoked very occasionally to emphasise a point. However, a moderate – let alone excessive – indulgence in such an approach is both undesirable and tends to undermine the utility as well as credibility of the academic writing concerned. Nevertheless, the reasonable postulation of hypothetical situations that might arise before the courts and the legal analysis that flows therefrom might not only have useful normative value for the courts but might also assist in the resolution of current fact situations by analogy.

14 It is important to emphasise that when I wrote the observations just quoted, I was *not* – in any shape or form – deprecating the importance of *theory* and/or of theoretical or conceptual methodology.[27] Indeed, in novel situations, the need for conceptual analysis from first principles is often of the first importance. More specifically, there are also valuable and interesting analyses in the law of remedies from a

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24 See *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric* [2007] 1 SLR(R) 853 at [44] (and reproduced at n 17 above).

25 See *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric* [2007] 1 SLR(R) 853 at [44] (and reproduced at n 17 above).

26 See *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric* [2007] 1 SLR(R) 853 at [44] (and reproduced at n 17 above).

27 Or even *interdisciplinary* work, although Richard Posner is of the view (albeit in the American context) that "academic law increasingly has attracted refugees from other disciplines" who "have a natural inclination to base their legal teaching and writing on insights gleaned by them in the disciplines that were their first choice" and "[o]ften … have little interest in the traditional topics and methods of academic legal inquiry": see Richard A Posner, *Divergent Paths – The Academy and the Judiciary* (Harvard University Press, 2016) at p 9. And this includes, not surprisingly, a penchant for theory as well (at pp 10–12).

more theoretical standpoint.[28] It is also clear that the very concept of a "university" signals (as the very word itself embodies) the need for *unity in diversity*, in order that no one mode of scholarship becomes the dominant one to the exclusion of all others. However, there is a sense in which a purely abstract piece can serve no purpose other than to obfuscate (even it appears to be learned). Even worse is a tightly knit community of legal scholars who speak in a "language" which is of interest only to themselves and which is of no earthly use beyond the confines of their "legal commune" – and it would be all the more the pity if these legal scholars actually possessed the innate intelligence to apply their minds to more practical issues. Indeed, by focusing inwards only upon themselves to the exclusion of participation of others would be the very *antithesis* of the need for *unity in diversity* that was just referred to. Fortunately, though, if the Singapore experience is anything to go by, the undesirable traits in legal scholarship just mentioned are the exception rather than the rule. And I would like to consider three relatively recent Singapore decisions in the law of remedies to illustrate how legal scholarship has in fact *enhanced* the quality of analysis in decisions of the Singapore courts.[29]

15 As already alluded to above, one significant decision in which legal scholarship played an important part is the Singapore Court of Appeal decision in *MFM Restaurants*. As also mentioned above, that particular case clarified that the apparently new legal criterion introduced by Lord Hoffmann in the House of Lords decision in *The Achilleas* in the context of the test for remoteness of damage in the law of contract did *not* represent the law in Singapore. The relevant law in Singapore continued to be governed, instead, by the seminal English decision in *Hadley v Baxendale*.[30] In arriving at its decision in *MFM Restaurants*, the court considered, *inter alia*, a great many pieces of secondary literature. Indeed, this approach was not applied with regard to only the issue of remoteness of damage. The court also considered the issue of punitive damages and cited a number of articles in the process.[31] It also considered the important House of Lords decision in *Attorney*

28 See, for example, Stephen Smith, "Why Courts Make Orders (and What This Tells Us about Damages)" (2011) 64 CLP 51.

29 See also – in a more general vein – the very recent as well as interesting analysis in Lee Zhe Xu *et al*, "The Use of Academic Scholarship in Singapore Supreme Court Judgments: 2005–2014" (2015) 33 Sing L Rev 25.

30 (1854) 9 Exch 341; (1854) 165 ER 145.

31 *MFM Restaurants Pte Ltd v Fish & Co Restaurants Pte Ltd* [2011] 1 SLR 150 at [53] (citing Ralph Cunnington, "Should Punitive Damages Be Part of the Judicial Arsenal in Contract Cases?" (2006) 26 Legal Stud 369; Pey-Woan Lee, "Contract Damages, Corrective Justice and Punishment" (2007) 70 MLR 887; Solène Rowan, "Reflections on the Introduction of Punitive Damages for Breach of Contract" (2010) 30 OxJLS 495; and Andrew Phang & Pey-Woan Lee, "Restitutionary and Exemplary Damages Revisited" (2003) 19 JCL 1).

General v Blake,[32] and cited a number of articles as well.[33] However, as already mentioned, *MFM Restaurants* was concerned primarily with the applicability of the House of Lords decision in *The Achilleas* and, in this particular regard, the Singapore Court of Appeal considered a great number of academic articles as well as notes – relating, in the main (and not surprisingly, perhaps, in the circumstances), to *The Achilleas* itself.[34] And it is equally unsurprising that, after the decision in

32 [2001] 1 AC 268.

33 Citing Graham Virgo, *The Principles of the Law of Restitution* (Oxford University Press, 2nd Ed, 2006) ch 17 at pp 490–492 as well as 526 and 527–529 (*MFM Restaurants Pte Ltd v Fish & Co Restaurants Pte Ltd* [2011] 1 SLR 150 ("*MFM Restaurants*") at [54], [55] and [56], respectively); Martin Graham, "Restitutionary Damages: The Anvil Struck" (2004) 120 LQR 26 (*MFM Restaurants* at [55]); Pey-Woan Lee, "Responses to a Breach of Contract" [2003] LMCLQ 301 (*MFM Restaurants* at [55]); Pey-Woan Lee, "A New Model of Contractual Compensation" [2006] LMCLQ 452 (*MFM Restaurants* at [55]); David Campbell & Philip Wylie, "Ain't No Telling (which Circumstances Are Exceptional)" (2003) 62 Camb LJ 605 (*MFM Restaurants* at [55]); Robert J Sharpe & Stephen M Waddams, "Damages for Lost Opportunity to Bargain" (1982) 2 OxJLS 290 (*MFM Restaurants* at [55]); and Samuel Stoljar, "Restitutionary Relief for Breach of Contract" (1989) 2 JCL 1 (*MFM Restaurants* at [55]).

34 Citing Adam Kramer, "An Agreement-centred Approach to Remoteness and Contract Damages" in *Comparative Remedies for Breach of Contract* (Nili Cohen & Ewan McKendrick eds) (Oxford: Hart Publishing, 2005) ch 12 at p 249 (*MFM Restaurants Pte Ltd v Fish & Co Restaurants Pte Ltd* [2011] 1 SLR 150 ("*MFM Restaurants*") at [73], [107] and [118]); Adam Kramer, "The New Test of Remoteness in Contract" (2009) 125 LQR 408 (*MFM Restaurants* at [73]); Harvey McGregor, *McGregor on Damages* (Sweet & Maxwell, 18th Ed, 2009) at paras 6-173, 6-171 and 6-171 (*MFM Restaurants* at [90], [94] and [97], respectively); Paul C K Wee, "Contractual Interpretation and Remoteness" [2010] LMCLQ 150 (*MFM Restaurants* at [90], [92], [98] and [101]); Greg Gordon, "*Hadley v Baxendale* Revisited: *Transfield Shipping Inc v Mercator Shipping Inc*" (2009) 13 Edinburgh L Rev 125 (*MFM Restaurants* at [90]); Michael G Bridge, *The Sale of Goods* (Oxford University Press, 2nd Ed, 2009) at pp 762, 761–762 and 762 (*MFM Restaurants* at [91], [95] and [115]); Andrew Robertson, "The Basis of the Remoteness Rule in Contract" (2008) 28 Legal Stud 172 (*MFM Restaurants* at [95] and [107], respectively); Edwin Peel, "Remoteness Revisited" (2009) 125 LQR 6 (*MFM Restaurants* at [95], [99], [115], [116] and [118]); Steve McAuley observed thus (see Steve McAuley, "*Transfield Shipping Inc v Mercator Shipping Inc*" (2010) 38 ABLR 65 (*MFM Restaurants* at [95]); Robert E Megarry, *Miscellany-at-Law* (Stevens & Sons Ltd, 1955) at p 210 (*MFM Restaurants* at [97]); Elizabeth Macdonald, "Casting Aside 'Officious Bystanders' and 'Business Efficacy'?" (2009) 26 JCL 97 (*MFM Restaurants* at [98]); Brian Coote, *Contract As Assumption – Essays on a Theme* (Rick Bigwood ed) (Oxford: Hart Publishing, 2010) (*MFM Restaurants* at [98]); Brian Coote, "Contract As Assumption and Remoteness of Damage" (2010) 26 JCL 211 (*MFM Restaurants* at [98] and [106]); Stroud F C Milsom, "Reason in the Development of the Common Law" (1965) 81 LQR 496 (*MFM Restaurants* at [98]); John Halladay, "Remoteness of Contractual Damages" (2009) 21 Denning LJ 173 (*MFM Restaurants* at [99] and [115]); Goh Yihan, "*Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd*" (2009) 9 OUCLJ 101 (*MFM Restaurants* at [101] and [113]); Brice Dickson, "The Contribution of Lord Diplock to the General Law of Contract" (1989) 9 OxJLS 441

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MFM Restaurants was handed down, there were further articles and comments on both *The Achilleas*[35] and *MFM Restaurants*,[36] and (from a comparative perspective) both decisions.[37] It is also interesting to note that *MFM Restaurants* has itself been subsequently cited in various contract textbooks.[38] Indeed, it was also subsequently affirmed by the Singapore Court of Appeal in *Out of the Box Pte Ltd v Wanin Industries Pte Ltd*,[39] which usefully cautioned against conflating cases which in fact concern the interpretation of a contract in order to identify the specific nature of the obligation that has been undertaken with cases that are truly concerned with questions of remoteness.[40]

(*MFM Restaurants* at [106]); Janet O'Sullivan, "Damages for Lost Profits for Late Redelivery: How Remote Is Too Remote?" (2009) 68 Camb LJ 34 (*MFM Restaurants* at [115] and [117]); Gary Richard Coveney, "Damages for Late Delivery under Time Charters: Certainty at Last?" (2009) 23 Austl & NZ Mar LJ 205 (*MFM Restaurants* at [115] and [117]); *Chitty on Contracts* vol 1 (Hugh G Beale gen ed) (Sweet & Maxwell, 30th Ed, 2008) at para 26-100G (*MFM Restaurants* at [117]); Lord Hoffmann, "*The Achilleas*: Custom and Practice or Foreseeability?" (2010) 14 Edinburgh L Rev 47 (*MFM Restaurants* at [134], [136] and [137]); and Andrew Phang, "Doctrine and Fairness in the Law of Contract" in *The Common Law Lecture Series 2008–2009* (Jessica Young & Rebecca Lee gen eds) (The University of Hong Kong, 2010) at pp 18–24 (*MFM Restaurants* at [138]).

35 See, for example, Max Harris, "Fairness and Remoteness of Damage in Contract Law: A Lexical Ordering Approach" (2011) 28 JCL 122 and Victor P Goldberg, "*The Achilleas*: Forsaking Foreseeability" (2013) 66 CLP 107.

36 See, for example, Yihan Goh, "Explaining Contractual Remoteness in Singapore" [2011] JBL 282.

37 See, for example, Goh Yihan, "Contractual Remoteness in England and Singapore Compared: Orthodoxy Preferable?" (2013) 30 JCL 233 and Senthil Sabapathy, "*The Achilleas*: Struggling to Stay Afloat" [2013] Sing JLS 384.

38 See, for example (and leaving aside for the moment Singaporean textbooks), Michael Furmston, *Cheshire, Fifoot and Furmston's Law of Contract* (Oxford University Press, 16th Ed, 2012) at p 763; John Burrows, Jeremy Finn & Stephen Todd, *Law of Contract in New Zealand* (LexisNexis NZ Ltd, 4th Ed, 2012) at para 21.2.3(c); Nicholas C Seddon, R A Bigwood & Manfred P Ellinghaus, *Cheshire & Fifoot Law of Contract – 10th Australian Edition* (LexisNexis Butterworths Australia, 2012) at paras 23.39 and 23.40; Jill Poole, *Textbook on Contract Law* (Oxford University Press, 12th Ed, 2012) at p 372; Adam Kramer, *The Law of Contract Damages* (Hart Publishing, Oxford, 2014) at p 301; *Benjamin's Sale of Goods* (Michael Bridge gen ed) (Sweet & Maxwell, 9th Ed, 2015) at para 16-043; Ewan McKendrick, *Contract Law – Text, Cases and Materials* (Oxford University Press, 6th Ed, 2014) at pp 885–886; Ewan McKendrick, *Contract Law* (Palgrave, 11th Ed, 2015) at p 361; as well as Katy Barnett & Sirko Harder, *Remedies in Australian Private Law* (Cambridge University Press, 2014) at p 125.

39 [2013] 2 SLR 363 (which is also cited in Adam Kramer, *The Law of Contract Damages* (Oxford: Hart Publishing, 2014) at pp 301, 303, 333, 334 and 486).

40 *Out of the Box Pte Ltd v Wanin Industries Pte Ltd* [2013] 2 SLR 363 at [29] and [36]. It might also be noted that the court also observed (at [26]) that it had, in *MFM Restaurants Pte Ltd v Fish & Co Restaurants Pte Ltd* [2011] 1 SLR 150:

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16 Turning to another Singapore Court of Appeal decision, *ACES System Development Pte Ltd v Yenty Lily*[41] ("*ACES System Development*"), the (significant) points that were at issue concerned the nature of the user principle and its relationship to the compensation principle. Although the court did render some observations on these issues, it did not have to arrive at a definitive conclusion as there was, in fact, sufficient evidence to award the plaintiff substantive damages based on the compensation principle and, that being the case, there was no need as such to turn to the user principle. Nevertheless, the court did explore the proposition to the effect that the user principle is an exception to the general compensation principle inasmuch as the former principle can be invoked when the application of the latter principle only yields nominal damages in favour of the plaintiff. In this particular regard, the court examined the leading English Court of Appeal decision of *Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd*,[42] and posited, *inter alia*, a possible *alternative* analysis (referred to by the court in *ACES System Development* as "the Possible Alternative Analysis")[43] which would acknowledge that *only* Denning LJ (as he then was) had utilised the *user principle* in arriving at his decision and that the other two judges (Somervell and Romer LJJ) had utilised the *compensation principle* instead and that, in the circumstances, the user principle rested (*pace* Lord Denning's approach) on a *restitutionary* foundation that was separate and independent from (but not an exception to, as has been traditionally thought) the compensation principle. On a related note, where the possible alternative analysis just referred to applied, there was *no* requirement that there had been *actual* use of the plaintiffs' goods.[44] However, as already alluded to above, as this was "a rather thorny area of the law of damages", the court felt that "it would be appropriate … to defer arriving at a conclusive or definitive view as to what ought to be and, in particular, whether the Possible Alternative Analysis outlined in this judgment should be adopted instead as part of Singapore law" because "[a]s already noted above, there is *sufficient evidence in the present case* to permit [the] court to arrive at a decision utilising the *compensation*

[undertaken] an extensive review of existing case law and academic commentaries" before "[rejecting] Lord Hoffmann's new approach towards remoteness of damage in contract [in *Transfield Shipping Inc v Mercator Shipping Inc* [2009] 1 AC 61], at least to the extent it deviated from the rule in *Hadley v Baxendale* [(1854) 9 Exch 341; 156 ER 145].

41 [2013] 4 SLR 1317.

42 [1952] 2 QB 246.

43 See, in particular, *ACES System Development Pte Ltd v Yenty Lily* [2013] 4 SLR 1317 at [39].

44 See generally *ACES System Development Pte Ltd v Yenty Lily* [2013] 4 SLR 1317 at [42]–[46].

principle" [emphasis in original].[45] This particular case has in fact been the subject of commentary elsewhere,[46] but what *is* relevant for the purposes of the present piece is that, in its analysis, the Singapore Court of Appeal cited a not insignificant amount of legal literature in the process.[47] This is not surprising in view of the very difficult nature of

45 *ACES System Development Pte Ltd v Yenty Lily* [2013] 4 SLR 1317 at [54].

46 See Daryl Xu, "The Juridical Nature of User Damages for Wrongful Detention of Property: *ACES System Development Pte Ltd v Yenty Lily*" (2014) 14 OUCLJ 127.

47 Citing John Glover, "Restitutionary Principles in Tort: Wrongful User of Property and the Exemplary Measure of Damages" (1992) 18 Monash U L Rev 169 (*ACES System Development Pte Ltd v Yenty Lily* [2013] 4 SLR 1317 ("*ACES System Development*") at [25], [34], [41] and [43]); Graham Virgo, *The Principles of the Law of Restitution* (Oxford University Press, 2nd Ed, 2006) at pp 425–427, 439 and 459–60, 436–437 and 441, 427–428 and 459–460 (*ACES System Development* at [27], [29], [30], [31] and [40], respectively); Andrew Burrows, *The Law of Restitution* (Oxford University Press, 3rd Ed, 2011) at pp 652 and 651–652 (*ACES System Development* at [29] and [40], respectively); Jack Beatson, "The Nature of Waiver of Tort" in Jack Beatson, *The Use and Abuse of Unjust Enrichment – Essays on the Law of Restitution* (Oxford: Clarendon Press, 1991) ch 8 at pp 232 and 232–234 (*ACES System Development* at [29] and [40], respectively); James Edelman, *Gain-based Damages – Contract, Tort, Equity and Intellectual Property* (Oxford: Hart Publishing, 2002) at pp 143–144, 633–635 and 67 (*ACES System Development* at [30], [32] and [44], respectively); James Edelman, "The Measure of Restitution and the Future of Restitutionary Damages" [2010] RLR 1 (*ACES System Development* at [30]); Lord Goff of Chieveley & Gareth Jones QC, *The Law of Restitution* (Sweet & Maxwell, 7th Ed, 2007) at para 36-011 (*ACES System Development* at [31]); Norman Palmer, *Palmer on Bailment* (Sweet & Maxwell, 3rd Ed, 2009) at para 33-007 (*ACES System Development* at [37]); Nicholas Poon, "Turning Example into Exemplary: Ten Years on, the Curious Case of *Attorney-General v Blake*" (2011) 29 Sing L Rev 139 (*ACES System Development* at [38]); Harvey McGregor, *McGregor on Damages* (Sweet & Maxwell, 18th Ed, 2009) at para 12-015 (*ACES System Development* at [39]); Peter Birks, "The English Recognition of Unjust Enrichment" [1991] LMCLQ 4 (*ACES System Development* at [40]); Keith Mason, John W Carter & Greg J Tolhurst, *Mason and Carter's Restitution Law in Australia* (LexisNexis Butterworths Australia, 2nd Ed, 2008) at pp 671–674 (*ACES System Development* at [40]); Daniel Friedmann, "Restitution of Benefits Obtained through the Appropriation of Property or the Commission of a Wrong" (1980) 80 Colum L Rev 504 (*ACES System Development* at [44]); Ewan McKendrick, "Restitution and the Misuse of Chattels – The Need for a Principled Approach" in *Interests in Goods* (Norman Palmer & Ewan McKendrick gen eds) (LLP Reference Publishing, 2nd Ed, 1998) ch 35 at pp 908–916 (*ACES System Development* at [44]); Mitchell McInnes, "Gain, Loss and the User Principle" [2006] RLR 76 (*ACES System Development* at [44]); David Howarth, "Torts and Miscellaneous Other Wrongs" in *Butterworths Common Law Series – The Law of Restitution* (Steve Hedley & Margaret Halliwell gen eds) (Butterworths LexisNexis, 2002) ch 12 at para 12.35 (*ACES System Development* at [44]); David M Walker, *The Oxford Companion to Law* (Oxford: Clarendon Press, 1980) at p 373 (*ACES System Development* at [44]); *Black's Law Dictionary* (Bryan A Garner gen ed) (Thomson West, 9th Ed, 2009) at p 560 (*ACES System Development* at [44]); Robert J Sharpe & Stephen M Waddams, "Damages for Lost Opportunity to Bargain" (1982) 2 OxJLS 290 (*ACES System Development* at [53]); and *Clerk &*

(*cont'd on the next page*)

this particular area of the law as well as the relatively novel alternative approach which the court had set out in its judgment.

17 Finally, I would like to touch briefly on another Singapore Court of Appeal decision – *RBC Properties Pte Ltd v Defu Furniture Pte Ltd*[48] ("*RBC Properties*"). For the purposes of the present piece, I am concerned with only one particular aspect of that case – the measure of damages that ought to obtain pursuant to s 2(1) of the Misrepresentation Act[49] (a point which has also since been the subject of a perceptive comment).[50] Although the court did express some provisional views on this particular issue,[51] it is also important to note that, as the issue itself was not argued before the court, the court stated that it would express a conclusive view only when it was next directly in issue before it.[52] What is interesting for the purposes of the present piece is the fact that the provisional view expressed by the court was in fact *at variance with* the prevailing case law. In particular, in the English Court of Appeal decision of *Royscot Trust Ltd v Rogerson*[53] ("*Royscot Trust*"), it was held (disagreeing with the then prevalent academic opinion on this particular issue) that the measure of damages to be awarded under s 2(1) of the Misrepresentation Act ought to be that measure which would have been awarded for *fraudulent misrepresentation or deceit*. This view was subsequently cited with approval by the Singapore High Court in *Ng Buay Hock v Tan Keng Huat*.[54] However, drawing upon, *inter alia*, the secondary legal literature,[55] the Singapore Court of Appeal in *RBC Properties* suggested that the approach laid down in *Royscot Trust* (as briefly described above) might be *reconsidered*. It should, however, also be noted that the court in *RBC Properties* had also noted the approach of two law lords in the House of Lords decision in *Smith New Court*

Lindsell on Torts (Michael Jones & Anthony Dugdale eds) (Sweet & Maxwell, 20th Ed, 2010) at paras 17-07–17-08 (*Clerk & Lindsell on Torts* at [58]).

48 [2015] 1 SLR 997.

49 Cap 390, 1994 Rev Ed.

50 See Timothy Liau, "Abolishing the Fiction of Fraud in the Misrepresentation Act" [2015] LMCLQ 464.

51 *RBC Properties Pte Ltd v Defu Furniture Pte Ltd* [2015] 1 SLR 997 at [80]–[85].

52 *RBC Properties Pte Ltd v Defu Furniture Pte Ltd* [2015] 1 SLR 997 at [85].

53 [1991] 2 QB 297.

54 [1997] 1 SLR(R) 507.

55 Citing Richard Hooley, "Damages and the Misrepresentation Act 1967" (1991) 107 LQR 547 (*RBC Properties Pte Ltd v Defu Furniture Pte Ltd* [2015] 1 SLR 997 ("*RBC Properties*") at [83] and [84]); John Cartwright, *Misrepresentation, Mistake and Non-Disclosure* (Sweet & Maxwell, 3rd Ed, 2012) at para 6-64, fn 386 (*RBC Properties* at [83]); Ian Brown & Adrian Chandler, "Deceit, Damages and the Misrepresentation Act 1967, s 2(1)" [1992] LMCLQ 40 (*RBC Properties* at [84]); *Chitty on Contracts* (Sweet & Maxwell, 31st Ed, 2012) (Hugh G Beale gen ed) at para 6-075 (*RBC Properties* at [84]); as well as Edwin Peel, *Treitel: The Law of Contract* (Sweet & Maxwell, 13th Ed, 2011) at para 9-066 (*RBC Properties* at [84]).

Securities Ltd v Citibank NA,[56] in particular, that of Lord Steyn who had observed that *Royscot Trust* had been subject to "trenchant academic criticism".[57] Indeed, the court proceeded to observe thus:[58]

> Although both Lord Steyn and Lord Browne-Wilkinson expressed no conclusive view on *Royscot Trust* in *Smith New Court*, the tenor of their judgments (particularly that of Lord Steyn) suggests that the days of *Royscot Trust* might be numbered.

18 The court in *RBC Properties* then further observed as follows:[59]

> Indeed, as we have already noted, there is no reason in both logic and principle why a plaintiff should be as well-placed as he would have been had the misrepresentation concerned taken place in a situation of *actual* fraud or deceit since, *ex hypothesi*, the situation is in fact *not* one that pertains to actual fraud or deceit but on the contrary one that *falls short* of it. Further, and consistent with Lord Steyn's observations in *Smith New Court*, it is extremely difficult to see how the moral turpitude entailed under s 2(1) would on the same level as that entailed in a situation of fraudulent misrepresentation or deceit. [emphasis in original]

19 A few concluding observations might be apposite at this particular juncture. Although I have endeavoured to demonstrate the numerous pieces of secondary legal literature cited in all the three decisions mentioned, it is important to emphasise that a close perusal of the relevant paragraphs of the judgments in which such literature has been cited also demonstrates (in no uncertain terms) that this literature has not been cited for its own sake.[60] Certainly, in law and, indeed, in life generally, quantity is not *necessarily* a sign of quality. However, a close perusal as well as analysis of the relevant paragraphs in these decisions will demonstrate how important – from a *qualitative* perspective – the relevant secondary legal literature has been in assisting the Singapore courts in arriving at their decisions on relatively controversial areas of the law of damages – simultaneously underscoring the vital role which academic scholarship *can* play in the practical sphere. As already

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56 [1997] AC 254.

57 *Smith New Court Securities Ltd v Citibank NA* [1997] AC 254 at 283, citing Richard Hooley, "Damages and the Misrepresentation Act 1967" (1991) 107 LQR 547.

58 *RBC Properties Pte Ltd v Defu Furniture Pte Ltd* [2015] 1 SLR 997 at [84].

59 *RBC Properties Pte Ltd v Defu Furniture Pte Ltd* [2015] 1 SLR 997 at [84].

60 See also, for example, in relation to guarding against the dangers of mere reliance on citation for its own sake, Richard A Posner, *Divergent Paths – The Academy and the Judiciary* (Harvard University Press, 2016) at pp 28 and 380–381 and Neil Duxbury, *Jurists and Judges – An Essay on Influence* (Hart Publishing, 2001) at pp 14–17 and 35. Reference may also be made to Jack Beatson, "Legal Academics: Forgotten Players or Interlopers?" in *Judge and Jurist – Essays in Memory of Lord Rodger of Earlsferry* (Andrew Burrows, David Johnston & Reinhard Zimmermann eds) (Oxford University Press, 2013) ch 40 at pp 535–538.

mentioned, this is in no way to deprecate theoretical writings. However, it is equally true that theoretical writings that tend to appeal (and, indeed, be of relevance) to only a select band of academics *are* to be assiduously avoided – no matter how eloquently or clever they have been framed and phrased.

20 On a somewhat unrelated (but by no means unimportant) note, some of the views expressed thus far in this piece may have implications with regard to the issue of academic assessment for the purposes of tenure and promotion. The substance of academic scholarship – as opposed to merely where it is published – ought to be the focus. More importantly, the ideals of unity in diversity referred to earlier must be the governing principle. And this means that the focus ought not to be merely on theory, still less "high" theory. Excellent *doctrinal* legal scholarship is also equally important and is certainly important from a *practical* perspective. And, contrary to opinion in some quarters, excellent textbooks and monographs are as – if not *more* – important compared to articles (or even a series of articles) in top journals. From my own personal experience, it is even more difficult to write an excellent textbook: writing a good textbook requires an immense effort of both synthesis *as well as* analysis over a sustained period of time, culminating in a work that is several hundreds of pages in length.[61]

IV. Conclusion

21 I have sought to advance two simple – and related – theses in this essay. The first is that, in the search for principle (whether in the law of remedies in particular or in the law in general), comparative analysis is extremely important. Secondly, I attempted to explain as well as demonstrate the importance of integrating academic scholarship with practical analysis. Both these theses are deceptively simple – but they are by no means easy to accomplish and (perhaps as, if not more) importantly, might even entail a change in one's mindset. To this end (and with particular reference to the second thesis), an author has recently suggested, amongst other things, two possible ways forward which would aid in integrating academic scholarship with practical analysis. Although the author was writing from an American perspective, his suggestions are, in my view, of sufficient generality that they could be applied in the Commonwealth context as well.

61 And *cf* Richard A Posner, *Divergent Paths – The Academy and the Judiciary* (Harvard University Press, 2016) at p 46, where the learned author refers to "the decline of the legal treatise".

22 It has, first, been suggested that there should be "collaborative research between law professors and judges".[62] I think that this is an excellent suggestion, although care will have to be taken (especially on the part of the judge concerned) to note that the views expressed in any published research are his or her personal views only. There is also a need to avoid excessively controversial views in order to avoid (in turn) any misconceptions (whether real or imagined). This is less likely to be a danger in, for example, commercial law in general and the law relating to remedies in particular, although, in my view, care and sensitivity ought still to be a key consideration when a judge expresses his or her views in an extra-judicial sphere.

23 The same author also suggests that the *practical* skills which *law firms* insist law graduates must have would also put pressure on the law schools to focus less on purely theoretical courses and more on practical training instead.[63] Again, although he is writing in the American context, there is much truth in this. This brings me back to a point made earlier in this essay – that legal academics cannot merely indulge in their favourite "hobby horses" but must also bear in mind their (more important) calling to train law students for *practice*. I should also add that, when I was in legal academia, my proudest moments would be when my work was cited by the courts (both in Singapore and, on occasion, abroad). Anecdotal evidence suggests that, in some quarters, this might no longer be the case. If so (and I hope that I have been misinformed in this particular regard), this would be a turn for the worse and an attitude of the utmost parochialism that can only damage legal scholarship in the medium and (certainly) longer term. Having also taught legal philosophy (in addition to the law of contract) for a great many years, it is my view that whilst theory is extremely interesting, an excessive preoccupation with it will be a disservice to the legal profession as law graduates will be ill-equipped to embark on a legal career. Indeed (and on the contrary), it is impossible to embark on so-called "black-letter" or doctrinal research without simultaneously invoking theoretical concepts. By the same token, it is impossible to embark on sound theoretical research without some idea of how the law works in practice. I should add that it is also important to have an *historical* approach towards the law as well. And, as I have already alluded to above, this *diversity* ought *also* to be embodied within *the different ways in which one expresses one's legal research*. To this end, I have, as a legal academic, experimented with as many genres of legal writing as possible – from articles to textbooks, essays in books, case

62 See Richard A Posner, *Divergent Paths – The Academy and the Judiciary* (Harvard University Press, 2016) especially at pp 262 and 286.

63 See Richard A Posner, *Divergent Paths – The Academy and the Judiciary* (Harvard University Press, 2016) at pp 381–384.

notes, legislation comments, legislative digests, book reviews, review articles, monographs, law reform reports as well as newspaper articles. The audience which a legal academic potentially faces is a very wide one – and ought, ideally, to include laypersons as well. Any attitude to the contrary would be only to bury one's head in the legal sand – and that would be a tragic waste of legal talent in a world that has never had more possibilities for exploration and innovation than at any other time in history. The present volume exemplifies, in fact, what is possible when the correct attitude is adopted and I would like to take this opportunity to congratulate, once again, Prof Bant and all the authors for bringing to life that sense of wonder at the nobility in legal scholarship when legal scholars adhere to the ideals which I have referred to in the present essay.