Published in Equity Today: 150 Years after the Judicature Reforms. Oxford: Hart, 2023.
pp. 383-402. DOI: 10.5040/9781509954636

Equity in Commerce: Too Much and Too Little?

MAN YIP

I. INTRODUCTION

The interaction and clash between equity and commerce have attracted much attention from judges[1] and academics[2] in recent years. Commercial lawyers may complain about equity introducing uncertainty into commercial endeavours and at times, (mis-)applying the 'moral standards of the vicarage' to actors in commercial dealings.[3] However, the objections are not directed at all aspects of equity, but are usually addressed to some 'disfavoured parts of it', such as the creation of a new obligation or discretionary remedies.[4] On the other hand, from the perspective of equity lawyers, equity's interplay with commerce may lead to the contractualisation or commercialisation of equitable doctrines,[5] thereby lowering the standards that equity traditionally expects of actors such as trustees and fiduciaries.[6]

Lord Briggs, writing extra-judicially, stated that the important task is to investigate how 'to set bounds upon the role of equity in business and commerce, so as

[1] See, for example, The Honourable Justice MJ Beazley, 'Conflicts in Commercial Trusts' (Annual Commercial and Corporate Law Conference, Supreme Court of New South Wales, 2016); Lord Briggs of Westbourne, 'Equity in Business' (2019) 135 *LQR* 567; M Leeming, 'The Role of Equity in 21st Century Commercial Disputes – Meeting the Needs of Any Sophisticated and Successful Legal System' (2019) 47 *Australian Bar Review* 137; The Hon Geoffrey Nettle AC, 'Trust and Commerce in Historical Perspective' (2021) 15 *Journal of Equity* 2. See too, Newbury's chapter in this volume.

[2] See, for example, J Penner and P Davies (eds), *Equity, Trusts and Commerce* (Oxford, Hart, 2017); P Devonshire and R Havelock (eds), *The Impact of Equity and Restitution on Commerce* (Oxford, Hart, 2019); I Samet, *Equity: Conscience Goes to Market* (Oxford, OUP, 2018).

[3] *UBS AG (London Branch) v Kommunale Wasserwerke Leipzig GmbH* [2017] EWCA Civ 1567, [2017] 2 Lloyd's Rep 621 [347] (Gloster LJ dissenting). See also *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 WLR 1752 [81] (Lord Walker). *cf* M Harding, 'Equity and the Value of Certainty in Commercial Life' in P Devonshire and R Havelock (eds), *Impact of Equity and Restitution on Commerce* (Oxford, Hart, 2019) 147.

[4] Leeming (n 1) 151.

[5] M Yip and J Lee, 'The Commercialisation of Equity' (2017) 37 *Legal Studies* 647.

[6] See, eg, L Ho and R Nolan, 'The Performance Interest in the Law of Trusts' (2020) 136 *LQR* 402.

to keep its important role from getting out of hand'.[7] Focussing on modern English developments, Lord Briggs concluded that judges, academics and advocates have succeeded only in parts in keeping equity to its proper role.[8] But what is equity's proper role in commerce? It must be tied to the basic principles and the boundaries that are set in respect of these principles' operation in each context. But whatever equity's role may be in contemporary commerce, it undoubtedly takes some of its colour from its historical and non-commercial origins.

This chapter contributes to discussion of the operation of modern equity in commerce by introducing a comparative perspective: it considers how equity has developed in recent years in other common law jurisdictions, such as Hong Kong and Singapore. This international perspective is crucial for three reasons. First, equity has taken root in other jurisdictions beyond England and Wales and has resulted in developments of potential value to English law for law reform purposes. Second, commerce is transnational and the quality of common law (including equitable principles) in other jurisdictions is one of the factors which may influence where parties wish to have their international commercial disputes resolved. Third, a comparative review of Hong Kong and Singapore developments is meaningful because they are both financial centres whose laws have historically hewed closely to English law. Moreover, foreign judges (sitting or former judges) can exert some degree of direct influence on the laws in both jurisdictions.[9]

This chapter examines two areas: first, the modern courts' recourse to 'unconscionability'; and secondly, the irreducible core of trusteeship and duty limitation and liability exemption clauses. The first area is at the heart of the 'disfavoured' parts of equity which are said to generate uncertainty in commerce. The second area relates to the converse complaints from equity scholars that commercial considerations lower the standards set in equity. The analysis will show that the interaction between commerce (and to a large extent, contract law) and equity in these two areas demonstrates the interplay between certainty and flexibility in law. In the area of 'unconscionability', equity exhibits the trait of flexibility in a commercial context traditionally dominated by the principle of certainty. In the area of duty limitation and liability exemption clauses, on the other hand, equity exhibits the trait of certainty by providing a baseline standard which commerce attempts to make malleable based on the principle of party autonomy. It is perhaps not so much a clash between equity and commerce as a tension between certainty and flexibility in the enterprise of developing law and administering justice. The bounds that need to be set are determined by the role that equity plays in each context, informed by the values championed by each jurisdiction based on its unique culture, experience and the attitudes of the individual judges.

[7] Lord Briggs (n 1) 569.

[8] ibid 568.

[9] In Hong Kong, overseas judges are appointed to join the local judges in hearing appeals in the Hong Kong Court of Final Appeal: www.hkcfa.hk/en/about/who/judges/npjs/index.html. In Singapore, foreign judges are appointed as International Judges to hear cases in the SICC and the appeals from the SICC to the Singapore Court of Appeal: www.sicc.gov.sg/about-the-sicc/judges.

II. THE COMMERCIAL CONTEXT

It is apposite to make a preliminary remark about what is meant by 'commerce' and 'business' in this chapter. The commercial and domestic distinction is not a bright-line division.[10] However, 'context' is not used in this chapter as a determinant of the applicable tool of analysis. Instead, context is used more generally as the background against which to appreciate the application and adaptation of equitable principles. I therefore use the terms 'commerce' and 'business' widely, and so include business dealings that are not at arms' length.

Crucially, it is accepted that commercial and domestic contexts fall on a continuum and do shade into each other at some point. Further, the analysis is anchored on the observation that what might be traditionally perceived as the domestic context can be underlined by compelling commercial considerations such that it becomes a form of business. This is evident in the field of private client/wealth management practice, the context in which we will examine the law on duty limitation and liability exemption clauses in section IV. Relevantly, as the analysis will show, the 'commercial context' is a generalised label that in fact comprises different contexts. There is a need to differentiate between them.

III. UNCONSCIONABILITY

A. The Meaning of 'Unconscionability'

In *Gillett v Holt*, Walker LJ explicitly acknowledged that 'the fundamental principle of equity' is to 'prevent unconscionable conduct'.[11] The problem with the language of 'conscience' (and cognate labels)[12] is that it is vague and connotes intuitions that are inimical to the objectivity required by law.[13] Examples of judicial criticism and caution on the direct use of 'unconscionability' as a free-standing doctrine abound.[14] As do judicial efforts in setting limits to restrain the excesses of 'unconscionability' in modern law. In *Gavin Edmondson Solicitors Ltd v Haven Insurance Co Ltd*,[15] for example, Lord Briggs rejected as unprincipled an argument that the law on a solicitor's equitable lien should protect solicitors from 'any unconscionable interference

[10] See, eg, *Chan Yuen Lan v See Fong Mun* [2014] SGCA 36, [2014] 3 SLR 1048 [155]: the Singapore Court of Appeal categorically rejected the unclear domestic and commercial distinction that has emerged from *Stack v Dowden* [2007] UKHL 17, [2007] 2 AC 432.

[11] *Gillett v Holt* [2001] Ch 210 (CA) 225.

[12] For an examination of the historical meaning and usage of terms like 'conscience' and 'unconscionability', see R Havelock, 'The Evolution of Equitable "Conscience"' (2014) 8 *Journal of Equity* 128.

[13] See P Birks, 'Equity, Conscience, and Unjust Enrichment' (1999) 23 *Melbourne University Law Review* 1; R Havelock, 'Conscience and Unconscionability in Modern Equity' (2015) 9 *Journal of Equity* 1, 3–4; G Virgo, 'Whose Conscience? Unconscionability in the Common Law of Obligations' in A Robertson and M Tilbury (eds), *Divergences in Private Law* (Oxford, Hart, 2016).

[14] See, eg, *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 (PC) 392 (Lord Nicholls); *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve (sole executrix of the estate of Ng Hock Seng, deceased)* [2013] SGCA 36, [2013] 3 SLR 801 [100]–[103].

[15] [2018] UKSC 21, [2018] 1 WLR 2052.

with their expectations in relation to recovery of their charges'.[16] In respect of the element of 'unconscionability' in the equitable doctrine of knowing receipt, both the Hong Kong and Singapore courts have clarified its application in the commercial context. Under Hong Kong law, the defendant must have 'actual knowledge of the facts which render it unconscionable for the defendant to retain the benefit of the receipt'.[17] Under Singapore law, whilst actual knowledge of breach of trust is not 'invariably required', the Singapore Court of Appeal said that unconscionability could be shown in the commercial context 'where there are circumstances in a particular transaction that are so unusual, or so contrary to accepted commercial practice'.[18]

B. The Modern Embrace of 'Unconscionability'

Yet, the general wariness of 'unconscionability' in modern law has not halted courts from embracing it in some contexts. As Lord Briggs astutely points out, 'unconscionability' may 'sometimes help … in preventing equity being reduced to a set of arcane rules, and becoming detached from its fundamental purpose'.[19] The modern function of 'unconscionability' is as a tool wielded by courts to decide cases in a fact-sensitive way, whether in responding to new facts or in taking the full facts of the case into consideration. Its curse is its very charm: the lack of complete definitional precision. In English law, we have seen the endorsement of 'unconscionability' as part of the test for setting aside a voluntary disposition on the basis of mistake in *Pitt v Holt*.[20] In Australia, 'unconscionability' is very much alive,[21] both in statutes (commonly referred to as 'statutory unconscionability'),[22] as well as in judge-made law.[23]

More recently, in Singapore and Hong Kong, we see judicial recourse to 'unconscionability' by the apex courts in extending existing principles and developing new doctrines in 'hard cases'. In both jurisdictions, 'unconscionability' provides the justification for the law to decide the outcome in a fact-sensitive way. The inherent difficulty with a fact-sensitive approach is in ensuring that it does not undermine certainty, a value that is considered paramount in the commercial context. The introduction of new principles or the extension of existing ones based on a fact-sensitive approach

[16] ibid [58].

[17] *Hing Yip Holdings (Hong Kong) Ltd v Cellmark China Ltd* [2021] HKCFI 1396 [209], citing *Thanakharn Kasikorn Thai Chamkat (Mahachon) v Akai Holdings Ltd* [2010] HKCFA 63, (2010) 13 HKCFAR 479.

[18] *George Raymond Zage III v Ho Chi Kwong* [2010] SGCA 4, [2010] 2 SLR 589 [32] (VK Rajah JA).

[19] Lord Briggs (n 1) 583.

[20] [2013] UKSC 26, [2013] 2 AC 108 [124]–[125]. For an application in the commercial context, see *Co-operative Bank Plc v Hayes Freehold Ltd* [2017] EWHC 1820 (Ch).

[21] However, Justice Leeming notes extra-judicially that based on a sample of commercial list judgments from 2014 to 2018, a large percentage of the claims based on allegations of unconscionable conduct failed. See Leeming (n 1) 1513–14.

[22] See, eg, Australian Securities and Investments Commission Act 2001, s 12CB and Australian Consumer Law, s 21.

[23] See discussion in Havelock, 'Conscience and Unconscionability in Modern Equity' (n 13) 15–19.

is even more concerning. I examine these decisions below and investigate how courts balance certainty, flexibility and innovation in modern equity, and thus how proper bounds on equity operating in commerce are set.

i. The Narrow Doctrine of Unconscionability: BOM v BOK

BOM v BOK[24] is a landmark ruling of the Singapore Court of Appeal. The Court's decision was delivered by Andrew Phang JA (since redesignated as JCA) who was a contract law scholar prior to joining the bench. The case, in which Singapore law recognised the narrow doctrine of unconscionable transactions,[25] arose in the family context between a married couple whereby the wife misled her husband into giving up his inheritance by asking him to sign a trust deed at a time when he was undergoing acute grief over the passing of his mother. The husband alleged that the wife had misrepresented to him that the trust of all of his assets in favour of his infant son was to take effect on his death when in fact it took effect immediately, a matter he belatedly learnt after signing the deed. The Singapore Court of Appeal agreed that the trust deed could be set aside on the grounds of misrepresentation, mistake, undue influence and unconscionability.

In respect of the doctrine of unconscionability under Singapore law, the Singapore Court of Appeal formulated a two-stage test.[26] Under stage one, the plaintiff bears the burden to show that he or she suffered from an infirmity of sufficient gravity and evident to the counterparty which the counterparty exploited in procuring the transaction. On satisfying this requirement, the burden then shifts to the defendant at stage two to show that the transaction was fair, just and reasonable. The Court of Appeal emphasised that the Singaporean version of unconscionable bargains is one that sits between the narrow version endorsed in cases such as *Fry v Lane*[27] and *Cresswell v Potter*[28] and the broad version exemplified by *Commercial Bank of Australia Ltd v Amadio*.[29] Notably, the Singapore Court of Appeal was of the view that the *Amadio* doctrine – which is based on the test of 'special disadvantage' – is too uncertain and can lead to subjective judicial analysis.[30] The Singaporean doctrine also expanded the list of recognised infirmities laid down in the aforementioned English cases to include physical, mental or emotional infirmities, beyond poverty and ignorance.[31] The point appears to be this: the doctrine needs to be fact-sensitive, but it must clearly define what facts may be admitted for evaluation. The decision has attracted

[24] [2018] SGCA 83, [2019] 1 SLR 349.

[25] *cf Esben Finance Ltd v Wong Hou-Lianq Neil* [2022] SGCA 1, [2022] 1 SLR 136 [246]. In this subsequent decision, the Singapore Court of Appeal seemed to have taken a more tentative stance in respect of the place of the free-standing doctrine of unconscionability in Singapore law. Phang JCA, delivering the unanimous judgment of the court, described the doctrine as 'putative' and commented that it had not been rejected entirely in *BOM v BOK*.

[26] *BOM v BOK* (n 25) [141]–[142].

[27] (1888) 40 Ch D 312 (Ch).

[28] [1978] 1 WLR 255 (Ch).

[29] (1983) 151 CLR 447 (HCA).

[30] *BOM v BOK* (n 25) [133].

[31] ibid [141].

trenchant criticisms from Bigwood, especially in respect of the court's characterisation of *Amadio* as representing a broad doctrine of unconscionability.[32] This is not the occasion to examine Bigwood's criticisms in detail. Instead, I wish to raise three other points regarding *BOM v BOK* that are tied to the theme of my chapter.

First, the *BOM v BOK* doctrine of unconscionability also applies to contractual transactions,[33] although the Singapore Court of Appeal does not appear to draw any distinction between the principles to be applied in the commercial and non-commercial contexts. This is consistent with the same court's approach in *Chan Yuen Lan v See Fong Mun*,[34] a case concerning beneficial ownership of property, in which it laid down a six-step framework that is to apply in both commercial and non-commercial contexts. That the same principles apply does not mean that there is no distinction at all in the application in each context – the Court acknowledged that 'in principle', it would be easier to rebut the presumption of resulting trust in the domestic context.[35] Reading the two cases together, and to borrow Hopkins' terminology,[36] the Singapore courts favour a 'context-neutral, outcome-specific' approach. That is, the same principles are applied regardless of the context, but the context affects the application and therefore the outcome of the case.[37]

Second, the Singapore Court of Appeal was wary of introducing uncertainty and unpredictability by the recognition of 'unconscionability' as a free-standing doctrine, even in the domestic context. It tried to dissociate 'unconscionability' from historical usage and perception and imbue it with modern sensibility. This grave concern must be read against the wider backdrop of the country's ambition to become a leading hub for international dispute resolution. It explains the Court's lengthy discussion of the various meanings of 'unconscionability' and the distinction between unconscionability operating as an overarching rationale and unconscionability operating as a substantive doctrine.[38] The discussion has a signalling effect: to avoid any perception that Singapore equity – particularly in the context of equitable intervention in contracts – descends into wide discretion and uncertainty. More importantly, the Court is clearly vigilant against introducing uncertainty and unpredictability through the embrace of unconscionability even in the domestic context. The application of these principles in the commercial context, on a 'context-neutral, outcome-specific' approach, ensures that the principles are not subject to further adaptation which could potentially lead to greater uncertainty.

Third, it may be questioned as to whether the Court of Appeal's concern over uncertainty was somewhat overstated to the point that it colours its view of *Amadio*.

[32] R Bigwood, 'Knocking Down the Straw Man: Reflections on *BOM v BOK* and the Court of Appeal's "Middle-Ground" Narrow Doctrine of Unconscionability for Singapore' [2019] *Singapore Journal of Legal Studies* 29.

[33] *BOM v BOK* (n 25) [176].

[34] (n 11) [147].

[35] ibid [157], citing PS Davies and G Virgo, *Equity and Trusts: Cases and Materials* (Oxford, OUP, 2013).

[36] N Hopkins, 'Regulating Trusts of the Home: Private Law and Social Policy' (2009) 125 *LQR* 310, 316.

[37] See *BOM v BOK* (n 25) [112]. This is evident in the Singapore Court of Appeal's treatment of the issue as to whether there was an implied retainer between the wife (a lawyer) and the husband in relation to the former's advice as to the effect of the trust deed to the latter. The court took note of the marital context and said that it is 'far removed from the commercial contexts in which implied retainers are typically found'.

[38] *BOM v BOK* (n 25) [117]–[126].

The answer would depend on one's perspective. Here, I agree with Bigwood's point that 'the interpretation of another legal system's doctrinal formulation is to a significant and unavoidable extent perspectival',[39] but I do so in affirmation of the value of a comparative perspective. The treatment of equity in a particular legal system is always tied to its unique legal culture and history, and to some degree, influenced by the personality and training of the judges involved.[40] A person internal to the legal system may consider an external viewpoint on the laws of her own country as a misinterpretation, having acquired familiarity with how the laws are applied locally and perceived by the local legal community. In relation to the doctrine of unconscionability, Bigwood points out that the Australian doctrine should not be perceived as a wide doctrine because *Amadio* has been reined in by a series of subsequent decisions.[41] On the other hand, the external viewpoint is often expressed in the process of assessing the suitability of transplanting that law to a different legal system. The two perspectives are equally valuable and pertinent to the understanding of the development of equity in each jurisdiction. In particular, on this occasion in *BOM v BOK*, Phang JA was concerned with adopting the language of 'special disadvantage', which potentially admits a wide margin of discretion, in Singapore law. No matter how Australian courts might have circumscribed *Amadio* in subsequent cases, it cannot be denied that the nuances in post-*Amadio* Australian case law could become lost in transplantation.[42] In discussing perspective, I should also add that Phang JA was likely influenced by the paramount status of certainty in Singapore contract law in his treatment of equity in the domestic context, especially as the doctrine is equally applicable in the contractual context.[43] Indeed, the tolerance for flexibility and discretion would certainly vary from jurisdiction to jurisdiction,[44] and even from one judge to the next.[45] This helps to explain the difference in approach to the doctrine of unconscionability between the different jurisdictions. I will return to this point shortly in my discussion of *Quoine Pte Ltd v B2C2 Ltd*.[46]

[39] Bigwood (n 33) 138.

[40] Yip and Lee (n 5) 649–50.

[41] Bigwood (n 33) 51–54, referring to, eg, *ACCC v C G Berbatis Holdings Pty Ltd* [2003] HCA 18, (2003) 214 CLR 51 and *Kakavas v Crown Melbourne Ltd* [2013] HCA 25, (2013) 250 CLR 392.

[42] In *Stubbings v Jams 2 Pty Ltd* [2022] HCA, [2022] 399 AL 409 [39] Kiefel CJ, Keane and Gleeson JJ explained that considerations of knowledge, special disadvantage and unconscientious exploitation under the *Amadio* doctrine are not 'to be addressed separately as if they were separate elements of a cause of action in tort' and the court, in determining equitable relief, is entitled to take 'a more comprehensive view' based on an examination of the facts of the case.

[43] Phang JA (as he then was) has referred to the Singapore court's rejection of an implied duty of good faith in contract law: see *BOM v BOK* (n 25) [125]. Put another way, the learned judge approached the matter from the standpoint of transactional certainty, rather than through the lenses of equity.

[44] See E McKendrick, 'Commercial Contract Law: How Important Is the Quest for Certainty?' [2021] *Lloyd's Maritime and Commercial Law Quarterly* 72, 96.

[45] The Honourable Justice Peter Young OA, then Chief Judge in Equity in New South Wales, had made this point extra-judicially in the context of comparing the judicial attitude towards time clauses, citing the Privy Council decision in *Union Eagle Ltd v Golden Achievement Ltd* [1997] AC 514 (PC) (an appeal from Hong Kong) as illustration. See PW Young, 'Equity, Contract and Conscience' in S Degeling and J Edelman (eds), *Equity in Commercial Law* (Sydney, Lawbook Co, 2005) 503.

[46] [2020] SGCA(I) 02, [2020] 2 SLR 20.

ii. Unilateral Mistake in Equity and Unconscionable Conduct

The *BOM v BOK* doctrine not only applies in the commercial context, but it potentially functions as a control as to how much equity should be introduced in the commercial setting in Singapore law, especially in novel situations. In *Quoine*, the Singapore Court of Appeal was confronted with an appeal from the Singapore International Commercial Court ('SICC') concerning cryptocurrency trades carried out on the defendant's currency exchange platform as a result of a prior computer system glitch. The contracts were concluded pursuant to the parties' respective deterministic algorithms without human participation or foreknowledge. This resulted in the plaintiff selling Ethereum for Bitcoin at a rate that was approximately 250 times the then prevailing market rate, and the sale proceeds were automatically credited to the plaintiff's account. On the defendant's discovery of the system error and the trades made, it unilaterally cancelled the trades and reversed the debit and credit transactions. The plaintiff sued the defendant, amongst other claims, for breach of contract.

One of the defences raised was unilateral mistake in equity.[47] The defendant argued that the counterparties to the contracts had mistakenly believed that they would be trading at prices which approximated the prevailing true market value. It further contended that the plaintiff's programmer had actual or constructive knowledge of this mistake because his main objective in programming the trading software which allowed trades at disproportionate prices to take place under certain conditions was to 'unconscionably profit' from potential errors of the other market participants.[48] Both the majority and the dissenting judgment from Mance IJ relied on *BOM v BOK*, but to different effects.

The majority (comprising Menon CJ, Phang JA, Prakash JA and French IJ) rejected the defence on the basis that there was neither constructive knowledge of the mistaken party's mistake nor unconscionable conduct, which are requirements under current Singapore law,[49] on the part of the programmer to justify setting aside the contract on the basis of unilateral mistake in equity.[50] By way of obiter, the majority referred to the discussion of 'unconscionable conduct' in *BOM v BOK* in its consideration as to whether 'the same narrow conception of unconscionability should apply in the context of unilateral mistake in equity', although it was not necessary for the Court to decide the point in the dispute.[51] This obiter comment, whilst contemplative in nature, indicates inclination on the majority's part to unify the definition of 'unconscionable conduct' under Singapore law, for the purpose of legal certainty.

[47] The Singapore Court of Appeal assumed without deciding that the defence of unilateral mistake could be availed by the defendant as a defence to the breach of contract claim mounted by the plaintiff, even though the alleged mistake related to contracts entered into between the plaintiff and the counterparties. See *Quoine* (n 47) [78].

[48] ibid [112].

[49] The majority took the view that the court's task was to 'apply existing law on the doctrine subject to incremental adjustments being made in order to suit the particular context'. A more fundamental reform would require legislative intervention: ibid [79].

[50] ibid [126]–[127].

[51] ibid [109]–[110].

Mance IJ, in dissent, took the position that the defendant should have succeeded in its defence of unilateral mistake in equity, not based on current principles but through an adaptation of the current principles to uphold justice 'in the new world of algorithmic programmes and artificial intelligence'.[52] As the parties had entrusted the transactions to computers, there was no human involvement or consciousness at the time the transactions took place.[53] Hence, it would not be meaningful to apply the existing law on unilateral mistake which necessarily asks if the counterparty had actual knowledge or constructive notice of the mistake.[54]

To fashion a new set of principles for the algorithmic world, Mance IJ first emphasised the attributes of equity as being *flexible* and *supplemental* to the common law to provide relief relating to unilateral mistake.[55] Mance IJ said that '[e]quity's conscience must be capable of being affected by behaviour in seeking to retain the benefit of the mistake, once it is discovered'.[56] This provides justification to fashion a test that focuses on a reasonable trader's reaction upon learning of the transactions. If a reasonable trader would have recognised that a fundamental computer error had occurred on discovering the transactions, and the mistake could be readily corrected without detriment to the non-mistaken party or prejudice to third-party interests, it would be unconscionable to allow the trader to retain the benefit.[57] As Mance IJ explained, it is the failure to 'do the honourable thing and return the benefit' in such circumstances that amounts to unconscionability.[58]

Importantly, Mance IJ referred to *BOM v BOK* in his analysis as a point of distinction. He said a distinction needs to be made between, on the one hand, unconscionability being used as the sole criterion for relief (as in *BOM v BOK*) which justifies a narrow scope of operation and, on the other hand, unconscionability being used as an additional criterion to a primary basis of relief,[59] which permits a greater scope of flexibility 'to meet the equity of the case'.[60] In other words, unlike the majority, he confined the narrow view of unconscionability in *BOM v BOK* to a defined context of application which does not implicate areas that lie beyond. Following from this analysis, Mance IJ's proposed principles for unilateral mistake in equity applied to algorithmic contracting would not be subject to the narrow view of unconscionability in *BOM v BOK*. Unconscionability or unconscionable conduct is not used as the sole criterion for relief. On one view, Mance IJ's proposed adaptation of the principles of unilateral mistake is reminiscent of the *Pitt v Holt* test for setting aside a voluntary disposition on the basis of mistake. The *Pitt v Holt* test requires a causative mistake of sufficient gravity which would render it unjust or unconscionable to leave the mistake uncorrected.[61] The court would consider all the circumstances of the case

[52] ibid [193].
[53] ibid [182].
[54] ibid [178] and [204].
[55] ibid [163] and [166].
[56] ibid [171]–[172].
[57] ibid [195].
[58] ibid [206].
[59] As suggested in relation to unilateral mistake in equity in *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2005] SGCA 2, [2005] 1 SLR(R) 502.
[60] ibid [169]–[170].
[61] *Pitt v Holt* (n 21) [126].

to determine if the transaction should be reversed. Similarly, Mance IJ's proposed test of unilateral mistake may be recast as requiring a very serious computer error to have occurred and in determining whether to reverse the transaction, the court is to consider the circumstances of the case. The factors to take into account include: whether the party seeking to retain the benefit of the transaction would have realised that a very serious mistake had occurred on learning of the transaction; whether the party seeking to retain the benefit would have suffered any detriment if the transaction were reversed; whether any third party interests have intervened;[62] and whether the party seeking to set aside the contract were so egregiously at fault that he should be denied relief.[63] On this interpretation, there is a primary basis (a very serious or fundamental mistake) to which the additional consideration of 'unconscionability' attaches. Pertinently, as with the *Pitt v Holt* test but unlike the traditional test for unilateral mistake in equity, Mance IJ's test does not depend on particular kinds of egregious conduct. It is concerned with whether the circumstances of the case, holistically assessed, require a transaction to be set aside. The test therefore does not seek to define 'unconscionable conduct'.

Crucially, Mance IJ's proposed adaptation results in a test that is no longer concerned with unilateral mistake, terminology which suggests that only one party is mistaken. Rather, a new doctrine concerned with computer error was proposed by Mance IJ. On one level, *Quoine* is a testament to the contrasting views on the modern recourse to unconscionability and equity's relationship with contractual certainty. Interestingly, this contrast in views – which may be fairly described as a clash between the internal and external perspectives on 'unconscionability' and certainty – played out in an 'international and commercial'[64] dispute governed by Singapore law in a national court designed to be 'international' in character.[65] Indeed, it may be said that the majority looked at the doctrine of mistake in equity through the prism of contract, a standpoint which would lead to an impulse to restrain equitable intervention in the name of safeguarding contractual certainty. Mance IJ, on the other hand, considered the matter through the lens of equity which quite naturally brought to the fore the role and qualities of equity in delivering fair and just outcomes. In his own words, '[t]here are cases where justice outweighs in the balance the interests of legal certainty'.[66] This contrast in views also bears on a point of reflection: is the admired quality of a jurisdiction's commercial law attributed primarily to its certainty? Mance IJ's dissenting judgment will draw sympathy from those who attach greater weight to delivering fair and just outcomes. The answer would differ between jurisdictions, and even between judges. In *Vauxhall Motors Ltd v Manchester Ship Canal Co Ltd*,[67] in accounting for the high regard which English law enjoys in the world, Lord Briggs placed greater emphasis on the value of certainty,[68] whilst Lady Arden

[62] ibid [167].
[63] ibid [195].
[64] The SICC only hears 'international and commercial' disputes.
[65] It may be that, for this reason, former English judges feel less inhibition in expressing their views in the SICC than in the English courts. cf *Lehtimäki v Cooper* [2020] UKSC 33, [2022] AC 155 [236] (Lord Reed).
[66] *Quoine* (n 47) [184].
[67] [2019] UKSC 46, [2020] AC 1161.
[68] ibid [2] and [41].

accorded greater weight to the delivery of fair and just outcomes and credited that attribute of English law to its equitable principles.[69]

iii. Discretionary Remedialism – 'Unconscionability' and Controls

The contrast in views between the majority and Mance IJ in *Quoine* also bears on the judicial techniques used to set proper bounds to the operation of equity in commerce. Beyond defining 'unconscionability', there are other techniques (some deliberate and others incidental) which work towards the same end. In this subsection, we examine controls of excessive discretion in the commercial context in relation to two controversial equitable doctrines: the remedial constructive trust and proprietary estoppel.

Whilst English law has explicitly rejected the remedial constructive trust,[70] it has been recognised in Australia, Canada and Singapore. The remedial constructive trust affords courts the flexibility to award proprietary relief based on the circumstances of the case. Unlike the Australian model, the Singaporean model has generally escaped intense scrutiny, in part, because its framework remained underdeveloped for a long time.[71] And in most cases in which the remedy was sought, the claim had been unsuccessful.

Importantly, 'unconscionability' lies at the core of the Singaporean model of remedial constructive trust. It is 'predicated on a state of knowledge which renders it unconscionable for the recipient to keep the [asset which will be subject to the trust]'.[72] It is thus well accepted that under Singapore law, fault is required for a remedial constructive trust to be awarded. To date, the one case in which the claim for remedial constructive trust succeeded concerned commercial fraud.[73] A seemingly narrow definition of 'unconscionability' notwithstanding, the remedial constructive trust could potentially lead to widely available proprietary relief in both domestic and commercial settings. Many causes of action recognised under Singapore law entail an element of fault. And it is by no means clear where the line between new categories of institutional constructive trust and new instances in which a remedial constructive trust could arise is to be drawn.[74]

Beyond the requirement of fault, the only doctrinal controls appear to be that: (a) the remedial constructive trust does not establish a cause of action and operates only as a remedy awarded at the court's discretion;[75] (b) there must be a proprietary

[69] ibid [63].

[70] *Bailey v Angove's Pty Ltd* [2016] UKSC 47, [2016] 1 WLR 3179 [27].

[71] See generally M Yip, 'Singapore's Remedial Constructive Trust: Lessons from Australia?' (2014) 8 *Journal of Equity* 77. *cf Ok Tedi Fly River Development Foundation Ltd v OK Tedi Mining Ltd* [2021] SGHC 205 [106].

[72] *Wee Chiaw Sek Anna* (n 15).

[73] *National Bank of Oman SAOG Dubai Branch v Dhamala* [2020] SGHC 199, [2020] 3 SLR 943. The cause of action in response to which the remedy was granted was the tort of unlawful means conspiracy.

[74] eg, under Singapore law, a constructive trust imposed over unauthorised gains received in breach of fiduciary duty is institutional in nature: see *Guy Neale v Nine Squares Pty Ltd* [2014] SGCA 64, [2015] 1 SLR 1097.

[75] *Ok Tedi* (n 72) [109].

connection between the assets claimed and the plaintiff's own assets;[76] and (c) the court can tailor the remedy to the circumstances of the case to prevent prejudice to third parties' interests.[77] In practice, the remedial constructive trust under Singapore law has been kept in check as a result of judicial restraint prevailing at the High Court level. The restraint is expressed in a variety of ways, including scepticism that the remedy has been firmly recognised under Singapore law;[78] advice that the remedy is to be 'sparingly' imposed;[79] and a general unwillingness to discuss the remedy where the case could be resolved through other means.[80] That being the case, a general judicial disclination against awarding or even engaging with the remedy does not amount to setting *proper bounds* on this equitable remedy. To ensure that the remedial constructive trust does not become an instrument of subjective justice, the immediate task is to develop proper principles to guide the exercise of discretion.

It has been said that the modern function of proprietary estoppel 'is to deal, in a fact-sensitive way, with some of the risks arising from the existence of legal powers, such as the power to transfer property to another'.[81] The Hong Kong Court of Final Appeal's decision in *Cheung Lai Mui v Cheung Wai Shing (No 2)*[82] appears to have taken an overly expansive view of a fact-sensitive approach on the basis of unconscionability.

The case arose in the domestic context, arising from a dispute between a successor to title to the land and an occupier who claimed that a promise was made to him by the predecessor co-owners of the land. The Court was confronted with the question whether there was 'reasonable detrimental reliance' of the promisee before the death of the promisor (in this case, the last surviving co-owner) and whether detrimental reliance after the promisor's death could be taken into account. Sidestepping the issue of whether the detriment suffered by the occupier was *substantial* prior to the promisor's death, the Court simply took the view that the occupier's reliance was reasonable having regard to the family culture and his relative youth at the material time. On the issue of appropriate relief, in a disappointingly brief analysis, Ribeiro PJ and Gummow NPJ simply held that 'dispossessing' the occupier in circumstances where he had not invested in any other properties and had instead maintained strong sentimental and emotional attachment to the land which was his family home for many years would be *unconscionable* in the sense used by Walker LJ in *Gillett v Holt*.[83] The Court gave no explanation as to why Hong Kong law, at the remedial

[76] *Zhou Weidong v Liew Kai Lung* [2017] SGHC 326, [2018] 3 SLR 1236 [81]–[82]. The claim would fail if the claimant's assets have been dissipated.

[77] *Ong Chai Koon v Ong Chai Soon* [2021] SGHC 76 [185].

[78] *Ok Tedi* (n 72) [106].

[79] *CPIT Investments Ltd v Qilin World Capital Ltd* [2017] 5 SLR 1 (SICC) [199] (Vivian Ramsay IJ).

[80] See, eg, *Sabyasachi Mukherjee v Pradeepto Kumar Biswas* [2018] SGHC 271 [19]; *Philip Antony Jeyaretnam v Kulandaivelu Malayaperumal* [2019] SGHC 214, [2020] 3 SLR 738 [23]–[24].

[81] J Mee and B McFarlane, 'Estoppel Remedies: Switching to Expectation When It is Difficult to Quantify Detriment' (*University of Oxford Property Law Blog*, 15 March 2022), www.law.ox.ac.uk/research-and-subject-groups/property-law/blog/2022/03/estoppel-remedies-switching-expectation-when.

[82] [2021] HKCFA 19, [2021] 5 HKC 185.

[83] (n 12) 225 and 232.

stage, should start with expectation relief[84] and how detriment was assessed to determine if that starting point ought to be displaced. Whilst direct financial expenditure is not required to establish detriment, the Court appears to be overly sympathetic towards the occupier's sentimental and emotional attachment to the home. Further, the occupier and his family had enjoyed rent-free accommodation for many years, a countervailing benefit that should be taken into account in the Court's exercise of discretion.

How would the *Cheung Lai Mui* decision affect the application of proprietary estoppel in the commercial context? Whilst the decision appears to endorse the exercise of strong discretion, it may be that the commercial context is somewhat insulated from the impact of *Cheung Lai Mui*. It is generally difficult to succeed on the doctrine where the claim arose out of failed contractual negotiations where the parties knew that the terms agreed to were not binding.[85] In Singapore, the judicial sentiment is that a claim in proprietary estoppel should not be imposed too readily in the commercial setting, as parties 'dealing at arm's length' would expect to arrange their dealings through contract.[86] Hong Kong courts further acknowledge that communications in the family context are more informal and equivocal in terms than communications in the commercial context.[87] The judicial impulse to protect reliance is far less powerful in the commercial context.

IV. DUTY LIMITATION AND EXEMPTION CLAUSES IN MODERN TRUSTS

A. Autonomy, Beneficiary Protection and the Needs of a Valid Trust in the Modern Age

Duty limitation and exemption clauses raise 'the question of the appropriate balance between settlor autonomy and the protection of the interests of beneficiaries and the needs of a valid trust in the modern age'.[88] Academic commentary is generally focused on the concept of the irreducible core of trustee obligations, an idea first developed by Hayton[89] and then formulated into law by Millett LJ in *Armitage v Nurse*: 'The duty of the trustees to perform the trusts honestly and in good faith for the benefit of the beneficiaries is the minimum necessary to give substance to the trusts …'.[90]

[84] This matter has yet to be settled under Hong Kong law: see Y Liew, 'Proprietary Estoppel Remedies in Hong Kong: Lessons from Singapore, England, and Australia' (2020) 50 *Hong Kong Law Journal* 109. See also *Shun Pong Ltd v Chan Koo Kai Felix* [2018] HKEC 3507 (HC) [93].

[85] *Cobbe* (n 3); *Motivate Publishing FZ LLC v Hello Ltd* [2015] EWHC 1554 (Ch); *Smoke Club Ltd (In Administration) v Network Rail Infrastructure Ltd* [2021] UKUT 78 (LC).

[86] *Day, Ashley Francis v Yeo* [2020] SGHC 93, [2020] 5 SLR 514 [192].

[87] *East Surplus Investment Ltd v Tincho Industrial Co Ltd* [2012] HKEC 1343 (DC) [19].

[88] T Graham and D Russell, 'Exemption Clauses in the Modern Age: Do They Result in an "Institution in Crisis"?' (2022) 28 *Trusts & Trustees* 54, 57.

[89] D Hayton, 'The Irreducible Core Content of Trusteeship' in AJ Oakley (ed), *Trends in Contemporary Trust Law* (Oxford, OUP, 1996).

[90] *Armitage v Nurse* [1998] Ch 241 (CA) 253–54.

Millett LJ's beneficiary-centred formulation echoes Hayton's comment that 'there is a strong contract-like basis for gratuitous family trusts to be regarded as "deals" made with trustees for the benefit of the beneficiaries'.[91] Even so, the formulation, which adopts the common law definition of dishonesty, has been criticised as being too 'permissive' and 'laissez faire' for the law of trusts.[92] Millett LJ's suggestion that professional trustees may exclude liability for gross negligence at common law[93] has also been criticised for setting the baseline standard a little too low.[94]

More generally, the irreducible core of trustee obligations calibrates a balance between settlor autonomy and beneficiary protection by prescribing the 'outer limits of trust drafting' beyond which the transaction may not take effect as a trust.[95] What is rarely investigated is the needs of a valid trust in the modern age and how this consideration interacts with the considerations of settlor autonomy and beneficiary protection. The discussion below shows that modern trusts are multifarious and in a number of instances, business considerations underline both the practice as well as the development of trust law. This is because modern trusts are not exclusively or even predominantly of the traditional gratuitous family trust variety. Two types of trusts are examined below.

B. Debt Securitisation

In the specialised context of debt securitisation, it is clear that the trust structure is deployed in the transaction not for the sole benefit of the beneficiaries who are the noteholders. Instead, the trust is utilised 'as a means of enforcing collective action for the issuer's protection'.[96] By consolidating the enforcement rights in the hands of the trustee, the trust structure prevents the noteholders from individually pursuing their rights as creditors of the issuer, a course of conduct that could trigger drastic financial consequences for the latter which would in turn harm the collective interests of the noteholders. Hence, the trustee's role is not a custodian to protect the noteholders but 'a gatekeeper' to restrict investors' ability to enforce their rights against the issuer.[97] The most that can be said is that the trustee's role is to balance the interests of both the note issuer and the noteholders.

It is only with an appreciation of the commercial reality that one can understand the English Court of Appeal's decision in *Citibank NA v MBIA Assurance SA*.[98] In that case, the senior notes were guaranteed by MBIA. To ensure its position was

[91] Hayton (n 90) 62.
[92] Graham and Russell (n 89).
[93] *Armitage* (n 91) 256.
[94] See, eg, Graham and Russell (n 89); A Usilova, 'Reliance on a Professional Trustee: A Case for a Change to the Rule in *Armitage v Nurse*' (2016) 8 *Trusts & Trustees* 923.
[95] D Fox, 'Non-Excludable Trustee Duties' (2011) 17 *Trusts & Trustees* 17, 26.
[96] M Yip, 'The Commercial Context in Trust Law' [2016] *Conv* 347.
[97] P Rawlings, 'Reinforcing Collectivity: The Liability of Trustees and the Power of Investors in Finance Transactions' (2009) 23 *Trust Law International* 14.
[98] [2007] EWCA Civ 11, [2007] 1 All ER (Comm) 475.

protected, MBIA was accorded the right to give Citibank, the security trustee, mandatory instructions concerning the latter's exercise of certain powers and discretions. The trust deed explicitly provided that in acting on MBIA's instructions, Citibank 'need not have regard to the interests of the noteholders'. This raised the question as to whether Citibank's acting in accordance with MBIA's mandatory instruction would be inconsistent with the irreducible core of trusteeship.

Arden LJ took the view that Citibank's powers were not so reduced that it ceased to be a trustee, as Citibank owed an obligation of good faith at all times and the trust deed conferred real discretions on Citibank in other respects which it had to exercise independently.[99] In other words, the trust was valid, and Citibank could act in accordance with the provisions in the trust deed. However, it has been challenged that there was a meaningful trust for the noteholders because MBIA effectively held control over the exercise of all important powers of the trust.[100] And an essential aspect of the trustee obligation – that is to act for the benefit of the beneficiaries – was certainly missing. Yet, to hold to the contrary would mean either that the trust was not valid or that the relevant clause was unenforceable. Either outcome would have an impact on the industry. Would a guarantor have come on board without the duty modification clause in the trust deed and, if so, at what additional costs? If we bear in mind that a security trustee is a gatekeeper to balance the interests of the note issuer and the noteholder, and not a traditional trustee who acts for the sole interests of the beneficiaries, the result appears less exceptional. The prioritisation of contractual freedom (party autonomy) in this instance is arguably justified.[101]

C. Modern Family Trust Practice

More worrying is the trend of a laissez faire approach towards duty limitation and exemption clauses in modern family trust practice. The trust industry has seen a decline in small or medium-sized family trusts.[102] Instead, many clients are wealthy individuals who desire to retain significant control over assets (especially their business assets or empires) which are settled on trusts for family members. The modern family trust is thus not necessarily set up with intergenerational distribution of wealth as the immediate objective because the settlors are usually still in their prime. How does the trust industry respond? It has switched to the language of professional services and trust markets and relabelled family trust practice as 'private client work' which expression indicates that the focus is on taking care of the interests of the settlor. Business considerations undoubtedly infiltrate the trust deals made between settlors and trustees who are in a client–service provider relationship. The rise of settlor-directed trust products is a testament to this business reality.

[99] ibid [82].
[100] A Trukhtanov, 'The Irreducible Core of Trust Obligations' (2007) 123 *LQR* 342, 345.
[101] See too the commercially motivated approach to interpretation of a 'no action' clause in a bond issue taken by Lawrence Collins LJ in *Elektrim SA v Vivendi Holdings 1 Corp* [2008] EWCA Civ 1178, [2009] 2 All ER (Comm) 213.
[102] R Walker, 'The Changing Face of Trust Law' (2017) 31 *TLI* 19, 21.

Nor are governments, lawmakers and courts blind to the business reality. How should the law balance the economic objective of growing a local trust industry and the legal imperative of ensuring sufficient beneficiary protection? On the one hand, we see steps to raise the baseline standard of protection. For example, where professional trustees are concerned, an objective test of dishonesty is applicable,[103] instead of a subjective test as endorsed in *Armitage v Nurse*. Further, it has been questioned as to whether it is right to exempt professional trustees from liability for gross negligence.[104] Various jurisdictions (including established wealth management centres) have taken the position, by way of judge-made law or legislative intervention, that trustee exemption clauses cannot exclude liability for gross negligence.[105] On the other hand, there is increasing acceptance that fiduciary duties may be modified by contract, including a trustee's fiduciary duties so long as they are not reduced below the 'irreducible core' formulated in *Armitage v Nurse*.[106]

The tension between the two objectives can be seen in the recent *Zhang Hong Li v DBS Bank (Hong Kong) Ltd*[107] litigation which involved a robustly drafted anti-*Bartlett* provision. Where the shares of a private company are settled on trust and the trust holds a controlling interest in the corporate entity, an anti-*Bartlett* provision is frequently, though not invariably, included in the trust deed to override the trustee's *Bartlett* duty.[108] A *Bartlett* duty requires the trustee to supervise the progress of corporate affairs by making inquiries and consulting with the company's directors from time to time to ensure that she has an adequate flow of information on corporate management. The practical effect of an anti-*Bartlett* provision is to keep the trustee out of the way of corporate management.

In *Zhang v DBS*, a married couple (the settlors) set up a family trust, governed by Jersey law, of the sole share in a private investment company ('Wise Lords') owned by the wife, Ji. The beneficiaries of the trust were the settlors and their children. The trustee was a subsidiary company of DBS Bank (which was the settlors' banker) and it nominated DBS Bank's corporate services subsidiary as the sole director of Wise Lords to manage its daily operations. To retain control over Wise Lords' investment activities, Ji was appointed as its investment advisor and authorised to give investment instructions to DBS Bank directly. The trust deed contained robustly drafted anti-*Bartlett* provisions which effect was that the trustee had no duty to interfere with or supervise the corporate management of Wise Lords save where it acquired actual knowledge of dishonesty at the corporate level. Specifically, the trustee was entitled to assume that corporate management was competent, without taking any

[103] See *Walker v Stones* [2001] QB 902 (CA) 939; *Fattal v Walbrook Trustees (Jersey) Ltd* [2010] EWHC 2767 (Ch), [2012] Bus LR D7 [81]. cf *Spread Trustee Co Ltd v Hutcheson* [2011] UKPC 13, [2012] 2 AC 194 [107] (Lord Mance).

[104] See the dissenting judgments of Lady Hale and Lord Kerr in *Spread Trustee* (n 104).

[105] See, eg, Canada, Hong Kong, Jersey, New Zealand and Scotland.

[106] *Lehtimäki* (n 66) [82] (Lady Arden), citing her own decision in *MBIA* (n 100). It should be borne in mind that not all situations of conflicts are harmful to the interests of the beneficiaries: see JH Langbein, 'Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest' [2005] *YLJ* 931.

[107] (2019) 22 HKCFAR 392.

[108] Derived from the case of *Bartlett v Barclays Bank Trust Co Ltd (No 2)* [1980] Ch 515 (Ch). See further Man Yip, 'Trust-owned companies: understanding the trustees' duties' (2018) 31 *TLI* 185.

steps of verification or obtaining any information regarding Wise Lords' affairs. Further, it would be exempted for liability for any losses arising from: (a) acts or omissions of directors or other persons regardless of the degree of culpability; and (b) not obtaining information about Wise Lords or verifying the veracity of information received.

Ji's investment strategy led to huge losses suffered by Wise Lords during the 2008 financial crisis which she, together with the husband, sought to recover by suing (in their capacity as objects of the trust) for breach of trust. All levels of the Hong Kong courts affirmed the validity of the anti-*Bartlett* provisions under Jersey law, but they differed on whether the trustee nevertheless still owed a duty of supervision which was breached in the circumstances. Notably, the Court of Final Appeal rendered a detailed judgment even though the parties had already reached a settlement just prior to the release of the judgment. It did so because the case 'involves issues of law of general importance, and … has attracted considerable public interest in Hong Kong and internationally'.[109] Although the Hong Kong court was technically ruling on a matter governed by Jersey law, its views on the anti-*Bartlett* provisions and the irreducible core of trusteeship more generally reflect the position under Hong Kong law, which either fosters or shakes the confidence of settlors in Hong Kong as a wealth management centre. It was therefore an opportune occasion for the apex court of Hong Kong to share its views on trust law, especially at a time when Hong Kong was undergoing instability.

For the purposes of present analysis,[110] it suffices to contrast the views of the Hong Kong Court of Final Appeal against the views of the Hong Kong Court of Appeal. Both courts relied on the expert report given by Professor Paul Matthews as an expert on Jersey law, but they disagreed as to what Professor Matthews meant by 'a residual obligation' on the trustees which the anti-Bartlett provisions, whilst valid, did not exclude. The expert report states:[111]

> Although the trustee has no obligation to interfere in the business of the company, and no obligation to obtain information regarding the company, it still has a power to do so, because it is a member of the company. If circumstances were to arise where no reasonable trustee could lawfully refrain from exercising those powers, a failure to do so in such a case would amount to a breach of trust …

The decision of the courts was arrived at based on the written report. The Court of Appeal held that notwithstanding the validity of the anti-*Bartlett* provisions, there remained a residual supervisory duty on the trustee to intervene in corporate operations and make inquiries 'where no reasonable trustee could lawfully refrain from exercising those powers'.[112] Following the Court of Appeal's holding, the trustee could not simply rely on the anti-*Bartlett* provisions and routinely approve the investments

[109] *Zhang v DBS* (n 109) [6].

[110] For a detailed analysis of the judgments reached at all three levels of Hong Kong court, see R Lee and M Yip, 'Exclusion of Duty and the Irreducible Core Content of Trusteeship: A Re-Assessment' (2020) 14 *Journal of Equity* 131.

[111] For the relevant excerpt of the report, see *Zhang v DBS* (n 109) [55].

[112] *Zhang Hong Li v DBS Bank (Hong Kong) Ltd* [2018] HKCA 435 [6.8]–[6.10].

directed by Ji. It should have intervened in the high-risk transactions directed by Ji that led to the huge losses sustained by the trust.

The Hong Kong Court of Final Appeal, in a unanimous judgment delivered by Ribeiro PJ, Fok PJ and Lord Neuberger NPJ, held that the Court of Appeal's decision was self-contradictory because the 'residual obligation' conceptualised by the Court of Appeal would be clearly inconsistent with the express terms of the trust.[113] A non-contradictory reading of the relevant paragraphs of the expert report was to be preferred: that is, the anti-*Bartlett* clauses did not exclude an obligation on the trustee to act in cases where it had actual knowledge of dishonesty.[114] On the facts, since the trustee did not possess actual knowledge of dishonesty, it was not under a duty to intervene and there was therefore no breach of trust. Whilst the outcome was defensible on the facts,[115] Lee and I have argued that the residual, high-level supervisory obligation endorsed by the Hong Kong Court of Appeal could be justified on the basis of a reanalysed account of the irreducible core of trustee obligations.[116] Essentially, we argued for a higher baseline standard based on an expanded scope of the irreducible core to include liability for gross negligence where professional trustees are concerned. I will not rehash those arguments here.

The point to make is that the contrast in views between the two Hong Kong courts belies a difference in opinion as to the balance between settlor autonomy and the minimum level of beneficiary protection in the modern trust industry involving professional trustees. Unlike the debt securitisation context, the trustee in a modern family trust remains a steward of trust assets for the benefit of the beneficiaries. In this context, certain standards set by equity are mandatory and cannot be modified by contract. A court that privileges settlor autonomy would set a very low minimum standard, to enable the settlor to enjoy a wider span of choice in structuring the trust deal. A court that privileges beneficiary protection would set a higher standard, as the Hong Kong Court of Appeal did, which therefore restricts the settlor's freedom of choice.

The root of the problem is *Armitage v Nurse*. In choosing the common law definition of dishonesty as opposed to the more malleable concept of 'equitable fraud', and in excluding liability for gross negligence (a concept that is difficult to define) from the irreducible core, Millett LJ was privileging certainty. A baseline which is certain would facilitate the creation of family trusts by enabling settlors and trustees to know beforehand what terms they could put into the trust deed. However, Millett LJ dealt with a simple, traditional family trust, without anticipating how his formulation of the irreducible core could impact family trusts of a very different variety to enable reservation of (excessive) settlor control. There is no reason why certainty and flexibility cannot go hand in hand in equity by allowing a calibrated approach towards the irreducible core of trusteeship. Such a calibration, distinguishing between

[113] *Zhang v DBS* (n 109) [64].
[114] ibid [63].
[115] Zhang and Ji had bargained for the right to direct an investment of their choice. It was only when Ji's investment decisions had gone wrong that they decided to sue the trustee for breach of trust to recoup their losses.
[116] Lee and Yip (n 112) 138–47.

a professional trustee and a lay trustee, has already been made in respect of the statutory duty of care.[117] The differentiation in standards, when applied in the context of duty limitation and liability exemption clauses, reins in the excessive desire of the settlor to retain control over assets settled on trust, which fee-earning trustees are in practice unable to push back against. Such an approach facilitates the establishment of a healthy modern trust industry.

V. REFLECTIONS

A single chapter cannot make a comprehensive review of all recent developments in the law of equity, much less across all common law jurisdictions. My objective is not to propose a generalised role of equity in modern commerce. My analysis of the selected handful of cases, however, indicates that the role of equity would differ in each context. 'Unconscionability' has been wielded by courts as a tool to apply a fact-sensitive approach, especially in responding to new situations arising from complex human dealings. It confirms the value of equity in commerce to provide intervention and innovation. The cases demonstrate that the courts of different jurisdictions and even judges of the same court may have different views as to the proper balance between certainty and flexibility, as well as the means to achieve that balance. Even more fundamentally, these terms must be understood in a native legal environment and against the experience of the particular judges pronouncing them.

My analysis of the concept of the irreducible core content of trustee obligations and duty limitation and liability exemption clauses reveals a similar line of tension between certainty and flexibility. Equitable standards appear to be displaced in favour of commercial considerations. I have explained that the role of standard setting must be understood with reference to the objective of the trust. Where the trust is not utilised in the traditional paradigm of protecting the beneficiaries against trustee abuse, its traditional standards arguably do not apply with full rigour. Where it does, however, courts should not readily allow the equitable standards to be displaced by settlor autonomy. In clearly endorsing equity's place and standards in the modern practice of family trust, for instance, equity facilitates the establishment of a healthy trust industry.

Finally, and more generally, each jurisdiction has its own philosophy, motivations and techniques in invoking equity in commerce. To fully appreciate the underlying philosophy, motivations and techniques, it is sometimes helpful to examine their origin and development in the domestic context, as the discussion above has shown. Further, as a result of these differences, courts must take great care in assessing the persuasive value of foreign case law concerning the same or similar doctrine in the development of its own law.[118]

[117] Trustees Act 2000, s 1.

[118] See, eg, M Leeming, 'Equity in Australia and the United Kingdom: Dissonance and Concordance' Institute of European and Comparative Law, Oxford Law Faculty (25 October 2019), www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2019%20Speeches/Leeming_20191025.pdf.`