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Constitutional supremacy, inherent powers, and orders that damages or costs be paid in instalments

Tan Meow Hiang v Ong Kay Yong [2023] SGHC 286

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*The General Division of the High Court of Singapore stated (*obiter*) in* Tan Meow Hiang v Ong Kay Yong *that it does not have a general power to order that damages or costs be paid in instalments. It reasoned that any such power must have been impliedly restricted by legislation. So instalment orders can only be made (a) by certain subordinate courts; (b) by the General Division on appeal; (c) by the General Division at first instance in personal injury cases.*

In response, this note aims to advance the conversation on the law on instalment orders and what the Constitution has to say about the courts' inherent powers. There are possible arguments, based on constitutional principle and/or constitutional history, that legislation purporting to take away certain powers from the courts is unconstitutional, or at least that the courts should be slow to hold that such powers have been taken away. Anyway, the legislation which the General Division cited arguably did not take away the powers to make instalment orders; neither do common-law rules such as the rule that damages are ordered "once and for all". Therefore, we need not rely on legislative reform to avoid the uneasy conclusion which the General Division felt compelled to reach.

I. Introduction

1. Can a court order that damages or costs be paid in instalments? (Let us call this an "instalment order".) This question has significant constitutional implications, particularly in jurisdictions where there is a supreme Constitution. It also raises doctrinal questions relating to the dictum that damages are ordered "once and for all".

2. According to Goh Yihan J, sitting as the General Division of the High Court of Singapore (functionally similar to the High Court of England and Wales) in *Tan Meow Hiang*,[1] the answer appears to be: not without *statutory* authority. That was *obiter*. His Honour was dealing with an appeal from the District Court (a subordinate court, for present purposes functionally similar to the County Court of England and Wales). The Supreme Court of Judicature Act 1969 ("SCJA", which is similar to the Senior Courts Act 1981) clearly

[1] *Tan Meow Hiang v Ong Kay Yong* [2023] SGHC 286.

states that (in his Honour's words) "the General Division has the power to make instalment orders when it is exercising its appellate jurisdiction in relation to an appeal from the State Courts". The District Court is one of the State Courts.

3. On the latter specific point, Goh J was clearly correct. However, Goh J's *obiter* view on the general point may be open to question. One might ask: might the High Court not have the *inherent* power to make an instalment order? His Honour did not explicitly address this point, but suggested that any such power must have been excluded by legislation. However, in this writer's respectful view, Goh J could have considered more deeply the limits of the Legislature's power to cut down the courts' inherent powers, and/or taken a different reading of the relevant legislation.

4. That might well have yielded a different conclusion on the general point – one that would avoid the problematic result that a subordinate court can make instalment orders while the General Division (a superior court) can only do so in the exercise of appellate jurisdiction but not original jurisdiction.

II. Goh J's decision: no inherent power to make instalment orders

5. Goh J referred to Singapore's State Courts Act 1970 (or "SCA", functionally similar to the County Courts Act 1984) and Supreme Court of Judicature Act 1969 (or "SCJA", similar to the Senior Courts Act 1981). His Honour noted that:

a. The SCA says that a District Court may make instalment orders.[2]

b. The SCJA says no such thing about the General Division, nor the Appellate Division of the High Court or the Court of Appeal (Singapore's other two superior courts).

c. All the SCJA says about instalments is:

i. the General Division can "order damages assessed in any action for personal injuries to be paid in periodic instalments rather than as a lump sum";[3]

ii. "[i]n hearing and deciding an appeal, the General Division has all the powers and duties, as to amendment or otherwise, of the court from which the appeal was brought".[4]

6. Therefore, said his Honour: "Given that Parliament has seen fit to expressly restrict the General Division's power to make instalment orders to this very specific context

[2] State Courts Act 1970 s 43(1)(b).

[3] Supreme Court of Judicature Act 1969, First Schedule, para 17.

[4] SCJA s 22(2).

concerning an action for personal injuries, it would not be proper for a court to read into the SCJA a more general power… Parliament has… chosen to confine it to a specific context".[5]

7. To Goh J's mind, this is the product of a legislative oversight, and Parliament should consider filling the gap by "giving the General Division the power to make instalment orders generally with respect to all monetary awards".[6]

8. In this writer's respectful view, Goh J's analysis was incomplete because Parliament does *not* have the final say on what the General Division's powers are. Parliament's power to limit the courts' powers is itself limited by the Constitution. Therefore, Goh J should have considered whether Parliament cannot legislate to take away the General Division's inherent power to make instalment orders, or at least should not be so readily held to have done so. Anyway, the legislation can be interpreted to reach a conclusion different from Goh J's.

III. Where would a power to make instalment orders come from?

9. His Honour, previously a professor of law, is the author of Singapore's leading academic article on the courts' inherent powers (and inherent jurisdiction).[7] There, Assistant Professor Goh (as he then was) sought to reconcile the existence of inherent jurisdiction and powers with the observation that

> "courts regard themselves as being subject to legislative intent. Indeed, the courts have consistently said that because they are creatures of statute, their jurisdiction and powers are statutorily constrained".[8]

10. Prof Goh proposed the following framework: The starting point is that courts have certain inherent jurisdiction and powers.[9] But Parliament can cut these down – either expressly, or impliedly by 'covering the field': *expressio unius est exclusion alterius*.[10] Prof Goh went on to set out proposals on how to discern Parliament's intention.[11]

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[5] *Tan* (n 1) [17].

[6] ibid [20].

[7] Goh Yihan, 'The Inherent Jurisdiction and Inherent Powers of the Singapore Courts: Rethinking the Limits of their Exercise' [2011] *Singapore Journal of Legal Studies* 78. Prof Goh used the term "jurisdiction" to refer to a court's "authority" to decide a case, and "powers" to what the court does in the exercise of that authority. Hence (this writer submits) one might speak of "jurisdiction" to hear a claim for breach of contract, but "power" to order specific performance, as well as "case management powers". The Singapore courts have adopted Prof Goh's terminology: *Re Nalpon Zero Geraldo Mario* [2013] 3 SLR 258 (SGCA) [33].

[8] Goh, ibid 200.

[9] ibid 208.

[10] ibid 201ff.

[11] Prof Goh's ideas have been accepted by the courts: see *Cheong Wei Chang v Lee Hsien Loong* [2019] 3 SLR 326 (SGHC) [67]-[69]; *Arun Kaliamurthy v PP* [2014] 3 SLR 1023 (SGHC) [13]-[15]; *WGM v WGN* [2022] SGFC 71, [31(e)].

11. Therefore, while Goh J did not deny that the General Division *could* have had the inherent power to grant instalment orders, we can surmise that his Honour thought that that power had been excluded by statute.

IV. The Constitution and implied powers

A. Introduction

12. In his article, Prof Goh assumed that there is a system of "parliamentary sovereignty" whereby "the courts… are creatures of statute" and "their jurisdiction and powers are statutorily constrained".[12] With respect, this assumption is not accurate: because the Constitution, not Parliament, is supreme in Singapore, Parliament does not have the final word on what the General Division's powers are.

13. A contrary view would be startling. Consider the General Division's power to perform judicial review of legislation and executive action. Can it really be that a malicious legislature, perhaps led by a malicious executive, can remove this power of the courts, by which their own powers are kept in check – and by ordinary statute, too? Even in countries where the answer is 'yes' (such as, perhaps, the UK[13]), that answer is startling; all the more in countries like Singapore where the power of judicial review is said to be constitutional in nature.

14. Singapore's senior courts are creatures, not of any *ordinary* statute, but of the Constitution. Therefore, Singaporean lawyers and courts – and their counterparts in other jurisdictions that practice constitutional, not parliamentary, supremacy – cannot accept at face value remarks such as Sir Jack Jacob's statement that "the court may exercise its inherent jurisdiction in respect of matters which are regulated by statute or by rule of court, so long as it can do so without contravening any statutory provision".[14] That statement is true only if that the "statutory provision" in question is constitutionally valid.

15. What, then, does the Constitution say? The key provision is Article 93:

> "The judicial power of Singapore shall be vested in a Supreme Court and in such subordinate courts as may be provided by any written law for the time being in force."

16. This provision does not merely establish the courts as empty shells into which the Legislature may pour (or choose not to pour) what content it wishes. Instead, the words

[12] Goh (n 7) 200.

[13] Cf. *R (Jackson) v Attorney General* [2006] 1 AC 262 (UKHL) [102] (Lord Steyn); *R (Privacy International) v Investigatory Powers Tribunal* [2020] AC 491 (UKSC), as understood in Benjamin Joshua Ong, 'The ouster of Parliamentary sovereignty?' [2020] *Public Law* 41; see also Eirik Bjorge, 'Legislation purporting to oust the High Court's jurisdiction' (2020) 136 *Law Quarterly Review* 12, 17-18.

[14] [Jack] I H Jacob, 'The Inherent Jurisdiction of the Court' (1970) 23 *Current Legal Problems* 23, 24.

"judicial power",[15] "court", "Supreme Court", and "High Court" are themselves pregnant with meaning. Therefore, ordinary legislation cannot denude the courts of the features which the Constitution, by using those words, requires the courts to have.

17. In other words, when the Constitution speaks of a "court", the word "court" is not just a label or a name; it is a technical term, referring only to something that fits the technical meaning of "court". The High Court of Singapore has recognised this:

> "… the specific wording used in [Article 93] has the effect of vesting the judicial power of Singapore *exclusively* in the Supreme Court and the Subordinate Courts,[16] and not in any entity which is not a 'court', a 'court' being, at common law, an entity with certain characteristics. The reference to '[c]ourt' in Art 93 would include any statutory body or tribunal having the characteristics of a court."[17]

Here, the words "at common law" do not mean that the "characteristics of a court" are common-law rules which may be abrogated by statute. While the content of these rules may be found in the common law, the rules themselves have constitutional status.

B. The argument from constitutional history

18. One way to explain this point is through an appeal to history. In *Hinds*, Lord Diplock (writing for the majority of the Judicial Committee of the Privy Council) pointed out that the Constitutions of former British colonies were

> "… negotiated as well as drafted by persons nurtured in the tradition of that branch of the common law of England that is concerned with public law and familiar in particular with the basic concept of separation of legislative, executive and judicial power as it had been developed in the unwritten constitution of the United Kingdom. As to their subject matter, the peoples for whom new constitutions were being provided were already living under a system of public law in which the local institutions through which government was carried on, the legislature, the executive and the courts, reflected the same basic concept. The new constitutions, particularly in the case of unitary states, were evolutionary not revolutionary. They provided for continuity of government through successor institutions, legislative, executive and judicial, of which the members were to be selected in a different way, but each institution was to exercise powers which, although enlarged, remained of a similar character to those that had been exercised by the corresponding institution that it had replaced.
>
> Because of this a great deal can be, and in drafting practice often is, left to necessary implication from the adoption in the new constitution of a governmental structure which makes provision for a legislature, an executive and judicature. It is taken for granted that the

[15] See Jeffrey D Pinsler, 'The Inherent Powers of the Court' [1997] *Singapore Journal of Legal Studies* 1, 12: "the 'judicial power' referred to in Article 93 connotes a font of undefined powers which enables the court to function effectively".

[16] The State Courts of Singapore, which are the major subordinate courts of Singapore, were once named the "Subordinate Courts of Singapore" – perhaps a confusing label, since "Subordinate Courts" was both a name and a technical term, and there existed subordinate courts other than the Subordinate Courts.

[17] *Mohammed Faizal bin Sabtu v Public Prosecutor* [2012] 4 SLR 947 (SGHC) [17].

> basic principle of separation of powers will apply to the exercise of their respective functions by these three organs of government…"[18]

19. Lord Diplock focused on the separation of powers here, but made a more general point: The institutions described in post-colonial Constitutions were modelled after their colonial-era predecessors. Hence, the term "Supreme Court" in the Jamaican Constitution was not only a name, but also a technical term; the Supreme Court, *by definition*, had

> "(1) unlimited original jurisdiction in all substantial civil cases; (2) unlimited original jurisdiction in all serious criminal offences; (3) supervisory jurisdiction over the proceedings of inferior courts (viz. of the kind which owes its origin to the prerogative writs of certiorari, mandamus and prohibition)".[19]

20. Further, these characteristics had been elevated to constitutional status. Hence, legislation that purported to create a "Full Court Division of the Gun Court" was unconstitutional because that new court would try certain "serious criminal offences" – which only the Supreme Court could do.[20] Further, the new court was not just an *alter ego*[21] of the Supreme Court, because the judges of the new court lacked characteristics that the Supreme Court had. For example, the security of the new court's judges' tenure was less strongly protected than that of Supreme Court judges.[22] Therefore, in creating the new court, the Legislature was violating the separation of powers by unconstitutionally cutting down judicial power.

21. Similarly, in Singapore, the words "court", "High Court", and/or "Supreme Court" connote courts with certain features which those terms connoted at the time the Constitution came into force. If so, the argument goes, Goh J should have asked whether, when the Constitution came into force, the courts possessed the inherent power to make instalment orders.[23] If the answer is yes, then it might be unconstitutional for legislation to take away that power (expressly or otherwise).

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[18] *Moses Hinds v The Queen* [1977] AC 195 (PC) 211H-212H.

[19] ibid 221B-D.

[20] While "serious[ness]" is a matter of degree – see ibid 222C – the Full Court Division would have had the power to try offences punishable by a "mandatory sentence of detention at hard labour during the Governor-General's pleasure" (ibid 217C), which are certainly serious by any definition.

[21] This term has been borrowed from the judgment of Laws LJ in *R (Cart) v Upper Tribunal* [2011] QB 120 (EWHC) [39]-[42].

[22] *Hinds* (n 18) 218A-222B.

[23] In this regard, it should be noted that the General Division of the High Court is the successor of what, before 2021, was known simply as the High Court (before the coming into force of the Constitution of the Republic of Singapore (Amendment) Act 2019 (Act 38 of 2019), on which, see Supreme Court of Singapore, 'Media Release: Structural reforms to the High Court and appointment of Judges of the Appellate Division from 2 January 2021' (18 December 2020) <https://www.judiciary.gov.sg/news-and-resources/news/news-details/media-release-structural-reforms-to-the-high-court-and-appointment-of-judges-of-the-appellate-division-from-2-january-2021> accessed 9 November 2023, archived at <https://perma.cc/32EC-LKA8>).

22. This argument is supported by the Constitutional text. Article 94(2) states:

> "The Court of Appeal and the Divisions of the High Court have the jurisdiction and powers conferred on each of them by this Constitution and any other written law."

But the Constitution says nothing express about these courts' "jurisdiction and powers".[24] What, then, does the phrase "the jurisdiction and powers conferred… by this Constitution" mean? The answer is: The Constitution confers jurisdiction and powers on the courts through the very words "judicial power", "Supreme Court", "court", etc. If the intention were otherwise, the drafters would not have used those terms, which have specific technical meanings.

23. That said, not every historical feature of the courts (such as wig-wearing) has been elevated to constitutional status, but only certain core defining features, such as "institutional impartiality and integrity"[25] and "the adoption of a particular form of procedure".[26] This point is borne out by the definition of an inherent power. Here, "inherent" does not merely mean "vested in"; it refers to a feature that is *definitive* of a court: it is, as Jacob says, part of the "essential character of a superior court of law"; "[s]uch a power is intrinsic in a superior court; it is its very life-blood, its very essence, its immanent attribute. Without such a power, the court would have form but would lack substance".[27] In other words, without its inherent powers, the court would be unable to "act effectively within [its] jurisdiction"[28] or unable to "maintain its character as a court of justice"[29] – it would not be a court at all.[30]

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[24] Article 93A states that "the Chief Justice or… a Supreme Court Judge nominated by the Chief Justice" shall "hear and determine" "proceedings relating to the election of the President". But that provision relates to an individual judge, not the institutions of the High Court, Supreme Court, etc. (On this distinction, see further, generally, *Manjit Singh s/o Kirpal Singh v Attorney-General* [2013] 2 SLR 844 (SGCA) [52], [63]-[65].

[25] Susan Kiefel AC [Chief Justice of Australia], 'Judicial Review in Australia: The Protection and Power of Courts under the Australian Constitution' (Singapore Academy of Law Lecture, 26 September 2019) <https://www.sal.org.sg/sites/default/files/PDF%20Files/Speeches/AL%202019%20by%20CJ%20Susan%20Kiefel%20Final.pdf> accessed 9 November 2023, archived at <https://perma.cc/24VJ-A6R3>, p 27-28.

[26] Nicholas Owens, 'The Judicature', ch 27 in Cheryl Saunders and Adrienne Stone (eds), The Oxford Handbook of the Australian Constitution (OUP 2018) 651.

[27] Jacob (n 14) 27.

[28] *Connelly v DPP* [1964] AC 1254 (UKHL) 1301, cited in *Civil Procedure ('White Book')* (Sweet & Maxwell, 2023) [9A-68].

[29] *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Clrp Ltd* [1981] AC 909 (UKHL) 971, cited in *Civil Procedure ('White Book')* (Sweet & Maxwell, 2023) [9A-68].

[30] In other words, the word "inherent" here means (to quote the *Oxford English Dictionary*) "[e]xisting in something as a permanent attribute or quality; forming an element, esp. a characteristic or essential element of something; belonging to the intrinsic nature of that which is spoken of; indwelling, intrinsic, essential". The word "inherent" is not here used merely to mean "[v]ested in in or attached to a person, office, etc., as a right or privilege".

24. So, the argument goes, Goh J should have asked whether, when the Constitution came into force, the courts possessed the inherent power to order damages to be paid in instalments *and* this power was considered definitive of a court.

C. The argument from constitutional principle

25. Such an argument is not unfamiliar. For example, a similar argument justifies the courts' jurisdiction to perform judicial review (and power to grant the attendant remedies): to be a superior court *is*, *by definition*, to be able to perform judicial review. While the SCJA states that the General Division can grant prerogative orders,[31] it is the Constitution – specifically, the words "High Court" and "Supreme Court" (of which the High Court is a part) – that is the *source* of the court's power to grant these orders.[32] Otherwise, Parliament could sweep away judicial review by amending the SCJA by a simple majority of members present and voting.

26. Yet we must go deeper. What powers are *essential* to a court's being a court? Take, for example, the power to strike out "proceedings which are manifestly groundless",[33] which Jacob states is one of the courts' inherent powers. That power is good to have, but is it *necessary*? If a court had no such power, but would simply allow such proceedings to proceed to trial and then dismiss them, would the court really "have form but… lack substance"? Would the court really be rendered a non-court?

27. The answer is yes only if the word "court" means not only a dispute-resolver, but a dispute-resolver *with certain characteristics* – for example, efficiency. Such an argument – which involves, not an appeal to history, but rather to principle – is common. Sir Keith Mason suggests[34] that each of the court's inherent powers is an expression of a certain principle – such as "[e]nsuring [c]onvenience and [f]airness in [l]egal [p]roceedings" or "[p]reventing [a]buse of [p]rocess". The Singapore Court of Appeal has similarly held that it

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[31] SCJA, First Schedule, para 1.

[32] *Vellama d/o Marie Muthu v Attorney-General* [2012] 4 SLR 698 (HC) [23], glossed in Eugene K B Tan, Kenny Chng Wei Yao, and Benjamin Joshua Ong, *Halsbury's Laws of Singapore* (2021 Reissue) vol 1 (*Administrative Law*) [10.120] (to which paragraph this author discloses that he substantially contributed): "To hold otherwise would be to suggest that the Legislature could render the courts powerless to perform judicial review and grant an effective remedy merely by way of passing an ordinary statute… It is submitted that such a statute would be unconstitutional…" The High Court in *Vellama* was discussing the "power to grant declarations", but what it said applies to judicial review remedies more generally. This explains why, according to the Court of Appeal, a statute that "oust[s] the court's power of judicial review" is "constitutionally suspect for being in violation of Article 93 of the Singapore Constitution as well as the principle of the separation of powers": *Nagaenthran a/l K Dharmalingam v AG* [2019] 2 SLR 216 (SGCA) [74].

[33] Jacob (n 14) 43.

[34] Keith Mason, "The inherent jurisdiction of the court' (1983) 57 *Australian Law Journal* 449, cited in Goh (n 7) 195 and Rebecca Ananian-Welsh, 'The Inherent Jurisdiction of Courts and the Fair Trial' (2019) 41 *Sydney Law Review* 423, 426-427.

has the inherent power to re-open a concluded criminal appeal – not by an appeal to history,[35] but rather by reference to the principles of the "importance of truth in the criminal process"[36] and the need to prevent "miscarriage of justice".[37]

28. But this argument only establishes that such principles are essential to being a court, and therefore are of constitutional status. It does not follow that the Constitution requires that courts have certain specific powers that give effect to those principles. In other words, we have at most established that the Constitution demands that the courts uphold a certain principle which *can* (but need not) be promoted through a power to make instalment orders; we have not established that the Constitution *demands* that the courts be able to make instalment orders. After all, it cannot be objectionable if legislation purports to remove such a power, but the courts have sufficient other powers to uphold the principle.

29. That said, because the power serves a higher principle that is of constitutional importance, the courts ought to apply the following rule of construction: they should strive to interpret legislation in a manner that better upholds the constitutional principle.[38] Prof Goh's article did not consider such an argument.

30. Therefore, if the courts have an inherent power to make instalment orders, and if this power serves a salutary principle that the Constitution requires the courts to uphold (perhaps, sparing the temporarily impecunious defendant from hardship, or maximising the possibility that the successful plaintiff will receive the fruits of the litigation?), then Goh J might not have so readily concluded that the Legislature has taken away that power.

V. The case for saying that the General Division can make instalment orders, notwithstanding statute

31. Having discussed the matter in the abstract, let us examine instalment orders in more detail.

A. The argument from history

32. The first question is whether, if not for statute, the General Division would have the implied power to make instalment orders. It is worth turning – as Goh J did – to non-Singaporean authorities on this point. We will focus on the English position, which, reveals that the English courts have – and, one supposes, has had – the implied power to make instalment orders. If so, perhaps the Singapore courts do too.

[35] The Court of Appeal cited various authorities, but none of these dated from before Singapore's independence. Therefore, the Court's point was not that the Singapore courts have this power because the power has been imported through the Constitution.

[36] *Kho Jabing v Public Prosecutor* [2016] 3 SLR 135 (SGCA) [46].

[37] ibid [63]; *Yong Vui Kong v Public Prosecutor* [2010] 2 SLR 192 (SGCA) [16].

[38] Rosara Joseph, 'Inherent jurisdiction and inherent powers in New Zealand' (2005) 11 *Canterbury Law Review* 220, 232, cited in Marcelo Rodriguez Ferrere, 'The Inherent Jurisdiction and its Limits" (2013) 13 *Otago Law Review* 107, 134.

33. Goh J referred to s 75 of the Magistrates' Courts Act 1980, which provides that a magistrates' court "may, instead of requiring immediate payment… order payment by instalments". (Goh J could also have cited s 71(1) of the County Courts Act 1984, which is to similar effect.) By contrast, it appears that there is no such statute explicitly stating that the High Court of England and Wales may make an instalment order.

34. Yet, in at least two cases, that court has claimed to do just that.[39] Where did it get this power? The answer must be: it is an *inherent* power.

35. One might argue – as Goh J and the judges in the two cases suggested – that the High Court's power to make instalment orders comes from the Civil Procedure Rules 1998. Goh J mentioned r 40.11(a):[40]

> "A party must comply with a judgment or order for the payment of an amount of money (including costs) within 14 days of the date of the judgment or order, unless… the judgment or order specifies a different date for compliance (including specifying payment by instalments)".

36. The Court of Appeal of England and Wales has held that the "High Court… ha[s] power under this rule" – i.e. r 40.11 – "to provide for the judgment sum to be paid by way of instalments"[41] – in other words, r 40.11 is the source of the power. This is not correct. Rule 40.11(a) does not purport to *create* the power. All it says is that *if* the court makes an instalment order, then that order is to be obeyed; it does not say *that* the court can make an instalment order. Indeed, if the rule were the source of the power, then s 71(1) of the County Courts Act 1984 would be otiose, for the rule applies to the County Courts too.

37. Admittedly, these English cases (from the 2000s) are not decisive of the position in Singapore as of Singapore's independence in 1965. Nonetheless, nothing in these cases suggests that the English courts only gained the power to make instalment orders during the last few decades; there is no reason to think that that power did not exist before.

38. There is also an old case, *Fournier*, stating that a jury cannot award "an annuity of $300 to be paid annually to [a child]… till he or she should reach the age of eighteen years".[42] But one may argue that that case only forbids awarding damages in the form 'pay $*x* per year until a certain event'; it does not prohibit awarding lump-sum damages which are then

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[39] *Amsalem (t/a MRE Building Contractors) v Raivid* [2008] EWHC 3226 (TCC) [5], cited in *The Civil Court Practice ('Green Book') 2023* (LexisNexis 2023) vol 1, p 1125 para CPR 40.11[2] and *White Book* (n 28) [40.11.1]; *Gipping Construction Ltd v Eaves Ltd* [2008] EWHC 3134 (TCC) [10]-[11], cited in *White Book* (n 28) p [40.11.1]. These cases cannot be explained on the basis of s 2 of the Damages Act 1996 because they did not involve personal injuries: see *Amsalem (t/a MRE Building Contractors) v Raivid* [2008] EWHC 3028 (TCC); *Gipping* [2].

[40] *Tan* (n 1) [24(a)].

[41] *Loson v Stack* [2018] EWCA Civ 603, [17], cited in Juliet Wells (gen ed), *Zuckerman on Civil Procedure: Principles of Practice*, 4th ed (Sweet & Maxwell: 2021) [23.21].

[42] *Fournier v Canadian National Railway Company* [1927] AC 167, 169, cited in Harold Luntz, *Assessment of Damages for Personal Injury and Death* (4th ed, LexisNexis Butterworths: 2002) [1.2.7].

divided into instalments ('pay $x in each of *y* periods, where *x* times *y* is the total sum owed').[43]

39. Or consider *Phan Pow*, a decision of the High Court of the Federation of Malaya in Kuala Lumpur.[44] (Singapore merged with Malaya, Sarawak, and North Borneo[45] in 1963 to form Malaysia. Singapore separated from Malaysia in 1965, and can therefore b e taken to have inherited the traditions of the Malayan courts passed down through Malaysia.) The defendants asked to pay the damages they owed in instalments. There once was colonial-era legislation explicitly providing that the court could order payment in instalments, but this had been repealed. Yet, the court held that it still had the power to make an instalment order. It had the power to stay execution, and "[a]n order for payment by instalments is only a form of stay of execution in the case of a decree for payment of money".[46] This may furnish a basis for the General Division of the High Court of Singapore to make an instalment order.[47]

40. Finally, let us deal with the traditional rule that the court's award of damages must be "once and for all". Its true meaning, it is submitted, is *not* that the court cannot order payment in instalments. Rather, it means that "[d]amages are… *assessed* once for all at the time of the trial notwithstanding that in many cases, and this applies especially to cases of personal injury, uncertain matters have to be taken into account".[48] In other words, the award of damages "is not susceptible to review as the future unfolds, substituting fact for estimate";[49] the court cannot order the defendant to 'pay $x yearly until the plaintiff is able to walk again'. Even then, it is submitted that the court can still split the sum of damages – $x, which *has* been determined "once and for all" – into instalments: "pay $x in *y* yearly instalments of $(*x* divided by *y*) each". Even when the court makes an instalment order, the award has been made "once for all" in that if the plaintiff "miraculously recovers the next day, that is his good

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[43] See also *Metcalfe v London Passenger Transport Board* [1938] 2 All ER 352 (HC), cited in *McGregor on Damages* (15th ed, 1988) 1795.

[44] Cited in *Aver Asia (S) Pte Ltd v RJS Engineering and Marine Services Pte Ltd* [2017] SGMC 24, [9], in turn cited in *Tan* (n 1) [16], [29(c)].

[45] As Sabah was then known.

[46] *Phan Pow v Tuck Lee Mining & Co* (1959) 25 MLJ 32 at 33I (right column).

[47] More generally, it is worth considering whether the courts, by tapping on powers that they clearly do have, may effect limited reform to the law on damages. For a possible example of this, see *Miley v Birthistle* [2016] IEHC 196.

[48] *Mulholland v Mitchell* [1971] AC 666 (UKHL) 669 (emphasis added), cited in Michael F Rutter, *Handbook on Damages for Personal Injuries and Death in Singapore and Malaysia* (2nd ed, Butterworths Asia: 1993) p 380 para 581.

[49] *Lim Poh Choo v Camden and Islington AHA* [1980] AC 174 (UKHL) 182-183, quoted in Rutter (ibid) p 380 para 582. But note the present law on provisional damages: Rules of Court 2021, O 15 r 15(7)-(9).

luck",[50] and he is still entitled to be paid as ordered: the defendant cannot go back and ask the court to vary its order.[51]

B. The argument from principle

41. A power to make instalment orders could advance the principle of ensuring that the court's orders are complied with. The plaintiff may well be more likely to recover the full judgment sum if the defendant is allowed to pay in instalments, compared to if the defendant is ordered simply to pay a lump sum. In the latter case, the plaintiff may face greater costs of enforcement which he may not ultimately recover, or (especially if the defendant becomes bankrupt) the plaintiff might end up recovering a smaller sum altogether.[52]

42. Alternatively, a power to make instalment orders could advance the principle of avoiding hardship to the defendant: if the defendant would have been unable to pay a lump sum anyway, and so the plaintiff would be paid in instalments anyway, why not spare the defendant the difficulties of the bankruptcy process if possible?

C. An alternative reading of legislation which seemingly impliedly removes the General Division's power to grant instalment orders

43. It is now useful to examine more closely the legislation which Goh J said impliedly excluded the General Division's power to make instalment orders. As we will see, Goh J's interpretation of this legislation is one possible view; it is not the only possible one.

(1) Legislation explicitly stating that the General Division can make instalment orders in personal injury cases

44. First, there is paragraph 17 of the First Schedule to the SCJA, which states that the General Division can "order damages assessed in any action for personal injuries to be paid in periodic instalments rather than as a lump sum".

45. Section 18 describes the significance of the First Schedule:

> 18.—(1) The General Division has the powers that are vested in it by any written law for the time being in force in Singapore.
>
> (2) Without limiting subsection (1), the General Division has the powers set out in the First Schedule.

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[50] Rutter (n 48) p 74 para 144(2).

[51] *Quaere*: can the defendant go back to court to ask the court to change the order to an order to pay a lump sum, for example, if the defendant will be leaving the country and it would be inconvenient for him to pay? It is submitted that in principle the answer is yes, possibly subject to adjustments to take into the time value of money – on which, see Soh Kee Bun, 'The Powers of the Supreme Court of Singapore in Awarding Damages and Interest' [1994] *Singapore Journal of Legal Studies* 91, 101.

[52] Of course, much will depend on the specific facts, including the sum of other debts owed by the defendant to other creditors and, if the defendant is made a bankrupt, the way in which the bankruptcy is managed.

> (3) The powers mentioned in subsection (2) are to be exercised in accordance with any written law, Rules of Court or Family Justice Rules relating to them.

46. Clearly, nothing limits the General Division's powers to those in the First Schedule. At least some (if not all) provisions in the First Schedule serve only to affirm that the General Division has certain powers, and not to *create* those powers; and to affirm that Rules of Court may specify *how* those powers are to be exercised. Take paragraph 13: "Power to award costs." – it is not as though before the First Schedule was introduced in April 1993, the courts could not award costs.[53] So paragraph 17 need not be read as *limiting* instalment payments to cases involving an "action for personal injuries".

47. We can go further. Why does paragraph 17 of the SCJA explicitly state that the General Division can make instalment orders *in personal injury cases*? The answer may be that instalments have a unique role in personal injury cases. Ordinarily, an instalment order is a concession to a debtor who cannot afford to pay all at once: a sum of $50,000 may thus be paid in five instalments of $10,000 per year. But in personal injury cases, instalments can address a *different* problem: sometimes, in the first place, it cannot be said with certainty that the total sum to be paid is $50,000.

48. Consider an award for loss of future earnings, which, according to a Privy Council decision cited by the Singapore High Court in *Lai v Loo*, requires the court to engage in "the art of prophesying not only what the future holds for the injured plaintiff but also what the future would have held for him if he had not been injured".[54] According to the High Court, the solution is to "award damages… by way of periodic payments", and paragraph 17 allows this.[55]

49. In other words, the point of paragraph 17 in personal injury cases is not that there can be instalments, but rather that the instalment order may be expressed more flexibly than 'pay $\$x$ in y instalments of $\$(x$ divided by $y)$ each'. (Otherwise, paragraph 17 would not be a

[53] Why, then, is paragraph 13 there? This writer can only note that the Application of English Law Bill (whose First Reading was in August 1993 and which was passed in October 1993) was then in the works (as it had been for some time), and speculate that the First Schedule to the SCJA aimed, like the AELA, to make clear precisely which rules of English law applied in Singapore and which did not. We know that a draft of the Application of English Law Bill had been sent to the Minister for Law, Professor S Jayakumar, who was also the Minister who introduced the Bill that added the First Schedule to the SCJA, in 1992: see Chan Sek Keong, 'Application of English Law Act 1993 – A New Charter of Justice', ch 2 in Goh Yihan and Paul Tan (gen eds), *Singapore Law: 50 Years in the Making* (Academy Publishing: 2015) 26, Annex H, at 122.

[54] *Paul v Rendell* (1981) 55 AJLR 371 at 372, cited in *Lai Wai Keong Eugene v Loo Wei Yen* [2013] 3 SLR 1113 (SGHC) [24]. For detailed discussion, see Harold Luntz, *Assessment of Damages for Personal Injury and Death*, 4th edn (Oxford: LexisNexis Butterworths, 2002) [1.2.8]-[1.2.29], which provides a good summary of arguments for and against the 'once and for all' rule; Pearson Commission (Cmnd 7054-1) cited in *McGregor on Damages* (15th ed, 1988) [1] fn 2 and [1445] (para 555-576 and 612-614 of report).

[55] *Lai Wai Keong Eugene v Loo Wei Yen* [2013] 3 SLR 1113 (SGHC) [26]. See also s 2 of the UK's Damages Act 1996.

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solution to the problem which the court identified in *Lai v Loo*.[56]) In other words, paragraph 17 reverses *Fournier*,[57] so the Singapore court can make orders such as 'pay the plaintiff $*x* per year until the plaintiff turns *y* years old or the plaintiff dies, whichever occurs first', or perhaps even 'each year, pay the plaintiff $x adjusted to take into account inflation'.[58] The result is not unlike s 2 of the UK's Damages Act 1996, which allows a court to award "damages for future pecuniary loss in respect of personal injury" in the form of "periodical payments" which the court can vary.

(2) Legislation explicitly stating that certain subordinate courts can make instalment orders

50. Next, one might ask: If the power to make instalment orders is an inherent power, why does the SCA *explicitly* state that the State Courts have that power?[59] Perhaps Parliament thought that subordinate courts do not have such an inherent power; or that this ought to be put beyond doubt (lest one think that subordinate courts, like the State Courts, have a smaller pool of inherent powers than do superior courts[60]). In neither case did Parliament necessarily think that *superior* courts do not have such a power.

51. Such reasoning is supported by analogy with Singaporean case law on judicial immunity from suit. The SCA explicitly provides State Courts judges with immunity from suit in respect of

> "any act done… in the discharge of his or her judicial duty whether or not within the limits of his or her jurisdiction, provided that the judicial officer at the time in good faith believed himself or herself to have jurisdiction to do or order the act complained of".[61]

No statute provides for something similar for the superior courts. But, according to the Court of Appeal, no such statute is necessary, because judges of superior courts have such immunity *at common law* (perhaps one might say "inherently"?).[62] The reason why there is a statute expressly conferring such immunity on State Courts judges is merely to "place it beyond

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[56] Paragraph 16 cannot be the solution: that paragraph only refers specifically to "provisional damages assessed on the assumption that a contingency will not happen and further damages at a future date if the contingency happens" in personal injury cases.

[57] n 42.

[58] The possibilities have yet to be explored in Singapore law, perhaps because the High Court in *Lai* (n 55) [26], in the words of the Law Reform Commission of Hong Kong, "seemed to adopt the approach that if neither party sought damages by way of periodic payments, it must award lump sum damages": 'Consultation Paper on Periodical Payments for Future Pecuniary Loss in Personal Injury Cases'(April 2018) <https://www.hkreform.gov.hk/en/docs/periodicalpayments_e.pdf> accessed 9 November 2023, archived at <https://perma.cc/A65Y-LL6L> [4.71]. With respect, it is not clear why this approach has been taken, nor that it should be.

[59] SCA s 43(1)(b).

[60] A clear example is that superior courts, but not subordinate courts, have the inherent power to punish for contempt other than in the face of the court: see Jacob 49, though Mason 457 could be read as suggesting that this is an isolated area.

[61] State Courts Act 1970 s 43(1)(b).

[62] *AHQ v Attorney-General* [2015] 4 SLR 760 (SGCA) [18]-[19].

doubt",[63] given the old common-law rule that judges of inferior courts only have immunity from suit for acts done within jurisdiction.[64]

D. Conclusion on legislation

52. In short: If (as Goh J held) there is "no sensible policy reason"[65] why the State Courts but not the General Division should have the power to order payment in instalments, and if (as this writer submits) there is a *positive* policy reason why the General Division should have the power to order payment in instalments, then Goh J was free to hold that the General Division does have that power, and need not have considered the SCJA or the SCA from preventing him to do so. That conclusion may be reached even assuming that a regime of parliamentary sovereignty operates in Singapore (which it does not).

VI. Conclusion

53. Goh J was rightly troubled by his conclusion that the District Court (a subordinate court), but not the General Division (a superior court), has the power to make an instalment order. Such a conclusion would be constitutionally suspect, given the constitutional guarantee of "equality before the law".[66] Further, this writer respectfully agrees that there is "no sensible policy reason"[67] why some courts should have the power to order instalment payments but not others.

54. This note has aimed to show that there is another way to address Goh J's concerns besides leaving it to the Legislature. More generally, it is hoped that this note will spark conversations on the impact of the Constitution on the courts' inherent powers, as a modest supplement to Prof Goh's rightly influential work on inherent powers in Singapore. Finally, it is hoped that this note will contribute toward advancing the law on instalment orders of various forms, including in personal injury cases.

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[63] ibid [19].

[64] ibid [10].

[65] *Tan* (n 1) [26].

[66] Constitution of the Republic of Singapore, Art 12(1). The question of the appropriate remedy for such a breach is best discussed elsewhere.

[67] *Tan* (n 1) [26].