Singapore Management University
Institutional Knowledge at Singapore Management University

Research Collection Yong Pung How School Of Law | Yong Pung How School of Law

7-2012

Contract Law

Chee Ho THAM
Singapore Management University, chtham@smu.edu.sg

Pey Woan LEE
Singapore Management University, pwlee@smu.edu.sg

Yihan GOH
Singapore Management University, yihangoh@smu.edu.sg

Follow this and additional works at: https://ink.library.smu.edu.sg/sol_research

Part of the Asian Studies Commons, and the Contracts Commons

Citation
THAM, Chee Ho; LEE, Pey Woan; and GOH, Yihan. Contract Law. (2012). *Singapore Academy of Law Annual Review of Singapore Cases 2011*. 182-226.
Available at: https://ink.library.smu.edu.sg/sol_research/1464

This Case note/Digest is brought to you for free and open access by the Yong Pung How School of Law at Institutional Knowledge at Singapore Management University. It has been accepted for inclusion in Research Collection Yong Pung How School Of Law by an authorized administrator of Institutional Knowledge at Singapore Management University. For more information, please email cherylds@smu.edu.sg.

11. CONTRACT LAW

THAM Chee Ho
LLB (Hons) (National University of Singapore), BCL (Oxford);
Solicitor (England and Wales), Advocate and Solicitor (Singapore);
Attorney and Counsellor-at-Law (New York State);
Associate Professor, School of Law, Singapore Management University.

LEE Pey Woan
LLB (Hons) (London), BCL (Oxford);
Barrister (Middle Temple), Advocate and Solicitor (Singapore);
Associate Professor, School of Law, Singapore Management University.

GOH Yihan
LLB (Hons) (National University of Singapore), LLM (Harvard);
Advocate and Solicitor (Singapore);
Assistant Professor, Faculty of Law, National University of Singapore.

Formation of contract

Certainty and completeness

11.1 The Court of Appeal decision of *Norwest Holdings Pte Ltd v Newport Mining Ltd* [2011] 4 SLR 617 ("*Norwest (CA)*") (on appeal from [2010] 3 SLR 956 and discussed in (2010) 11 SAL Ann Rev 239 at paras 11.1–11.12) raised an important issue concerning the effect of a "subject to contract" clause. The case originated from the respondent's offer on 9 May 2008 to purchase the entire share capital of a wholly-owned subsidiary of the appellant. This offer was in response to the information memorandum put up by the appellant's sole liquidator. Crucially, this offer was stated to be "subject to the terms and conditions in the Sale and Purchase Agreement to be negotiated". Three days later, on 12 May 2008, a massive earthquake struck the region where the subsidiary's main assets were located. Just two hours after the earthquake, the appellant purported to accept the respondent's offer. The respondent transferred the balance of the required deposit to the appellant on 14 May 2008. By 3 June 2008, the respondent had not completed the purchase of the shares even though the completion date for doing so was 1 June 2008. The appellant then sued the respondent for breach of contract, whilst the respondent counterclaimed against the appellant for the return of the deposit paid.

11.2 The Court of Appeal held that the main issue was whether there was a binding contract between the parties. The respondent had argued that there was no concluded contract due to the "subject to contract"

clause in its offer made on 9 May 2008. It was further argued that conditions precedent still needed to be negotiated between the parties and therefore the *prima facie* meaning of the "subject to contract" clause should prevail, with the result that there was no binding contract between the parties. In contrast, the appellant argued that the essential terms of the contract had been agreed between the parties and hence the "subject to contract" clause ought not to be given its *prima facie* meaning because the context showed that the parties intended to be bound by a contract following the acceptance of the offer made on 9 May 2008. Therefore, as is evident from these arguments, the case turned on the proper approach to be taken in relation to a "subject to contract" clause.

11.3 The Court of Appeal stated that the starting point in considering whether there is a binding contract between parties should be determined by a consideration of all the circumstances and not be decided solely on the basis of the inclusion of a "subject to contract" clause. The court therefore agreed with the decision of the Supreme Court of the UK in *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG (UK Production)* [2010] 1 WLR 753 ("*RTS Flexible Systems*") to the effect that a "subject to contract" clause could be waived by the parties if the circumstances showed this to be the case: *Norwest (CA)* at [24].

11.4 The Court of Appeal further noted that, even if the essential terms of a contract had been agreed upon, parties entering into a contract containing a "subject to contract" clause may still be taken to intend that they not be contractually bound until a formal contract is subsequently executed. This would be the default position unless there is "strong and exceptional evidence to the contrary": *Norwest (CA)* at [29]. In support of this approach, the court referred to the Malaysian case of *Low Kar Yit v Mohamed Isa* [1963] MLJ 165, in which Gill J said (at [173]), that the courts will tend to give effect to a "subject to contract" clause unless there is strong evidence to the contrary.

11.5 It appears, therefore, that the approach of the Court of Appeal in *Norwest (CA)* is to presume – rebuttably – that when parties use a "subject to contract" clause, they intend for its *prima facie* meaning to apply. This presumption can be rebutted, although it seems that this would be an exceptional case requiring "strong and exceptional evidence", and the fact that parties had nothing left to negotiate does not necessarily rebut this presumption. This understanding of the court's holding is consistent with the court's earlier reference to the *RTS Flexible Systems* case: in deciding whether the presumption that the parties intended the *prima facie* meaning of a "subject to contract" clause to be rebutted, the court is to have regard to all the circumstances of the case. In other words, the inclusion of a "subject to contract" clause is not

determinative. However, such an inclusion is not without significance, for it means a court's analysis commences on the footing that there is a rebuttable presumption to the effect already described above.

11.6 Applying this approach to the facts of *Norwest (CA)*, the Court of Appeal found that the parties did not intend to be contractually bound until a formal sale and purchase agreement had been negotiated and executed. In particular, the court placed emphasis on the numerous references in the parties' correspondences to "subject to contract" clauses. In addition, the offer made on 9 May 2008 was itself stated to be "subject to contract" in more than one place. In fact, the appellant's own acceptance stated that a formal sale and purchase agreement was to be negotiated and executed between the parties. These facts led the court to conclude objectively that the parties had intended to further negotiate a sale and purchase agreement such that the "subject to contract" clause ought to be given its *prima facie* meaning.

11.7 Next, the Court of Appeal found that there was not a "very strong and exceptional context" which would override the *prima facie* meaning of the "subject to contract" clauses found in the parties' correspondence and, it may be added, principally in the respondent's offer on 9 May 2008: *Norwest (CA)* at [31]. On the contrary, the facts confirmed that the parties intended for the *prima facie* meaning of the "subject to contract" clause to apply. First, the respondent needed to obtain third-party funding to complete the purchase once the sale and purchase agreement had been negotiated and agreed upon. Second, the respondent's trading halt of its shares was not indicative of a concluded agreement with the appellant. Finally, the respondent's payment of the deposit was made pursuant to an express term of the information memorandum and on the understanding that it would be refunded if the sale and purchase agreement were not to materialise. As a result, the Court of Appeal found that there was no binding contract between the parties and ordered the appellant to return the paid deposit to the respondent.

11.8 Another decision of the Court of Appeal, *Soon Kok Tiang v DBS Bank Ltd* [2012] 1 SLR 397, discussed the issue of when a contract will be void for uncertainty. The case arose out of an action brought by the appellants, who were investors in a series of callable basket credit-linked notes known as "DBS High Notes 5" ("HN5"), to recover their investment sums under the said notes. The HN5 had been terminated due to the global financial crisis of 2008. The respondent bank informed the appellants that no sum would be due or payable to them as a result of the financial crisis. This rendered the appellants' investments in the HN5 worthless. The appellants' legal strategy to recover their investment sums was to argue that the HN5 were void at the time of their issuance and that the principal sums they had paid ought therefore to be

returned to them. The HN5 were said to be void because a material term of the contract underlying the HN5, which concerned the calculation of the sum payable in the event of early termination, was uncertain. It was uncertain because (it was argued) four possible (and contradictory) methods of calculation were included in various parts of a document known as the pricing statement. Furthermore, it was argued that two methods of calculation were not workable because there was uncertainty in the formulae for the calculation specified.

11.9 The Court of Appeal characterised the issue as a question of fact, rather than a question of law. After perusing the evidence, it found that the third method of calculation was the operative one and therefore the appellants' argument, which centred on uncertainty, failed. Further, it also found that the formulae for calculation were not uncertain and that, properly interpreted in the context, were entirely workable. The appellants therefore failed. In choosing to deal with the issue as a question of fact, the Court of Appeal provided a timely reminder that the question of whether a contract is void for uncertainty is a very factual one. However, that factual enquiry must have been guided by legal principles operating in the background, for it is otherwise impossible to know whether the threshold of uncertainty had been breached on the facts. In this regard, the Court of Appeal had referred to the legal arguments raised by both parties, though it did not indicate its express agreement with them. However, the principles appear clear. As argued by counsel, the starting point is that stated by the House of Lords in *G Scammell and Nephew Limited v H C and J G Ouston* [1941] AC 251, to the effect that it is only where the words of the contract failed to evince any definite meaning on which the court could safely act, that the court could say the contract was void for uncertainty. This is to be a measure of last resort. On the facts, this high threshold was evidently not crossed, because the court found that, in any event, there was no uncertainty.

Offer and acceptance

11.10 It is trite law that there must be, *inter alia*, a coincidence of offer and acceptance in order for a contract to be formed. This proposition is easy to state, but more complicated in practice.

Acceptance of an offer to settle

11.11 The High Court decision of *Robert Bosch GmbH v YSH Pte Ltd* [2011] SGHC 148 ("*Robert Bosch GmbH*") raised the issue of whether there was an acceptance of a compromise. In that case, the plaintiffs had written to the defendant proposing a settlement of an action based on the alleged infringement of the plaintiffs' intellectual property rights.

Crucially, out of the five terms proposed by the plaintiffs, the defendant's response was unequivocal only in respect of four terms. In relation to the term requiring the defendant to provide the plaintiffs with information with regard to Chinese suppliers or printers related to the intellectual property infringement action, the defendant's response was that it would only assist the plaintiffs "in so far as to information already available to you through your seizure" ("Provision-of-Information Term"). The pertinent issue was whether the defendant's response to these terms constituted an acceptance of the plaintiffs' offer to settle.

11.12 In dealing with this issue, Andrew Ang J referred to the well-established principle that a compromise will only arise if it satisfied the normal requirements of formation applicable to contracts generally, as stated by the Court of Appeal in *Gay Choon Ing v Loh Sze Ti Terence Peter* [2009] 2 SLR(R) 332 at [46]–[47]. Out of the constituent requirements of offer and acceptance, consideration and an intention to create legal relations, the crucial element was whether the defendant's response constituted a "final and unqualified expression of assent to terms of the [plaintiffs'] [o]ffer": *Robert Bosch GmbH* at [16]. On the facts, Ang J held that there had been no acceptance of the plaintiffs' offer to settle by the defendant. It was significant that the defendant expressed its reaction to the Provision-of-Information Term differently from its unqualified responses to the other terms. The learned judge read the defendant's response as being only to assist the plaintiffs with information the plaintiffs already had. This was therefore different from what the plaintiffs had asked for, *viz*, the provision of information which they did not have. Therefore, the defendant's response to the Provision-of-Information Term was really a rejection or a counter-offer of that particular term and hence there was no overall acceptance of the plaintiffs' proposed compromise. This case is therefore an apt illustration of the "mirror image rule" that requires an unequivocal and absolute assent to an offer before acceptance is established.

Lapse of offer after reasonable time

11.13 Just as an offer must be accepted unequivocally and absolutely, it must also be accepted before it has been terminated. In this regard, an offer may be terminated by the lapse of time. The time period concerned may be expressly stipulated in the offer (see *Dickson Trading (S) Pte Ltd v Transmarco Ltd* [1987] 2 SLR(R) 674) or, if it is not, be after a reasonable passage of time. What constitutes a "reasonable time" was raised in the High Court decision of *Ng Irene v Tan Meng Heng Robin* [2011] SGHC 128. In that case, a court order was made on 9 February 2010 in the course of divorce proceedings directing the plaintiff wife to receive a property at Stratton Walk, and the defendant husband to receive a property at The Calrose. The defendant subsequently made an

offer on 14 April 2010 to the plaintiff to swap the properties. This offer was expressly stated to last for three days. However, on 21 April 2010, the defendant wrote to the plaintiff urging the latter to seriously reconsider the proposed swap after the plaintiff had rejected the proposal on 20 April 2010. This letter of 21 April 2010 did not stipulate any express expiration of the offer. The plaintiff accepted the offer on 3 June 2010, and the question before Kan Ting Chiu J was whether the offer had lapsed by then.

11.14 The learned judge considered that there was no expiration specified for the 21 April 2010 offer. As such, his Honour had to consider when the offer could be taken to have reasonably lapsed. It was important that the court order for the original transfer of properties mandated such transfer to be completed by 9 July 2010. His Honour therefore thought that this was a reasonable date when the defendant's offer to swap would lapse because the plaintiff ought to be accorded sufficient time up until 9 July 2010 to consider the offer carefully, given the importance of the matter. Since the plaintiff had accepted the offer before 9 July 2010, the original court order was varied so as to effect the proposed swap. The learned judge's consideration of the facts illustrates the very factual nature of the enquiry relating to when an offer had lapsed after a reasonable time.

Lapse of offer in event of fundament change in circumstance

11.15 In last year's version of the present work, the High Court decision of *Norwest Holdings Pte Ltd v Newport Mining Ltd* [2010] 3 SLR 956 was noted to have raised the interesting issue of whether an offer would lapse in the event of a fundamental change in circumstance by the operation of an implied term in the offer ((2010) 11 SAL Ann Rev 239 at para 11.7). Belinda Ang Saw Ean J considered that the juridical basis for an offer lapsing due to changed circumstances could be based on either *Financings Ltd v Stimson* [1962] 1 WLR 1184 ("*Financings Ltd*") (which had implied a condition into the offer that the subject matter of the offer must remain in substantially the same condition as it was at the time of the offer, failing which the offer lapses), or *Dysart Timbers Limited v Roderick William Nielsen* [2009] 3 NZLR 160 ("*Dysart Timbers*") (which had required the change in circumstances to be fundamental before the associated offer could be said to have lapsed). Common to both approaches is the implication of a term to the offer concerned.

11.16 In the end, Ang J did not regard the reasoning employed in *Financings Ltd* and *Dysart Timbers* as convincing due to the artificiality of implying a term to unanticipated changes in circumstances. Instead, her Honour thought that the distinct doctrines of offer and acceptance or common mistake were adequate to explain the consequences of

changed circumstances which occur after an offer was made and before the offer was accepted. However, Ang J's approach leaves unaddressed the situation where the changed circumstances had become known after the offer was made, but before that offer was accepted. In such a situation, the offer has already been made and therefore such changed circumstances cannot be taken into account in construing the ambit of the offer. The doctrine of common mistake is likewise inapplicable because a contract has not been formed. Therefore, it may be said that the "implied term" approach in either *Financings Ltd* or *Dysart Timbers* remains of some use.

11.17 The High Court's decision in *Norwest Holdings Pte Ltd v Newport Mining Ltd* [2010] 3 SLR 956 has since attracted the attention of academic writers who had peripherally hoped for the Court of Appeal to express its views on this issue at a subsequent date: see, *eg*, Christopher Hare, "Changed Circumstances and Lapsing Offers" [2010] LMCLQ 379 and David McLauchlan and Rick Bigwood, "Lapse of Offers Due to Changed Circumstances: A Contract Conversation" (2011) 27 JCL 222. However, when the case reached the Court of Appeal during the year under review (reported as [2011] 4 SLR 617 and discussed above at paras 11.1–11.7), the court declined to express a firm view on the correctness of the High Court's view of the issue at hand as it had decided the appeal on a separate ground: [2011] 4 SLR 617 at [38]. Therefore, this issue, whilst interesting, remains to be determinatively resolved as a matter of Singapore law. However, the fact that the Court of Appeal did not expressly endorse Ang J's view, that *Financings Ltd* and *Dysart Timbers* were unconvincing in explaining the lapsing of an offer due to changed circumstances, is perhaps a hint that these cases remain of utility in Singapore law.

Formation of oral collateral contract

11.18 Whether a contract is formed is an enquiry that is highly dependent on the specific facts of the case. This remains the case whether the contract is oral or written and whether it is the main contract or a collateral contract. These general principles relating to the factual nature of the enquiry found expression in the High Court decision of *Communication Design International Ltd v Swarovski Management Pte Ltd* [2011] SGHC 110. The issue in that case was whether the parties had agreed to an oral agreement which contained, principally, a buy back term. After a thorough examination of the evidence, in particular the inconsistencies in the evidence of the party seeking to prove the oral agreement, Woo Bih Li J found that the alleged oral agreement was not in fact formed between the parties.

11.19 Turning now to the more specific issue of the formation of an oral collateral contract, this was one of the issues dealt with by the High

Court in *Goldzone (Asia Pacific) Ltd (formerly known as Goldzone (Singapore) Ltd) v Creative Technology Centre Pte Ltd* [2011] SGHC 103 ("*Goldzone*"). The case arose out of a suit brought by the plaintiff tenant against the defendant landlord for misrepresentation. The plaintiff alleged that the defendant had, through its employee, made eight false representations to it and thereby induced it to enter into three tenancy agreements. Related to its action in misrepresentation, the plaintiff also pleaded that the defendant's representations constituted an oral collateral contract, which had been breached. Andrew Ang J dismissed the plaintiff's claim of misrepresentation because he found that none of the eight alleged representations were either made or had induced the plaintiff to enter into the lease agreements. In any event, even if the representations had been actionable, his Honour found that the plaintiff had affirmed the lease agreements. This left the learned judge to deal with the oral collateral contract issue in two distinct stages. First, his Honour considered whether the representations could be admitted to prove the oral collateral contract in the first place. Second, assuming that the representations could be so admitted, his Honour proceeded to consider whether the substantive requirements of an oral collateral contract had been satisfied so as to lead to its formation.

11.20 In relation to the admissibility of the representations to prove an oral collateral contract, Ang J referred to the parol evidence rule as codified in ss 93 and 94 of the Evidence Act (Cap 97, 1997 Rev Ed). Although the general tenor of the rule as embodied within s 94 is that evidence of any oral agreement or statement is not admissible to add to, vary or contradict the written contract proved under s 93, s 94(*b*) allows, by way of an exception, extrinsic evidence to be admitted to prove the existence of a separate oral agreement. However, that oral agreement must be in relation to any matter on which the written contract is silent. The oral agreement must also not be inconsistent with the terms of the written contract. The requirement that the oral agreement not be inconsistent has been restated many times by the local courts, most prominently by the Court of Appeal in *Latham Scott v Credit Suisse First Boston* [2000] 2 SLR(R) 30 at [21] and by the High Court in *Lemon Grass Pte Ltd v Peranakan Place Complex Pte Ltd* [2002] 2 SLR(R) 50 at [126].

11.21 Applying s 94(*b*), Ang J held that the representations allegedly made by the defendant were not admissible because they were inconsistent with the express terms of the lease agreements. His Honour raised one specific example, pointing to the inconsistency between the alleged representation that the defendant would upgrade the premises, as contrasted with the express term in the lease agreements that the plaintiff would take over the premises in an "as is where is" condition. However, it is unclear from the judgment whether *every* alleged representation was inconsistent with the terms of the lease agreements.

The learned judge had simply stated that six clauses of the lease agreements contradicted the "slew of representations" allegedly made by the defendant: *Goldzone* at [44]. Even though the learned judge had referred to just six clauses when there had been eight alleged representations, it is entirely plausible that the substance of those six clauses collectively contradicted all of the representations. This is an important point because it raises the question of whether s 94(*b*) requires each and every oral statement sought to be admitted – and which would form the terms of the oral agreement sought to be proved – to be inconsistent with the written contract. The answer to this question must be in the affirmative. This is because a single oral statement that is not inconsistent with the written contract can possibly form a separate oral agreement consisting of just a single term. Such an oral agreement would still be contemplated under s 94(*b*). Of course, it might be more difficult to show that the parties had the intention of forming a binding contract consisting of a single term, but that relates to the separate question of whether the substantive requirements of a collateral contract are satisfied, as opposed to the admissibility of evidence. The possibility just referred to means that oral statements, sought to be admitted under s 94(*b*), must all be inconsistent with the written contract. From the tenor of the judgment, this must have been the case in *Goldzone*.

11.22 Although Ang J found that the representations were not admissible, his Honour, nonetheless, proceeded to deal with the question of whether the representations, if admitted, satisfied the substantial requirements of an oral collateral contract. In this regard, Ang J held that an oral collateral contract must satisfy four distinct requirements: (a) the statements (that is, the alleged representations) must be promissory in nature rather than representational; (b) certainty of terms; (c) separate consideration; and (d) existence of an intention that the statement is to be legally binding: *Goldzone* at [45]. On the facts, Ang J held that the plaintiff, by not making relevant submissions as to the fulfilment of these substantive requirements, had not discharged its burden of proof in establishing the existence of an oral collateral contract, referring to, *inter alia*, *Lemon Grass v Peranakan Place Complex Pte Ltd* [2002] 2 SLR(R) 50 at [118]. Crucially, the learned judge appeared to have placed much weight on the fact that the alleged representations were "glaringly inconsistent" with the terms of the lease agreements: *Goldzone* at [46]. It is unclear, however, how the fact of inconsistency related to the four substantial requirements of an oral collateral contract. This fact appears more relevant to the issue of admissibility, which had already been dealt with by the judge. It is important, in this regard, to distinguish the two separate questions relating to admissibility of evidence and, whether on that evidence, an oral collateral contract was in fact formed.

Consideration

11.23 It is well established that consideration for a promise must be *causally related* to the promise itself. Thus, a promise that is given as a mere expression of gratitude for past services is unsupported by valid consideration: that promise is given for *past* consideration which is *no* consideration. However, the courts look to substance rather than the form of the parties' transaction to determine if consideration was truly past. These principles are well-illustrated by the High Court decision of *Foo Song Mee v Ho Kiau Seng* [2011] SGHC 4 and the subsequent Court of Appeal decision of *Foo Song Mee v Ho Kiau Seng* [2011] SGCA 45 ("*Foo Song Mee (CA)*"). In this case, the plaintiff, a real estate agent, claimed the balance of a sum from the defendant pursuant to an alleged contract. Under that contract, the defendant had allegedly agreed to pay the plaintiff a commission in consideration of the plaintiff procuring "a good price" in relation to the defendant's *en bloc* purchase of some apartments. The High Court found that the quantum of the commission was not agreed before the options to purchase the apartments were granted. There was instead only a promise to pay an unspecified sum before the defendant secured the options. The final sum was agreed (if at all) only in a subsequent agreement *after* the options had been granted. Therefore, according to the court, the plaintiff's effort in securing a good price was past consideration in relation to the subsequent agreement.

11.24 The judgment of the High Court was overturned by the Court of Appeal in *Foo Song Mee (CA)*. The appellate court's decision emphasised the importance of looking at the substance of the transaction; it disagreed with the High Court's finding that consideration was past. The error, according to the Court of Appeal, was in viewing the subsequent agreement on the quantum of commission in isolation, rather than in its proper context. Viewed holistically, there was clearly consideration as the plaintiff had forgone her entitlement to reasonable remuneration and substituted it with the specific sum agreed. The plaintiff was entitled to a reasonable remuneration because the court would have implied a term based on contractual *quantum meruit* for the defendant to pay the plaintiff a reasonable sum for the services the plaintiff had rendered. This is, therefore, consistent with the principle that whether consideration is past is to be assessed substantively, rather than formally. This approach is in fact encapsulated in the Privy Council decision of *Pao On v Lau Yiu Long* [1980] AC 614, which sets out three cumulative elements to be satisfied before an act done before the giving of a promise can be consideration for that promise, although that case was not referred to by the Court of Appeal.

The terms of the contract

Incorporation of terms and contractual discretion

Distinction between terms and representations

11.25 A preliminary question when considering the terms of a contract is whether a statement is an express contractual term, or a mere representation standing outside the contract itself. The issue arose for consideration in the Court of Appeal decision of *Anti-Corrosion Pte Ltd v Berger Paints Singapore Pte Ltd* [2012] 1 SLR 427 ("*Anti-Corrosion Pte Ltd*"). The relevant question in that case was whether the respondent's representative gave certain assurances to the appellant's representative regarding the use of its paint (including a warranty as to quality), and whether those assurances formed part of the contract. These assurances and warranty were alleged to have been made by the respondent's representatives through several statements.

11.26 Having found that those assurances were in fact given, the court considered whether the parol evidence rule precluded the admission of the statements giving rise to those assurances into evidence. The court ruled that it did not. In particular, the court found that the written contract between the parties (comprising tax invoices and delivery orders) did not "comprise the entirety of the contractual relationship between the parties" and hence the statements made by the respondent's representatives could be admitted into the evidence. While the court did not state so, it is likely that the operative statutory provision was s 94(*b*) of the Evidence Act, also considered above in relation to the High Court decision of *Goldzone*: see paras 11.19–11.22 above. That provision allows for the proof of the existence of any separate oral agreement that concerns any matter on which the written contract is silent and which is not inconsistent with its terms. On the facts, the statements concerning the assurances on the use of the paint and the related warranty were not mentioned in the written contract. Hence, it is likely that s 94(*b*) was the operative provision that allowed the admission of the relevant statements.

11.27 Having considered that the statements were admissible, the court next considered whether they were "contractual terms or non-binding representations merely intended to induce the other party to enter into the contract without imposing any responsibility for breach of contract": *Anti-Corrosion Pte Ltd* at [26]. In answering this question, the court relied on Lord Denning MR's statement of principle in *Dick Bentley Productions Ltd v Harold Smith (Motors) Ltd* [1965] 1 WLR 623 to the effect that if a representation was made in the course of dealings for a contract to induce the other party to act upon it, and actually induces that other party to enter into the contract, then, it is

likely that the representation was in fact a term of the contract, unless it could be shown that the statement was innocently made. Applying this principle, the court thought that the statements were clearly important to the appellant's representative, who would not have accepted the proposed paint system otherwise. This raised a *prima facie* inference that the representations were in fact terms of the contract. The court emphasised that the respondent had the greater expertise in and knowledge of its own paint products and hence this inference was not rebutted. The result is that the court found that the statements concerned, comprising the assurances and warranty, were express terms of the contract. However, one might consider that when Lord Denning stated the principle laid out above, he had done so at a time before statutory remedies for misrepresentation were made available. Therefore, there was perhaps a need to more readily infer promissory intent. In the present day, the question could perhaps be reduced to simply whether there was meant to be a promissory term.

Terms implied in fact

11.28 There used to be some uncertainty whether the implication of terms in fact is governed by the "business efficacy test", the "officious bystander test", or both. In so far as Singapore is concerned, the uncertainty has been resolved by the High Court in *Forefront Medical Technology (Pte) Ltd v Modern-Pak Pte Ltd* [2006] 1 SLR(R) 927 ("*Forefront Medical Technology*"), in which it explained that the two tests are complementary to each other, and that the "officious bystander test" is the practical mode by which the "business efficacy test" is implemented. Decisions in the year under review demonstrate just how that explanation is to be applied. It is important, however, to note as a preliminary point, that the implication of a term must not contradict the express wording of the contract concerned. Were it otherwise, the implication of the term concerned will fail, without more. This was pointed out by the High Court in *Holdrich Investment Ltd v Siemens AG* [2011] SGHC 265 ("*Holdrich Investment Ltd*").

11.29 An example of a case applying the explanation in *Forefront Medical Technology* on the implication of terms in fact is the High Court decision of *ABN AMRO Bank NV Singapore Branch v CWT Commodities (SEA) Pte Ltd* [2011] 2 SLR 891 ("*ABN AMRO Bank NV*"). In that case, the defendant warehouse company contracted with the plaintiff bank to manage tin products for which the plaintiff provided trade financing. It transpired that the defendant had issued warehouse receipts and certificates of quality in respect of released tin products which had not left the warehouse, but which were subsequently re-pledged as fresh collateral. A question arose as to whether there was an implied term in the parties' agreement which obliged the defendant to inform the plaintiff of this fact. Woo Bih Li J found that such a term

could, in fact, be implied. His Honour, having referred to *Forefront Medical Technology*, held that it was "necessary for the efficacy of the [parties' agreement]" to imply a term obliging the defendant to inform the plaintiff of any tin product which was not physically leaving and entering the warehouse after they had been released and subsequently re-pledged: *ABN AMRO Bank NV* at [75] and [76]. Woo J's statement of the applicable test, which links the efficacy of the contract to the criterion of "necessity", demonstrates just how the High Court's rationalisation of the two traditional tests in *Forefront Medical Technology* is to be understood. The tests are not alternatives for one another, nor are they cumulative; rather, they are applied in the sense that the normative quality of "efficacy" is conditioned through the requirement of "necessity".

11.30 Lai Siu Chiu J in the High Court decision of *Holdrich Investment Ltd* adopted a similar view of the applicable test to ascertain if a term should be implied in fact. Her Honour expressed agreement with the approach advocated in *Forefront Medical Technology* and stated that the "touchstone ... for [the] application of the 'business efficacy' or 'officious bystander' test ... is that of necessity". To this statement it may, with respect, be added that while the criterion of "necessity" is certainly important in the implication of a term in fact, it is, however, without normative force. To frame the test as one premised on "necessity" begs the question, "necessary to *do what*?" As discussed in the preceding paragraph, this is precisely how the High Court's explanation in *Forefront Medical Technology* provides normative force to the otherwise bare criterion of "necessity": it explains that the implication of the term must be necessary *for business efficacy*. This is how the "officious bystander test" becomes the practical mode by which the "business efficacy test" is implemented: *cf Holdrich Investment Ltd* at [85].

11.31 Leaving aside the relationship between the "business efficacy test" and the "officious bystander test", a broader question is whether these traditional tests have been overtaken by a broader test based on the interpretation of the contract concerned. This possibility originated from Lord Hoffmann's judgment in the Privy Council decision of *Attorney General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988 ("*Attorney General of Belize*"). Lord Hoffmann explained that the implication of terms in fact is really an exercise of contractual interpretation. Therefore, whenever a court sought to imply a term, it must ask itself "whether such a provision would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean": *Attorney General of Belize* at [21].

11.32 Although the Court of Appeal in *MFM Restaurants Pte Ltd v Fish & Co Restaurants Pte Ltd* [2011] 1 SLR 150 ("*MFM Restaurants*")

expressly rejected Lord Hoffmann's test as being unnecessarily abstract, it is interesting to note that the same court has now in *Fong Song Mee v Ho Kiau Seng* [2011] SGCA 45 ("*Fong Song Mee (CA)*") noted that the implication of terms (generally) "should always be a matter of construction in the light of the precise circumstances of the case, in particular, the objective intention of the parties": *Fong Song Mee (CA)* at [15]. While one should not ascribe too great an importance on a single sentence in the court's judgment, this allusion to construction does at least raise, slightly, the question of whether the court's fundamental understanding of the implication of terms may be premised on interpretation, even if the test it chooses to apply is not such. However, given the clear rejection of Lord Hoffmann's test in *MFM Restaurants*, the Court of Appeal's statement in *Fong Song Mee (CA)* may be explained on the basis that the court was referring to a consideration of the facts of the case when implying a term in fact. There is certainly nothing amiss about this since the nature of the enquiry is, it bears repeating, factual in nature. It might also be briefly noted that the test in *Attorney General of Belize* was raised by counsel as being the test of implication in the High Court case of *Kim Eng Securities Pte Ltd v Goh Teng Poh Karen* [2011] SGHC 201 at [66], although the court in that case did not comment on the correctness of the submission.

Terms implied in law

11.33 In the High Court decision of *Chan Miu Yin v Phillip Morris Singapore Pte Ltd* [2011] SGHC 161 ("*Chan Miu Yin*"), an issue arose as to whether certain terms could be implied in law in employment contracts generally. These terms were (a) the implied term that the employer will treat an employee fairly in the manner of dismissal; and (b) the implied term that the employer will not exercise the contractual right to terminate the employment in bad faith. It is important to note that the action before the court was an application by the defendant to strike out the plaintiff's claim based on these implied terms. As such, the court need not decide determinatively that the plaintiff succeeded; all that it needed to be satisfied of was that the plaintiff's claim did not clearly and plainly disclose no reasonable cause of action.

11.34 In relation to the implied term relating to unfair dismissal, the court was not prepared to find that such a term could not be implied in Singapore. However, it bears noting that the court did not rule determinatively whether such a term was implied; all it held was that it could be and that this is an issue to be decided after a fuller consideration of the relevant authorities. In its reasoning, the court found plausible Lord Millet's reasoning in *Johnson v Unisys Ltd* [2003] 1 AC 518 – as adapted to the local context – that there was no need to imply a term in law into employment contracts to protect employees

from being dismissed in an unfair manner since there exists various statutory protection to employees generally under the Employment Act (Cap 91, 2009 Rev Ed). The court also noted that there is no express statutory right against unfair dismissal in Singapore. While the court thought that this meant the questions relating to the fairness of dismissal would be a matter of democratic decision that falls outside the province of the courts, it also noted that the non-existence of an express statutory right could also signify Parliament's intention to leave the issue to be decided by the courts. Ultimately, given that the courts in Singapore have not had the opportunity to consider the reasoning in *Johnson v Unisys*, and the extent to which the reasoning there applied to the local legislative framework, the court was not prepared to strike out the plaintiff's claim based on the implied term relating to unfair dismissal. This was a decidedly cautious approach since the court had, in fact, examined most of the cases, but yet declined to express a concluded view.

11.35 In relation to the implied term relating to the non-exercise of the contractual right to terminate the contract in bad faith, the court considered that the Court of Appeal decision of *Latham Scott v Credit Suisse First Boston* [2000] 2 SLR(R) 30 at [48] "*presupposes* that the employer had a duty not [to] terminate employment in bad faith" [emphasis in original] because the Court of Appeal was willing, in that case, to consider whether the employer had been motivated by bad faith in dismissing the employee. The court also considered the apparent obstacle against the implied term being argued posed by the Court of Appeal decision of *Ng Giap Hon v Westcomb Securities Pte Ltd* [2009] 3 SLR(R) 518 ("*Ng Giap Hon*"). The apparent obstacle was the Court of Appeal's holding in *Ng Giap Hon* that there is no general implied term of good faith (in law) in all contracts. However, the court in the present case considered that the precise question of whether there is a *sui generis* contractual duty not to terminate an employment in bad faith was not placed before the Court of Appeal in *Ng Giap Hon*. For all these reasons, it could not be said conclusively that the law does not recognise an implied term relating to the non-exercise of the contractual right to terminate the contract in bad faith, and the plaintiff's claim was similarly not struck out on this basis (although it was eventually struck out for a different reason).

11.36 The broader point from *Chan Miu Yin* arising out of the court's cautious approach must be that the courts will be very careful in implying terms in law. This, to be fair, is entirely consistent with the Court of Appeal's direction in *Jet Holding Ltd v Cooper Cameron (Singapore) Pte Ltd* [2006] 3 SLR(R) 769 at [89] that courts should indeed adopt a higher degree of care when implying terms in law, as compared with implying terms in fact. The rationale for this extra level of care is that terms implied in law applied to all contracts of a

particular type, as opposed to terms implied in fact which only apply to the contract at hand.

Terms implied by statute

11.37 A few cases in the year under review concerned the implication of terms by statute, specifically the Supply of Goods Act (Cap 394, 1999 Rev Ed) and the Sale of Goods Act (Cap 393, 1999 Rev Ed). The High Court decision of *Ho See Jui (trading as Xuanhua Art Gallery) v Liquid Advertising Pte Ltd* [2011] SGHC 108 concerned the former statute. The relevant question was whether a condition of satisfactory quality could be implied via s 4 of the Supply of Goods Act in a reinstallation agreement, which was for the relocation of a water dispensing unit and the supply of additional piping.

11.38 Lai Siu Chiu J first dealt with the preliminary issue of whether the Supply of Goods Act applied to a reinstallation agreement. Section 4 of the Supply of Goods Act provides that it applied to a "contract for the transfer of goods", which is in turn defined by s 1(1) to mean "a contract under which one person transfers or agrees to transfer to another the property in goods, other than an excepted contract". The list of excepted contracts is provided for in s 1(2). Lai J noted that even though the reinstallation agreement involved the provision of services, this did not render the Supply of Goods Act inapplicable since s 1(3) provides that a contract could still be a contract for the transfer of goods even if services are provided under the contract. More importantly, the learned judge emphasised that the reinstallation agreement contemplated the supply of additional piping, and hence the Supply of Goods Act applied. This meant that s 4 implied two conditions: first, via s 4(2), a condition of "satisfactory quality" was implied; and second, via ss 4(4) and 4(5), a condition of reasonable fitness for any particular purpose made known to the transferee, whether expressly or by implication, was implied. On the facts, both implied conditions were found to have been breached.

11.39 The Court of Appeal decision of *Chai Cher Watt (trading as Chuang Aik Engineering Works) v SDL Technologies Pte Ltd* [2012] 1 SLR 152 dealt with the implication of a condition via s 13 of the Sale of Goods Act (Cap 393, 1999 Rev Ed). The case concerned a contract for the sale of, *inter alia*, a drilling machine from the respondent to the appellant. The contract provided that the drilling machine would be 11 metres in length. However, it was later discovered that the machine was in fact 13.5 metres in length. The appellant argued that a condition was implied via s 13 of the Sale of Goods Act. The Court of Appeal agreed with this submission. Pursuant to s 13(1), it is an implied condition that the goods will correspond with the description provided in the contract. Since s 13(1) classifies every description of the contract

as a *condition*, any breach of it, no matter how small, will entitle the innocent party to treat the contract as discharged. The *Hongkong Fir* approach in the English Court of Appeal decision of *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26 therefore had no application and the consequences of the breach of an implied condition under s 13(1) did not matter. As the drilling machine was 13.5 metres and not 11 metres in length, there was a *prima facie* breach of an implied condition.

11.40 In addition, the court noted that s 15A of the Sale of Goods Act embodied the "*de minimis* rule". By this rule, the right to reject goods for breach of a condition (as implied by ss 13, 14 or 15 of the Sale of Goods Act) in non-consumer cases is limited where the breach is slight and/or technical. However, the *de minimis* rule did not operate against the appellant on the facts because the difference of 2.5 metres in length between the specification provided and the actual length of the drilling machine was not *de minimis*. Finally, for completeness, the court also rejected an argument premised on s 11(1) of the Sale of Goods Act that the appellant had waived its right to terminate by accepting delivery of the drilling machine. This was because the respondent had not discharged its burden of showing that the appellant had knowledge of the facts giving rise to its right to terminate.

Terms implied by custom or trade practice

11.41 The High Court decision of *Kim Eng Securities Pte Ltd v Goh Teng Poh Karen* [2011] SGHC 201 ("*Kim Eng Securities*") provides a rare example of a local decision in which a term was found to have been implied by custom or trade practice. The plaintiff in that case commenced the action against the defendant to enforce an obligation to indemnify the plaintiff for losses arising out of share trades executed by her on behalf of her clients. However, this obligation to indemnify was not stipulated in the defendant's letter of appointment with the plaintiff. Neither did the defendant sign a template indemnity – which all other dealers signed – because of an administrative oversight. The plaintiff therefore argued that this obligation to indemnify nonetheless arose, *inter alia*, either by way of a subsequent letter written in 2003 varying the original letter of appointment ("2003 Letter"), or because a term imposing such an obligation could be implied by custom or trade practice.

11.42 Tay Yong Kwang J found for the plaintiff and held that an obligation to indemnify existed. His Honour acknowledged that the 2003 Letter did in fact set out in express terms the defendant's obligation to indemnify the plaintiff. However, the learned judge also found that a term imposing such an obligation could be implied by custom or trade practice. His Honour said that the requirement of an

indemnity was applied to the plaintiff's employees performing the same tasks as the defendant, and that such a practice "was obviously known to the defendant and complied with by her": *Kim Eng Securities* at [67]. This suggests that, in order for a term to be implied by custom or trade practice, not only must the custom or trade practice be well-established (which appears to have been found on the facts), but such custom or trade practice must have been drawn to the defendant's attention, or had been followed without exception for a substantial period. This seems to impose at least a requirement of constructive knowledge before a custom or trade practice will be found to imply a term. This proposition was derived from a case cited by the plaintiff, *viz*, *Duke v Reliance Systems Ltd* [1982] ICR 449 at 452.

11.43 It is, however, important to recognise that *Duke v Reliance Systems Ltd* concerned an employment situation; specifically, the question before the English Employment Appeal Tribunal was the correct "normal retiring age" for an employee in the appellant's position, pursuant to s 64(1)(b) of the Employment Protection (Consolidation) Act 1978 (c 44) (UK). In that specific context, where the "normal retirement age" may vary from employer to employer, it may be necessary for the employee to be affixed with constructive knowledge of the custom or trade practice concerned. However, such a requirement may not be required more generally, especially where the custom or trade practice is "reasonable". It is clear that a "reasonable" custom or trade practice binds both parties whether they knew it or not. In contrast, an "unreasonable" custom or trade practice binds only where there is actual knowledge: see *Cunliffe-Owen v Teather & Greenwood* [1967] 1 WLR 1421 at 1439. A positive requirement premised on constructive knowledge fits uneasily with these established propositions: constructive knowledge is unnecessary in respect of a "reasonable" custom or trade practice, but is insufficient in respect of an "unreasonable" custom or trade practice. It is acknowledged, of course, that Kwang J had found actual knowledge on the facts in any event, but it is respectfully submitted that his Honour's imposition of a constructive knowledge requirement may need to be further examined. Also, even if the decision could be explained on the basis of actual knowledge, that presupposes that the custom or trade practice concerned was "unreasonable". It may legitimately be asked if a custom or trade practice requiring dealers to personally indemnify stockbrokers can be regarded as "unreasonable".

Unfair Contract Terms Act

11.44 In *Jiang Ou v EFG Bank AG* [2011] 4 SLR 246 ("*Jiang Ou*"), the High Court observed that conclusive evidence clauses which purported to exclude liability for fraud committed by a bank's employee would not satisfy the "reasonableness test" under s 11 of the Unfair Contract Terms

Act (Cap 396, 1994 Rev Ed) ("UCTA"). As a preliminary point, conclusive evidence clauses which exclude liability would be caught by s 3 of the UCTA as being an exclusion of contractual liability. Accordingly, such a clause would be subject to the "reasonableness test" prescribed in s 11 of the UCTA. In addition, as yet another preliminary point, s 11(5) of the UCTA provides that the burden lies on the party seeking to rely on the exclusion clause to prove its reasonableness.

11.45 Steven Chong J noted that, in determining whether the "reasonableness test" is satisfied, the relative bargaining power between the parties is a relevant consideration. Indeed, this factor is statutorily provided for under the Second Schedule to the UCTA, which has been judicially taken to be relevant towards a clause caught by s 3 even though the UCTA provides for its consideration only for clauses caught by ss 6(3), 7(3) and 7(4). In considering this factor, Chong J noted that where a conclusive evidence clause was reached between commercial entities, the courts usually take a non-interventionist approach and uphold the validity of the clause concerned. This is because of the parties' freedom to apportion risks as they think fit and also in consideration of the presence of insurance. On the other hand, where one party was a private entity, the courts may well be less likely to uphold the validity of such clauses. Chong J did not, however, express a definitive view on this latter situation concerning a private entity since no significant submission was made on this point.

11.46 To the learned judge's points, the following may be added. It is clear that the specific points made with regard to commercial entities agreeing to a conclusive evidence clause are applicable to exclusion clauses generally. First, where parties are commercial entities, the courts will generally uphold any exclusion clause reached as being valid. An illustration is provided by the High Court decision of *Consmat Singapore (Pte) Ltd v Bank of America National Trust & Savings Association* [1992] 2 SLR(R) 195, where the court observed that both parties were commercial entities and had entered into the contract concerned out of their own free will. However, the mere fact that both contracting parties are commercial entities does not, without more, render an exception clause a reasonable one pursuant to the UCTA. This was so held by the High Court in *Kenwell & Co Pte Ltd v Southern Ocean Shipbuilding Co Pte Ltd* [1998] 2 SLR(R) 583, where the court pointed out that the UCTA is intended precisely to cover, indeed to cover only, business liability. Business liability is defined to mean a liability for breach of obligations or duties arising from things done or to be done in the course of business. As such, a business or commercial concern is not any less protected by reason of being such.

11.47 Further, Chong J also held in *Jiang Ou* that a conclusive evidence clause which expressly excludes liability for the fraud of a

bank's employees would be unreasonable under the UCTA because of the negative impact such a clause would have on public confidence and trust in the modern banking system (*Jiang Ou* at [122]):

> Individuals and corporations entrust banks and employees of banks with their savings and investments. Public confidence in the banking system is therefore fundamental to the integrity of the system and is no doubt founded upon mutual trust and a reasonable expectation of honest dealings by employees of banks. Shifting the attendant risk and liability for the fraud or wilful misconduct of employees of banks by way of conclusive evidence clauses, strikes at the very heart of the presumed integrity of the system. The negative impact on public confidence and trust in the modern banking system would, in my view, render such clauses to be unreasonable under UCTA as well as void as a matter of public policy.

Construction of terms

General principles

11.48 Since the Court of Appeal's decision in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 ("*Zurich Insurance*"), it is now clear that the "contextual approach" applies in the interpretation of contracts in Singapore. More fundamentally, it is clear that the enterprise of interpretation is an objective one. As the Court of Appeal said in *Ang Tin Yong v Ang Boon Chye* [2012] 1 SLR 447 at [11] "[w]hat must be sought is the meaning that the contract conveys to a reasonable person having the background knowledge that would have been reasonably available to him". The court further stated that a holistic approach should be taken and regard had to the commercial purpose of the contract and circumstances in which it was made. The High Court in *Soo Nam Thoong v Phang Song Hua* [2011] SGHC 159 at [24] alluded to similar basic points.

11.49 *Zurich Insurance* prescribed a two-step framework in the interpretation of contracts. The *first step* is to consider whether the extrinsic evidence sought to be adduced can in fact be admitted. The Court of Appeal in *Zurich Insurance* concluded that although the parol evidence rule (as embodied in s 94 of the Evidence Act (Cap 97, 1997 Rev Ed)) still operates as a restriction on the use of extrinsic material to affect a contract, extrinsic material is admissible for the purpose of interpreting the language of the contract. Whether the extrinsic evidence is admissible for this purpose depends on whether it is (a) relevant (*ie*, it would affect the way in which the language of the document would have been understood by a reasonable man); (b) reasonably available to all the contracting parties; and (c) relates to a clear and obvious context.

11.50 The *second step* concerns the task of interpretation. This involves the application of the contextual approach under the terms of proviso (*f*) of s 94. The Court of Appeal in *Zurich Insurance* noted that neither ambiguity nor the existence of an alternative technical meaning is a prerequisite for the court's consideration of extrinsic material. Instead, the court will *first* take into account the plain language of the contract together with relevant extrinsic material that is evidence of its context. It is also important to note that "context" includes internal context as well, *ie*, the structure and consistency of usage within the contract, as demonstrated by the Court of Appeal's approach in *Azuma Engineering (S) Pte Ltd v MEP Systems Pte Ltd* [2011] 3 SLR 150. *Then, if, in the light of this context*, the plain language of the contract becomes ambiguous (*ie*, it takes on another plausible meaning) or absurd, the court will be entitled to put on the contractual term in question an interpretation which is different from that demanded by its plain language.

11.51 Several decisions in the year under review continued to apply and, in the process, refine, these principles enunciated in *Zurich Insurance*. In relation to the first step in the two-step framework outlined above, *viz*, whether the extrinsic evidence sought to be adduced can in fact be admitted, it must first be said that there is a distinction between using parol evidence to contradict, vary, add to or subtract from the terms of the contract, and using parol evidence to explain the contract. Parol evidence in the latter situation, pursuant to s 94(*f*), is generally admissible. However, parol evidence to effectively vary the contract is not generally admissible, where the parties intended the contract to contain all the terms of their agreement. Hence, where such an intention is contradicted, parol evidence may be admitted to vary the contract. This distinction was, however, blurred in the High Court decision of *Hanwha Non-Life Insurance Co Ltd v Alba Pte Ltd* [2011] SGHC 271 at [33]. The court stated that:

> In the present case, the parties clearly did not intend to embody their entire agreement in a written contract. That was why both parties relied on extrinsic evidence to shed light on the nature of the reinsurance policy. Such evidence would be useful if it is relevant, reasonably available to all the contracting parties and relates to a clear or obvious context.

11.52 With respect, whether or not the parties intended to embody their entire agreement in a written contract does not affect the distinct issue of whether extrinsic evidence is admissible to explain the contract. The court's allusion to the three criteria of relevance, reasonable availability and clear or obvious context has to do with whether extrinsic evidence is admissible to *explain* the contract; the prior question of whether the parties intended to embody their agreement

entirely within the written contract has nothing to do with the admission of extrinsic evidence for this purpose.

11.53 In *Lonpac Insurance Bhd v American Home Assurance Co* [2011] SGHC 257 ("*Lonpac Insurance*"), the High Court considered whether s 94 of the Evidence Act restricted the admission of oral evidence to explain or even vary or contradict the written terms of a contract, when the issue is between persons who are essentially strangers to the contract. Judith Prakash J held that it did not, relying on the High Court decision of *China Insurance Co (Singapore) Pte Ltd v Liberty Insurance Pte Ltd* [2005] 2 SLR(R) 509 ("*China Insurance*"). In *China Insurance*, the court had held that s 94, which excluded extrinsic evidence "as between the parties to any such instrument", was irrelevant where third parties were concerned. Therefore, Prakash J's holding in *Lonpac Insurance* simply demonstrates an application of *China Insurance*.

11.54 In addition, the High Court decision of *Sheng Siong Supermarket Pte Ltd v Carilla Pte Ltd* [2011] 4 SLR 1094 ("*Sheng Siong Supermarket*") may also be noted. Andrew Ang J in that case suggested that whether parol evidence is admissible depends on the purpose for which the evidence is to be used. The learned judge elaborated as follows (*Sheng Siong Supermarket* at [37]):

> Relying on such evidence to interpret the contract in its proper context is permissible; relying on the same to 'contradict or vary or add to or subtract from' the contract is impermissible.

11.55 While this may seem to be a mere restatement of the Court of Appeal's statement of the law in *Zurich Insurance*, it is suggested that the positive placement of such an overarching "purpose" test at the start of the enquiry gives proper effect to the parol evidence rule, which is exclusionary in nature. Furthermore, Andrew Ang J in *Sheng Siong Supermarket* examined the situations where the "purpose" test is offended: it appears that this hinges on the scope of the meanings that the contractual words could bear. Where the extrinsic evidence is to render the meaning of the term concerned "completely at odds" with either an express clause in the contract or with the meaning that the contractual words are capable of bearing, then the purpose of their admission would be to contradict, vary, add to or subtract from the terms of the contract, thereby infringing the parol evidence rule: *Sheng Siong Supermarket* at [38]. This statement of the law provides a useful threshold question to ask before ascertaining if the three criteria outlined in *Zurich Insurance*, *viz*, (a) relevance; (b) reasonable availability; and (c) clear and obvious context, are satisfied.

11.56 Turning to the second step in the two-step framework enunciated in *Zurich Insurance*, *viz*, the task of interpretation, the High Court decision of *Healthcare Supply Chain (Pte) Ltd v Roche Diagnostics*

Asia Pacific Pte Ltd [2011] 3 SLR 476 ("*Healthcare Supply Chain*") may be usefully noted. Choo Han Teck J held that he (*Healthcare Supply Chain* at [6]):

> ... did not hold that the contextual approach was to be the primary rule in the construction of a contract in that if one begins the construction of a contract by reference to it, and through it enter an expressway into extrinsic evidence not ordinarily permissible in the construction of a written contract, especially one that appears complete on the face of it.

11.57 The learned judge's statement illustrates the tension between adherence to a "modern" contextual approach, and the constraints placed on such an approach in the Evidence Act, which was enacted at a time when the law strongly recognised a distinction between latent and patent ambiguity, which is itself premised on the belief that words had a fixed meaning to them. This distinction originated from "Lord Bacon's Maxim 25" (sometimes "Maxim 23") in the late 16th century and came into prominence in the 18th century, by which only latent ambiguity may be explained by means of parol evidence. On the other hand, parol evidence was inadmissible to explain an ambiguity *apparent* on the face of the instrument, *ie*, patent ambiguity. This distinction between latent and patent ambiguity is still enshrined in s 95 of the Evidence Act, and presents a legislative challenge towards adopting a strong version of the contextual approach that would apply regardless of the type of ambiguity present. Understood in this manner, Choo Han Teck J's comments in *Healthcare Supply Chain* reveal the difficulty of reconciling a "modern" approach towards contractual interpretation, as urged by the House of Lords in the seminal case of *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, with an antiquated distinction between latent and patent ambiguity (which itself is premised on a view that words have fixed meanings) preserved by statute.

11.58 By the strong version of the contextual approach, extrinsic evidence is always admissible to interpret the contract, regardless of the presence or absence of ambiguity. In addition, because words are no longer regarded as having fixed meanings, but meanings dependent on the context, there is no need for ambiguity or absurdity before a "departure" from the plain meaning is warranted: there is no "departure" to speak of because the only relevant meaning is the contextual meaning. However, s 95 provides that extrinsic evidence is only admissible to *explain* the contract where there is latent ambiguity. This implies that it is possible for words to bear a fixed meaning on their face that is conclusive as to their meaning. Perhaps this is why, at the second step of the *Zurich Insurance* framework, the Court of Appeal in that case stated that a departure from the words' plain meaning is

permissible if ambiguity or absurdity ensued after consideration of the context: [2008] 3 SLR(R) 1029 at [108] and [130] (see also at [50]).

11.59 An example where the plain meaning of the contractual words was adhered to is the Court of Appeal decision of *Lim Keenly Buildings Pte Ltd v Tokio Marine Insurance Singapore Ltd* [2011] 4 SLR 286 ("*Lim Keenly*"). In that case, it was held that a plain meaning of the contractual clause concerned not only accorded with the interpretation contended for, but also aligned with the commercial purpose of the broader contract. Indeed, as the court reminds us (*Lim Keenly* at [28]):

> If the meaning of a clause was clear from the language of the clause itself, having regard to the context of the contract, it was unnecessary to canvass arguments pertaining to other specific features of the contract to 'aid' the interpretation of this clause, except where these specific arguments might demonstrate that the meaning of the clause was not so clear as it appeared at first blush.

11.60 This statement clearly captures the holding in *Zurich Insurance* that the plain meaning of contracts should not be departed from unless, as aided by the context, an ambiguity or absurdity ensues. This demonstrates that contractual interpretation in Singapore is still affected by old ideas concerning the fixed meanings of words as embodied within the Evidence Act.

11.61 Even though the courts are bound by the plain meaning of words unless an ambiguity or absurdity ensues after considering the extrinsic evidence, a related issue is whether recourse to extrinsic evidence is permissible in the first place where there is no ambiguity or absurdity on the face of the contractual words. Two High Court decisions appeared to think that recourse to extrinsic evidence in such a case is not permissible. First, Choo Han Teck J in *Healthcare Supply Chain* stated that the Court of Appeal in *Zurich Insurance* "clearly could not be saying that if the plain language of a contract is clear[,] one should start looking for extrinsic evidence – which might result in rendering the clear language unclear": *Healthcare Supply Chain* at [6]. Secondly, although it is not entirely clear from the judgment, Lai Siu Chiu J in the High Court decision of *Morten Innhaug v Sinwa SS (HK) Co Ltd* [2011] SGHC 20 ("*Morten*") appeared to come to the same conclusion: *Morten* at [41]. It is respectfully submitted that this position may need to be reconsidered.

1.62 In the first place, the Court of Appeal in *Zurich Insurance* clearly stated that "ambiguity is not a prerequisite for the admissibility of extrinsic evidence under provision (*f*) to s 94 [of the Evidence Act (1997 Rev Ed)]": *Zurich Insurance* at [132]. Indeed, extrinsic evidence has always been admissible to *raise* a latent ambiguity (see, *eg*, *Thomas v Thomas* 6 TR 617); the prohibition, as introduced by s 95 of the

Evidence Act, is that extrinsic evidence is not admissible to explain away a patent ambiguity.

11.63 Before leaving the general principles governing contractual interpretation in Singapore, one might raise the specific issue of the admissibility of prior negotiations and subsequent conduct in the interpretation of contracts. The Court of Appeal in *Zurich Insurance*, while finding academic arguments in favour of the admissibility of such evidence favourable, declined to affirmatively embrace their admissibility. This has left the exclusionary rule against prior negotiations and subsequent conduct intact in Singapore, with the result that lower courts have had to consider the admissibility of such evidence.

11.64 In *Sheng Siong Supermarket v Carilla Pte Ltd* [2011] 4 SLR 1094 ("*Sheng Siong*") the High Court had to consider whether an "inchoate" version of the final contract was admissible because it appeared to constitute evidence of "prior negotiations". The facts of this case are set out in greater detail below (at para 11.88). To circumvent the inadmissibility of evidence of prior negotiations, Andrew Ang J characterised the inchoate contract as a *product* of prior negotiations: it was a "post negotiation" document, and was thus not inadmissible. However, this reasoning, with respect, offends the general rule in English law that earlier drafts of the final contract are not admissible, which rule is in fact a specific example of the rule against "prior negotiations". The exclusionary rule is not in fact narrowly applicable to "prior negotiations" only but, rather, against "pre-*contractual* evidence" (although that definition might, in turn, be too broad). The rationale is that these documents, concluded before the final contract, are not helpful towards the interpretation of contracts, probably because they show the subjective intentions of the parties. Therefore, the High Court's reasoning in *Sheng Siong*, while overcoming the exclusionary rule on a technical basis, does not answer the fundamental objection against the admission of such evidence. Whether a document originated during negotiations or after, the more important question is whether it originated before the *contract* was formed. It is suggested that such technical characterisations would not be needed if there were to be a definitive rejection of the exclusionary rule by the Court of Appeal. That, though, remains to be seen.

Contra proferentum *rule*

11.65 In the High Court decision of *LTT Global Consultants v BMC Academy Pte Ltd* [2011] 3 SLR 903 ("*LTT Global Consultants*"), Judith Prakash J stated that there are two stages in deciding whether to apply the *contra proferentum* rule. The first stage involves determining whether there is an ambiguity in the contract that cannot be resolved by

interpreting the term in the context of the overall contract. The *contra proferentum* rule may only apply in the presence of such ambiguity and cannot be used to create an ambiguity where none existed. The corollary principle is that if the term is clear and free of ambiguity, then the *contra proferentum* rule will not apply, as was the case in the High Court decision of *JK Pte Ltd v Lonpac Insurance Bhd* [2011] SGHC 72 at [82].

11.66 The second stage in deciding whether to apply the *contra proferentum* rule, as stated by Judith Prakash J in *LTT Global Consultants*, involves identifying the person ("*proferens*") against whose interest the ambiguous term should be read. In this regard, if both parties were involved in the drafting of the contract, there would be no *proferens* with the result that the *contra proferentum* rule cannot be applied. Prakash J further stated that it is harder to apply the rule to the case of contracts that have been individually negotiated. In contrast, the rule applies more readily in standard form contracts, especially where one side puts forward the contract on "take it or leave it" terms. *LTT Global Consultants* itself involved a negotiated contract. In that case, since the parties had every opportunity to raise their individual concerns during the negotiations, Prakash J decided that the *contra proferentum* rule did not apply.

Interpretation and operation of exception clauses

11.67 In the High Court decision of *Ho See Jui (trading as Xuanhua Art Gallery) v Liquid Advertising Pte Ltd* [2011] SGHC 108 ("*Ho See Jui*"), Lai Siu Chiu J considered the principles governing the interpretation of exception clauses. Her Honour held that there were two relevant principles in that case (*Ho See Jui* at [92]):

> First, the exemption clause must specifically cover the contingency or loss for which exemption is sought … Second, the exemption clause will be construed *contra proferentum*.

11.68 Applying these principles, Lai J found that the exception clause concerned did not cover the contingency concerned and hence was ineffective. This illustrates the threshold question of interpretation which underlies the application of every exception clause. In any event, her Honour also found that because the party against whom the exception clause was sought to be enforced was dealing as a consumer, s 7(2) read with s 12 of the UCTA prevented the exemption of liability for the quality of the product concerned (a water inlet hose) and its fitness for the particular purpose for which it was supplied.

Vitiating factors

Illegality

Restraint of trade

11.69 A covenant in restraint of trade conventionally takes the form of an *express* prohibition against taking up employment with or interest in a competitor of the employer. At common law, such clauses are void unless shown to be reasonable. In *Mano Vikrant Singh v Cargill TSF Asia Pte Ltd* [2012] 1 SLR 311 ("*Mano Vikrant*"), the issue was whether this doctrine would also apply to contractual provisions that do not expressly prohibit competition, but which have the effect of restricting an employee's freedom to trade. This may arise when an employer seeks to retain key employees by promising attractive financial incentives (such as bonus payments or shares) that vest over a period of time but specifically provides that the employee would lose his entitlement if he competes with the employer ("Forfeiture-for-Competition Clauses"). Benefits that have yet to vest are thus *forfeited*. In the alternative, the contract may simply provide that the employee would forfeit his benefits if he resigns ("Payment-for-Loyalty Clauses"). Clearly, both types of provisions impose some measure of constraint on the employee's freedom to join a competitor or take up alternative employment – are they therefore unlawful restraints of trade? Steven Chong J held they were not.

11.70 The plaintiff in this case was employed by the defendant as its senior trader. It was a term of employment that the plaintiff entered into a non-compete agreement ("Non-Compete Agreement") under which he agreed, *inter alia*, not to compete with the defendant for a period of one year after the termination of his employment. The plaintiff also agreed, at his own option, to the defendant's incentive award plan ("Incentive Award Plan"). Under this plan, he would be paid discretionary incentive awards "based on individual, team and business unit results". However, 50% of the incentive award would be paid out as a cash award ("Cash Payments") while the balance would be paid over a period of one to three fiscal years ("Deferred Incentive Payments"), the precise duration of which was to be determined based on the quantum of the award. Significantly, the Incentive Award Plan contained a provision ("Forfeiture Provision") stating that the Deferred Incentive Payments that had yet to be paid would be forfeited if the employee engaged in any competing activity within a period of two years after leaving the defendant's employment. The Forfeiture Provision was therefore a clear instance of a Forfeiture-for-Competition Clause. Unlike the Non-Compete Agreement, the terms of the Incentive Award Plan were not obligatory. Had the plaintiff not agreed to the plan, he would still have been entitled to the Cash Payments, but not the Deferred

Incentive Payments. Sometime in July 2007, the plaintiff set up a company that engaged in a competing business and he resigned from the defendant's employment in November 2008. In consequence, the defendant forfeited the Deferred Incentive Payments that were declared, but not due for payment prior to his resignation, totalling US$1,741,894. The plaintiff then brought proceedings to recover the forfeited payments, arguing that the Forfeiture Provision was in substance a restraint of trade which was unreasonable and therefore void.

11.71 After reviewing numerous authorities from the UK, Australia and the United States, Chong J concluded that the Forfeiture Provision was not a restraint of trade. The test to apply was whether the provision would "cause the plaintiff 'to refuse business which otherwise he would take', or 'would diminish his prospects of employment'" (*Mano Vikrant* at [60], citing *Stenhouse Australia Ltd v Marshall William Davidson Phillips* [1974] WLR 134 at 141). The Forfeiture Provision did not so affect the plaintiff. All it did was to provide a financial disincentive for competing with the defendant. In effect, therefore, the plaintiff "had the choice of preserving his rights under the Incentive Payment Plan by refraining from competition with the defendant or risk forfeiture of his deferred bonus by exercising his right to compete": *Mano Vikrant* at [58]. Having at the material time full knowledge of the Forfeiture Provision, the plaintiff in deciding to compete must have made "a calculated business decision" that it was financially advantageous to do so notwithstanding the forfeiture of the unpaid bonus. Therefore, Chong J took the view that (*Mano Vikrant* at [58]):

> It seems to me that there is no compelling public policy that requires the court to intervene to hold the Forfeiture Provision as in restraint of trade when in truth there was no restraint in form or substance to speak of. The plaintiff was completely at liberty to compete with the defendant and had in fact done so when he set up a competing business in Xangbo. There is therefore no question of society being deprived of his skill and competency which is the cornerstone behind the restraint of trade doctrine.

11.72 Chong J also observed that had the outcome been otherwise, the law would have placed unjustifiable weight on the freedom to trade at the expense of the parties' freedom to contract. While there can be no inherent objection to opportunistic conduct on the part of employees, it is equally legitimate for employers to protect themselves against such opportunism. Forfeiture-for-Competition clauses are designed to do just that. Moreover, these provisions do not always work to the employees' disadvantage. On the contrary, the anticipated loss of incentives may even enable the employees to bargain for more favourable terms in their new employment.

11.73 The same reasoning would, according to Chong J, apply to Payment-for-Loyalty Clauses (although no such clause arose for consideration on the facts). Like Forfeiture-For-Competition Clauses, Payment-For-Loyalty Clauses do not explicitly prohibit an employee from working for others, but provide a disincentive for leaving the employer. In fact, such clauses have more overreaching effects since an employee who resigns would have his benefits forfeited whether or not he also competes with the employer. Even so, case law has consistently held that such clauses were not restraints of trade. In Chong J's view, this must be correct as there is no logical distinction between Forfeiture-for-Competition and Payment-for-Loyalty Clauses. This should be contrasted with the position in the UK where the former, but not the latter, category of clauses are generally characterised as unlawful restraints of trade.

11.74 Though not strictly necessary, Chong J also went on to find that the Forfeiture Provision would not satisfy the test of reasonableness if it were a restraint of trade clause. This was because the Forfeiture Provision had a longer than necessary tenure, covered geographical areas beyond its countries of operation, and extended to businesses it was not involved in.

11.75 There can be little doubt that the correct result was obtained in this case. It is generally the practice that employees who resign before bonus payments vest stand to lose such benefits. This was so even though the payments were in substance remuneration for work done before resignation. That such payments were "deferred" clearly has some deterrent effect on employees contemplating a change in employment. However, no one would seriously argue that such practice constitutes a restraint on trade. Of course, the clauses considered in *Mano Vikrant* are more severe in effects. Substantial sums may be deferred, not just for months, but for longer periods of one or more years. Even so, it must (as Chong J observed) be open to employers to devise financial incentives to entice employees to stay. This is so particularly where an affected employee is high-ranking and had, at the material time, adequate bargaining power so that he could have turned to alternative employment had he thought the deferral unreasonable. That said, if the substance of the test is one of *restraint*, then it may be that one could not be categorical that Forfeiture-for-Competition and Payment-for-Loyalty clauses would *never* be restraints of trade. The circumstances and effects of the provisions will have to be examined. A different result may conceivably be obtained where the employee in question had little or no bargaining power, and the effect of the forfeiture is prohibitive in the sense it would result in him being patently under-compensated for the work done.

11.76 *Smile Inc Dental Surgeons Pte Ltd v Lui Andrew Stewart* [2011] SGHC 266 ("*Smile Inc*") was another decision that examined the restraint of trade doctrine. Here, a dental clinic sued its former employee for the breach of a number of contractual provisions, including, *inter alia*, an undertaking not to compete with the plaintiff within 3 km of its clinics ("Radial Clause"), not to solicit its patients ("Non-Solicitation Clause") and not to deal with its patients ("Non-Dealing Clause"). The defendant resisted these claims on the ground that the clauses pleaded were unlawful restraints of trade and therefore unenforceable. Woo Bih Li J held for the defendant.

11.77 The starting point, according to Woo J (*Smile Inc* at [67]), was the three-limb test set out by the Court of Appeal in *Man Financial (S) Pte Ltd v Wong Bark Chuan David* [2008] 1 SLR(R) 663:

(a) Is there a legitimate proprietary interest to be protected?

(b) Is the restrictive covenant reasonable in reference to the interests of the parties?

(c) Is the restrictive covenant reasonable in reference to the interests of the public?

11.78 Applying this test, Woo J found, firstly, that the plaintiff had the relevant proprietary interest to protect because the plaintiff had little "institutional hold" over the patients treated by the defendant. All things (such as price and convenience) being equal, those who were happy with the defendant's services would likely follow him to a competing set up. However, the court went on to find that the Radial Clause was unreasonable with reference to the parties' interests because it was too wide in scope – the 3 km radius applied not only to the clinic at which the defendant had practised ("Forum Clinic"), but also to all other clinics of the plaintiff. Even if the clause were severed so that its application were confined to the Forum Clinic, it was still unreasonable to the extent that it attempted to prevent the defendant from competing with the plaintiff for *new patients*. The Radial Clause was also unlimited in time. Although this would not *ipso facto* render the clause unreasonable, the fact that a dentist's rapport with his patients would normally wear out after two or three years was evidence that its duration was excessive.

11.79 Interestingly, Woo J also declined the plaintiff's invitation to uphold the clause through "discretionary severance". This novel approach emanated from *Transport North American Express Inc v New Solutions Financial Corp* (2001) 200 DLR (4th) 560 ("*TNAE*"), a decision of the Ontario Superior Court of Justice. There, Cullity J took the view that the doctrine of severance is not limited to the striking out of offensive elements (*ie*, by applying the blue-pencil test), but may include the "reading down" of a provision so as to render it lawful in

scope and effects. In an oft-cited passage, Cullity J observed that (*TNAE* at [35]–[36]):

> The blue-pencil test is, I believe, a relic of a bygone era when the attitude of courts of common law – unassisted by principles of equity – towards the interpretation and enforcement of contracts was more rigid than is the case at the present time. At an early stage in the development of the law relating to illegal promises, severance was held to be justified on the basis of the blue-pencil test alone … we have moved a long way beyond that mechanical approach. Enforcement may be refused in the exercise of the kind of discretionary judgment I have mentioned even where blue-pencil severance is possible.
>
> Despite repeated statements in the cases that the court will not make a new agreement for the parties, that is, of course, exactly what it does whenever severance is permitted …

11.80 This concept of discretionary severance was rejected on appeal by the majority of the Ontario Court of Appeal (see *Transport North American Express Inc v New Solutions Financial Corp* (2002) 214 DLR (4th) 44), but was accepted by the dissenting judge, Sharpe JA. In *Man Financial (S) Pte Ltd v Wong Bark Chuan David* [2008] 1 SLR(R) 663 ("*Man Financial*"), Andrew Phang JA noted (*Man Financial* at [129]), these developments, but found it unnecessary to form any concluded view on the matter. In *Smile Inc*, however, Woo J pointed out that *TNAE* could be distinguished on its facts because the court there was not dealing with a restraint of trade clause, but a provision in a loan agreement that prescribed a higher rate of interest than that permitted by statute. Moreover, the learned judge did not think discretionary severance should be applied to "save" an unlawful restraint of trade clause. He explained (*Smile Inc* at [122]):

> Generally speaking, I do not favour the discretionary severance approach for employment contracts. If employers want to protect their trade connections or pool of clients, customers or patients then they would do well to draft a reasonable restraint of trade provision rather than to try and get the maximum protection which their employees will agree to. The discretionary severance approach will only encourage employers to try their luck by initially imposing the maximum protection they can get an employee to agree to and then to rely on a reading down of the provision when confronted with the likelihood of an unfavourable result in court. Moreover, not every employee will have the courage or resources to resist the threats of an employer to comply with a restraint of trade provision.

11.81 These are clearly pertinent considerations. It is true that the blue-pencil test is deficient in that it may be used to rewrite agreements in an arbitrary manner (for much is dependent on the accident of the language used by the drafter), but that is not a sufficient reason for embracing notional severance. The context to which severance is applied should also be considered. Given the inequality of bargaining power that

is inherent in most employment contracts, a development that tilts the balance further in favour of the employer is difficult to defend. Indeed, this context-sensitive approach also appears to have been endorsed in Canada. So although the Canadian Supreme Court has in *New Solutions Financial Corp v Transport North American Express Inc* (2004) 235 (4th) 385 reversed the decision of the Court of Appeal and held a court may apply discretionary or notional severance to identify the best cures for the illegality in question, the same court has subsequently held in *Morley Shafron v KRG Insurance Brokers (Western) Inc* [2009] BCWLD 700 ("*Morley Shafron*") that this approach had no place in the enforcement of restraint of trade clauses. Rothstein J (who delivered the decision of the court) gave two reasons for this view. The first is that in a contract of employment, unlike a contract for a loan, there is usually no bright line test for reasonableness. As his Honour explained (*Morley Shafron* at [39]):

> In the case of an unreasonable restrictive covenant, while the parties may not have had the common intention that the covenant be unreasonable, there is no objective bright-line rule that can be applied in all cases to render the covenant reasonable. Applying notional severance in these circumstances simply amounts to the court rewriting the covenant in a manner that it subjectively considers reasonable in each individual case. Such an approach creates uncertainty as to what may be found to be reasonable in any specific case.

The second reason identified by Rothstein J is similar to the policy concern articulated by Woo J in *Smile Inc*, *viz*, that the law ought not to unduly favour employers who already enjoy superior bargaining power.

Specifically, the doctrine of notional severance is problematic because (*Morley Shafron* at [40]):

> It invites the employer to impose an unreasonable restrictive covenant on the employee with the only sanction being that if the covenant is found to be unreasonable, the court will still enforce it to the extent of what might validly have been agreed to.

And this is an unsatisfactory position because (*Morley Shafron* at [41]):

> Not only would the use of notional severance change the terms of the covenant from the parties' initial agreement to what the court thinks they should have agreed to, it would also change the risks assumed by the parties. The restrictive covenant is sought by the employer. The obligation is on the employee. Having regard to the generally accepted imbalance of power between employers and employees, to introduce the doctrine of notional severance to read down an unreasonable restrictive covenant to what is reasonable provides no inducement to an employer to ensure the reasonableness of the covenant and inappropriately increases the risk that the employee will be forced to abide by an unreasonable covenant.

11.82 Returning to the decision in *Smile Inc*, Woo J proceeded to examine the Non-Solicitation and Non-Dealing Clauses. The Non-Solicitation Clause was too broad as it included patients of the plaintiff whom the defendant had never treated. Even more onerous was the Non-Dealing Clause, which (based on the plaintiff's pleading) prohibited the defendant from dealing with any of the plaintiff's patients, whether or not he had solicited their custom. Both clauses were also unlimited in time. These considerations led the learned judge to conclude that both clauses were unreasonable and void.

Illegality and restitutionary recovery under void contracts

11.83 The Court of Appeal's decision in *Aqua Art Pte Ltd v Goodman Development (S) Pte Ltd* [2011] 2 SLR 865 – reversing *Aqua Art Pte Ltd v Goodman Development (S) Pte Ltd* [2010] 4 SLR 86 – was previously discussed in (2010) 11 SAL Ann Rev 239 at para 11.77 onwards. For comments on the restitutionary remedies granted in this case, see paras 21.28–21.35 of this issue.

Discharge of contract

Discharge by agreement: **Force majeure** *clauses*

11.84 The important case of *Holcim (Singapore) Pte Ltd v Precise Development Pte Ltd* [2011] 2 SLR 106 has now been officially reported. The analysis of the Court of Appeal in this case was discussed (and some of its conclusions queried) previously in (2010) 11 SAL Ann Rev 239 at paras 11.90–11.104.

Discharge by frustration

11.85 A difficult issue arises in connection with the possible discharge of a contract by frustration when the so-called frustrating event affects not the possibility or practicability of performance of the contract, but the *purposes* for which the contract was entered into, particularly where the literal performance of the contractual obligations set out in the contract is still possible. It is clear that in many cases, a contract will be entered into by the contracting parties to achieve certain purposes which each party may have. In some cases, it may be possible for the courts to identify that a contract had been entered into for certain purposes which were held in *common* by both contracting parties. In such cases, it appears to be possible for the contract to be discharged by frustration if the effect of the frustrating event is to prevent *some* of those commonly held purposes to be achieved.

11.86 An example to illustrate this might be found in the seminal decision of *Taylor v Caldwell* (1863) 3 B & S 826, 122 ER 309 ("*Taylor v Caldwell*"). One could take the view that *Taylor v Caldwell* should be read as a case of discharge by frustration of the common purpose of the contracting parties, the common purpose being that an entire package of entertainments, comprising of concerts in a music hall and other activities in its surrounds, be held on the grounds in question, when the music hall was subsequently destroyed by fire. Doubtless, the attractions of the activities in the gardens surrounding the hall would be severely dampened if they were to take place next to a fire-blackened husk. Though literal performance of the contract was still possible, such performance would not have been consistent with fulfilment of the *common purposes* of the contracting parties, at least part of which would no longer be capable of being fulfilled.

11.87 A possible local example to illustrate the relative willingness of the courts to permit a contract to be discharged by frustration when the *common* purposes of the contracting parties to a contract have been thwarted (even if partially) by the occurrence of some external event may be found in the High Court decision in *Sheng Siong Supermarket v Carilla Pte Ltd* [2011] 4 SLR 1094 ("*Sheng Siong Supermarket*").

11.88 In this case, the defendant ("Carilla") acquired a lease of commercial premises of whom the reversionary owner was the Housing Development Board ("HDB"). Carilla sought to sub-let the premises to the plaintiff ("Sheng Siong"). The terms of the lease expressly provided that the premises were to be used for certain specified purposes, including the operation of a supermarket and food court. Though both parties were conscious that such usage of the premises would be subject to approval by the HDB as reversionary owner, and indeed, in some pre-contract communications, Sheng Siong had alerted Carilla that it would only enter into the lease on the basis that such approval be granted, the terms of the lease did not expressly provide that it was Carilla's responsibility to obtain such approval. Nor did the lease documentation provide that the sub-lease was to come to an end should the said HDB approval be withheld (*ie*, there was no express wording stipulating that Sheng Siong's entry into and continued performance of the obligations under that sub-lease were contingent upon the HDB providing the requisite approval).

11.89 In a somewhat confusing judgment, given the context in which agreement was reached, the learned trial judge reasoned that it was possible to construe the contract contained in the lease documentation as also having expressly provided for such a condition subsequent. Oddly, the learned judge then reasoned that this meant that the contract was discharged by frustration in light of the HDB's refusal to grant its approval. With respect, this part of the reasoning of the trial judge is

probably in error. If there had been an express (or, for that matter, implied) condition subsequent, the contract would not have come to an end on account of the occurrence of a supervening event of which the contracting parties had made no contractual provision. If it were right to conclude that the contract between Sheng Siong and Carilla contained an express term operating as a condition subsequent, upon the occurrence of that stipulated event, the contract would have been discharged by virtue of the parties' *agreement*. It would not, therefore, be open to conclude that the contract had been discharged by frustration.

11.90 However, based on the facts before the court in *Sheng Siong Supermarket*, one could take the view that there was, arguably, only a *promissory* condition on the part of Sheng Siong that it would operate a supermarket and food court at the leased premises, and that there had been *no* provision that HDB approval was to operate as a condition subsequent (*ie*, the relevant term was merely a promissory term and not a contingent one). If so, it would follow, arguably, that the contract under the lease could have been frustrated in light of the HDB's subsequent decision not to approve change of the use of the premises as a supermarket and food court. Though still capable of literal performance, were Sheng Siong to operate a supermarket and food court in the leased premises (as it had promised Carilla it would, on the assumption that there was only a promissory obligation to use the premises in the manner specified), once the HDB made clear its position that it would not approve usage of the premises in this manner, such performance by Sheng Siong would run counter to the initial, *common*, understanding between the parties that it would be possible to operate a supermarket and food court in the premises without exposing the parties to the risks associated with using the premises in a manner which violated the terms of Carilla's lease with the HDB. It would follow, then, that the court was right to conclude that that contract *had* been frustrated by reason of the HDB's refusal to grant its approval for the proposed use of the premises.

11.91 For completeness' sake, it may also be noted that (*Sheng Siong Supermarket* at [80]), having found that the contract for the grant of a sub-lease of commercial premises had been discharged by frustration, the learned judge ordered a refund of sums of money that had been paid by Sheng Siong to Carilla in reliance on s 2(2) of the Frustrated Contracts Act (Cap 115, 1985 Rev Ed). However, perhaps somewhat unusually, instead of going on to apply the proviso to s 2(2) to permit Carilla to retain out of those sums which had been paid to it, such expenses as it had reasonably incurred in attempted performance of its obligations under the contract prior to its discharge, the learned judge held that (*Sheng Siong Supermarket* at [80]):

> … pursuant to s 2(3), whatever were the expenses incurred by [Carilla] in relation to the [alteration and amendment] works and

> preparation of the proposal submitted to the [Housing Development Board ('HDB') as reversionary owner] (*eg*, in developing the plans submitted to the HDB, engaging the firm of architects, *etc*) should be subtracted from this sum. [emphasis added]

11.92 The grounds of decision do not explain why the learned judge thought it necessary to rely on s 2(3) rather than the proviso to s 2(2) to take into account expenses which had been incurred by Carilla. It may be that on the facts of the case, either s 2(3) or the proviso to s 2(2) could have been relied upon to similar effect. However, the two provisions operate in distinctly different ways. For one, the proviso to s 2(2) is entirely concerned with making provision for expenses which had been incurred by the party against whom a claim for recovery of monies under s 2(2) had been made: it is immaterial that no non-money *benefits* might have been conferred upon the claimant. In contrast, s 2(3) is not specifically focused upon *expenses* incurred – it is focused upon *non-money benefits* which had been conferred by one party upon the other. If such benefits had been conferred, s 2(3) requires the court to *value* those benefits in money terms, before granting the court a discretion to award a sum of money (the "just sum") not exceeding that value to provide a form of statutory restitution for the non-money benefits that had been granted under the frustrated contract.

Remedies

Causation of loss for breach of contract

11.93 In addition to certain observations about the operation of the doctrine of estoppel by convention (mentioned briefly in (2010) 11 SAL Ann Rev 239 at para 11.20), and apart from dealing with the issue of implication of terms in fact (discussed at para 11.29 above), the High Court in the case of *ABN AMRO Bank NV Singapore Branch v CWT Commodities (SEA) Pte Ltd* [2011] 2 SLR 891 ("*ABN AMRO Bank NV*") also made some observations on remedies. First, it reiterated the point that the burden lies upon the party who seeks to recover for its loss for breach of contract to show that such loss had been *caused* by the breach: *ABN AMRO Bank NV* at [121]–[130].

11.94 To better understand the court's comments on the pertinent judicial remedies which arose in the case before it, it is necessary to supplement the brief statement of the facts previously set out at para 11.29 above. In this case, the plaintiff bank engaged the defendant warehouse company to act as a "collateral manager" for tin products which were pledged to the plaintiff as security for trade financing that had been granted to Singapore Tin Industries Pte Ltd ("STI"). The

arrangement required the defendant to issue receipts and certificates of quality to the plaintiff for the pledged goods (which included a tin by-product known as "tin dross"). The receipts would notify the plaintiff that a certain type and quantity of goods had been received by the defendant, and the certificates of quality confirmed the minimum tin content of such goods as had been received. The plaintiff required the defendant to issue a receipt and a certificate of quality for every batch of goods delivered into the defendant's custody before making the decision to grant STI financing for that particular batch.

11.95 When the plaintiff instructed the defendant to release certain batches of tin dross to STI for sale, instead of taking physical delivery of the tin dross, STI would leave the tin dross in the defendant's warehouse and would then re-pledge such tin dross as fresh collateral. The defendant would then issue new receipts and certificates of quality for such tin dross as had been left in its warehouse along with new tin dross which STI placed in the defendant's custody. It was subsequently discovered that STI had perpetrated a fraud on the plaintiff. Instead of buying and selling tin dross to third parties, all the tin dross that had been pledged to the plaintiff had been produced by STI itself and had been left to accumulate in the defendant's warehouse. When STI defaulted on its loans, the plaintiff sought to realise its security in the tin dross that had been left in the defendant's custody – but this was fruitless as it transpired that the dross was contaminated with lead. Disposal of the contaminated tin dross cost the plaintiff S$104,680. Over and above that, the plaintiff had advanced monies to STI on the security of the tin dross of which US$10.6m was still outstanding. The plaintiff sought to recover both these heads of loss from the defendant on the ground that it had breached its contractual obligation to inform the bank that there had been no physical movement of the tin dross from its warehouse.

11.96 Although the court awarded damages in respect of the additional disposal costs, it rejected the claim for the US$10.6m. Woo Bih Li J pointed out that here, the onus lay on the plaintiff to prove that *had it been informed* of the lack of physical movement of tin dross, *it would not have made the decision to forward monies to STI on the security of the tin dross*. This it failed to do. Accordingly, its claim for the sum of US$10.6m being loans which had been made to STI and which were still outstanding failed for want of proof of causation. Woo J pointed out that it was conceivable that, by failing to inform the plaintiff of the lack of physical movement of the tin dross, it might have been possible for the plaintiff to prove that such failure had caused it to lose the *chance* to seek an explanation from STI and thence to review its own position as to whether to continue to provide trade financing to STI. However, the plaintiff had made no such pleading. Accordingly, Woo J rejected the plaintiff's allegation that it would have terminated the financing

arrangement with STI and would not have incurred the US$10.6m loss in terms of unpaid advances to STI: *ABN AMRO Bank NV* at [121]–[130]. It followed, therefore, that the claim for the US$10.6m had to fail.

Remoteness and quantification of loss for breach of contract

11.97 In *ABN AMRO Bank NV*, the High Court also followed the position taken by the Court of Appeal in *MFM Restaurants Pte Ltd v Fish & Co Restaurant Pte Ltd* [2011] 1 SLR 150 ("*MFM Restaurants*") (discussed previously in (2010) 11 SAL Ann Rev 239 at paras 11.123–11.126). Accepting that the Court of Appeal had in that case (*MFM Restaurants* at [134]ff), definitively settled the law on remoteness of loss, Woo J declined to apply the "additional legal criterion of assumption of responsibility introduced by Lord Hoffmann in *Transfield Shipping Inc v Mercator Inc* [2009] 1 AC 61": *ABN AMRO Bank NV* at [134]. Had causation been established, Woo J was of the view that the plaintiff's US$10.6m financing loss would *not* have been too remote as "[i]t was reasonably contemplated that the [plaintiff] would finance the tin dross based on the security of the [receipts] and [certificates of quality] issued by [the defendant]": *ABN AMRO Bank NV* at [135].

11.98 But for its failure to establish factual causation for this head of loss, it would then have been necessary for the court to proceed to *quantify* the plaintiff's loss in relation to the US$10.6m in unpaid advances – and this, too, would be a matter for which the burden of proof lay on the plaintiff. However, the court found that the bank would also have failed on this point, holding that the plaintiff, "did not know what it was doing especially when it came to tin dross. It simply agreed to an arbitrary formula to determine the amount to be advanced on the security of tin dross … without even establishing the objective value of tin dross with such tin content as stated in the [certificates of quality]": *ABN AMRO Bank NV* at [149].

11.99 Another interesting decision which reiterated the Court of Appeal's rejection of Lord Hoffman's approach in *Transfield Shipping Inc v Mercator Inc (The Achilleas)* [2009] 1 AC 61 may be found in the grounds of decision handed down by the assistant registrar in the assessment of damages in *Out of the Box Pte Ltd v Wanin Industries Pte Ltd* [2011] SGHC 226 ("*Out of the Box*"). Here, the plaintiff company had engaged the defendant company to produce a sports drink called "18" which the plaintiff had formulated and conceptualised. The drinks which were manufactured and supplied by the defendant to the plaintiff's formula were defective in that they would change colour and contained foreign particles or insects. Following consumer complaints, the relevant food safety authorities in Singapore issued a public warning

against consumption of "18" and directed that all stock be recalled from the market. The result of this was to irretrievably damage the "18" brand.

11.100 Having obtained summary judgment against the defendant for having breached its obligations under its contract with the plaintiff, the plaintiff sought to recover damages in respect of its loss as measured on the reliance basis – *ie*, the expenses it had incurred which had been wasted as a result of the defendant's breach. The chief component of these expenses related to its advertising and promotional expenses which, on the plaintiff's reckoning, came up to just over S$700,000.

11.101 The defendant's chief objection to being made liable for this type of loss was that such loss was too remote: the quantum was so large in light of the limited contract value for the drinks supplied that it was beyond the reasonable contemplation of the parties. The learned assistant registrar noted that in principle, it was enough that the type of loss had been within reasonable contemplation, though not the precise detail or quantum of the damage. However, the learned assistant registrar also accepted that "the concept of a type of loss is a fluid one and the appropriate characterisation of the type of loss suffered will depend heavily on the particular set of facts before the court", noting that even in *Victoria Laundry v Newman* [1949] 2 KB 528, the English Court of Appeal had differentiated between two types of loss of profit – one, the loss of profits from laundry operations and two, the loss of profits from an especially lucrative dyeing contract for a government ministry: *Out of the Box* at [47].

11.102 In similar vein, the learned assistant registrar was of the view that the category "advertising and promotion expenses" could be characterised to be of two different types given the circumstances of the case: domestic (nationwide), as compared with non-domestic (regional or worldwide), given that, "[t]he strategy and concept, the mediums [*sic*] used for advertising, the market research, the type of launch events, and even the models used in a regional or worldwide advertising campaign would all likely be different from that from a nationwide advertising campaign": *Out of the Box* at [52]. Significantly for the plaintiff, the learned assistant registrar held that nationwide expenses would fall under the first limb of *Hadley v Baxendale* (1854) 156 ER 145, 9 Exch 341, whereas regional and worldwide expenses would fall under the second limb. As such, since the plaintiff had not demonstrated that the defendant had had actual knowledge of its plans to promote "18" beyond Singapore's shores, its regional and worldwide advertising and promotional expenses would be too remote and was thus, irrecoverable.

Burden of proof to show a "bad bargain" and its effect on recovery for loss quantified on the reliance measure

11.103 In *Out of the Box* at [56]–[57], the learned assistant registrar also provided a useful reminder as to the burden of proof *vis-à-vis* the need to establish whether the plaintiff had made a "bad bargain" with the defendant:

> Where the claim is for 'reliance loss', there is one further limitation to the full recovery of loss that is both validly incurred and not too remote. As held in *CCC Films (London) v Impact Quadrant Films* [1985] QB 16 ('CCC Films') at 32, a plaintiff should only be entitled to recover its wasted expenditure to the extent that such expenses could have been recovered if the contract had been properly performed. In this regard, Hutchison J went on to state, at 40, that where a defendant's breach prevents the plaintiff from exploiting the subject matter of the contract, it would be fair to place the burden of proving that the plaintiff would not recoup its expenditure on the defendant.
>
> The present case is similar to *CCC Films*. By supplying the plaintiff with defective '18', the defendant had caused the plaintiff to discontinue '18' after less than 4 months in the market, thereby making it impossible for the plaintiff to prove the amount of profits it would have earned. As such, the burden should be on the defendant to prove, on the balance of probabilities, that the plaintiff would not have recouped the advertising expenses even if the defendant had not breached the contract.

11.104 To establish that the plaintiff had made a "bad bargain", the defendant relied on the sales figures for "18" during the four months it had been on the market before its recall, multiplying it to obtain an estimate of total sales had "18" been on the market for the full two years for which the defendant had been contractually obligated to manufacture the drink. In the judgment of the assistant registrar, this was insufficient to satisfy the burden of proof placed on the defendant as it did not factor in potential sales growth. Further, the two-year contract period was only a *minimum* period. Citing the decision of the High Court of Australia in *Commonwealth of Australia v Amann Aviation* (1991) 66 ALJR 123 with approval, the assistant registrar noted that "the prospect of securing a renewal of a contract can be properly taken into account in a determination of whether the plaintiff would have recouped its expenditure had the contract been properly performed": *Out of the Box* at [58].

Specific remedies: The equitable remedy of specific performance

11.105 The High Court's decision in *E C Investment Holding Pte Ltd v Ridout Residence Pte Ltd* [2011] 2 SLR 232 was discussed at some length previously (see (2010) 11 SAL Ann Rev 239 at paras 11.155–11.164). In

that prior discussion, mention was made of the appeal to the Court of Appeal on the issue of the availability of specific performance, and the hope that greater clarity might be provided on appeal as to whether the grant of specific performance to remedy breaches of contracts for the sale of land ought to depend (at least in some part) on whether the party seeking to enforce the contract had intended to acquire the land in question for investment or other purposes.

11.106 The plaintiff company's appeal against Quentin Loh J's decision at first instance was heard by the Court of Appeal on 15 March 2011 and judgment was handed down on 28 September 2011. That decision has now been reported: see *E C Investment Holding Pte Ltd v Ridout Residence Pte Ltd* [2012] 1 SLR 32 ("*E C Investment*").

11.107 Responding to the five grounds relied upon by the learned judge at first instance to support his conclusion that this was not an appropriate case to issue an order of specific performance against the defendant company which had declined to complete conveyance of the subject property despite the plaintiff company's exercise of its option to acquire that property, Chao Hick Tin JA (delivering the judgment of the court) clearly reversed the finding that the plaintiff company ("ECI") had not approached the court with clean hands because of the very low purchase price for the property and was for that reason barred from obtaining an order of specific performance in its favour (*E C Investment* at [103]), although it agreed that the lower court had rightly declined to make the order of specific performance which ECI had sought.

11.108 In respect of the other grounds relied upon by Loh J to come to that conclusion, however, Chao JA noted as follows (*E C Investment* at [103]):

> In coming to this conclusion [not to make the order of specific performance against the defendant company], we do not find it necessary, on the basis of the prevailing facts, to rely upon the more restrictive approach towards the grant of specific performance for land contracts espoused in the Canadian and the New Zealand cases. As specific performance is an equitable and discretionary remedy, the court must, in any event, take into consideration all the circumstances of the case at hand in order to ensure that it would be just and equitable to grant the relief.

11.109 So, although the Court of Appeal had observed that the approach taken by the court below was a departure from "the orthodox position that specific performance will always be decreed for … 'land contracts', *ie*, contracts relating to immovable property" (*E C Investment* at [78]), ultimately, the Court of Appeal concluded that ECI's application for specific performance ought to be denied simply on the

basis that on the facts before the court, it would be neither just nor equitable to grant that relief.

11.110 Five factual points were particularly influential in leading the Court of Appeal to this conclusion (*E C Investment* at [104]–[108]):

> First, we note that after ECI exercised the First Option on 27 August 2009, it was quite content to forego its right to acquire the Property if the compensation offered to it was right. This is shown by the fact that following the improvement in the property market during that period, the compensation demanded by ECI escalated from $180,000 (as set out in the Deed of Settlement) to $3.5m under the September 2009 Settlement, and subsequently, to $5m under the November 2009 Settlement.
>
> Second, in line with its desire for a settlement if the compensation offered was right, ECI implicitly permitted Ridout [the defendant] to look for other buyers as ECI knew quite clearly that Ridout/Anwar had no other means to pay the compensation demanded except by selling the Property to another person. We agree with the Judge's observations that: (a) 'it [was] clear [ECI] was happy not to proceed with completion and was trying to seek some kind of quick turnaround and large payout' (see [108] of the Judgment); and (b) '[ECI] by its conduct after 11 August 2009 clearly led [Anwar] to believe that it agreed, for a higher 'compensation', to allow [Anwar] to look for another buyer and … would not proceed to complete the purchase of the Property' (see [120] of the Judgment).
>
> Third, there should have been a happy ending under the November 2009 Settlement, but it was not to be. It is true that by JLC's letter to TLP of 11 November 2009, Ridout agreed to pay ECI the sum of $5m by noon on 16 November 2009, but, as things turned out, Ridout could not raise that sum in time. Its request for a mere two-day extension to make payment was rejected. We agree with the Judge's finding (at [115] of the Judgment) that ECI did not agree to this extension 'because of the significant rise in property prices and decided to go for a bigger payout, by claiming the Property itself'.
>
> Fourth, during the hearing of the present appeals, counsel for ECI brought it to our attention that in the event of our ruling that the Transaction was indeed for the sale of the Property by Ridout to ECI, this court should order that the transfer of the Property to Thomas Chan (which was effected on 17 December 2010 following the judgment of the court below) be undone. It is trite that an appeal does not operate as a stay of execution (see s 41 of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) and O 57 r 15(1)(*a*) of the Rules of Court). Although ECI's failure/omission to apply for a stay of the transfer of the Property to Thomas Chan does not *ipso facto* disentitle it from praying to this court for specific performance of the Sale Agreement, its failure/omission in this regard is a factor which the court can take into account in determining fairness and in exercising its discretion to grant or refuse specific performance.

> Fifth, and more importantly, we note that Orion [Oil Ltd, the first intervener in the proceedings who claimed an interest in the proceedings and who] has a charge over the balance of the sale proceeds of the Property (after the satisfaction of HLF's prior interest) as security for its loan of $10m to Anwar … Tremendous hardship would be suffered by Orion should specific performance of the Sale Agreement be granted to ECI as the Property would then be sold to ECI for a mere $20m. There would, in that scenario be very little money left from the sale proceeds of the Property for Orion after HLF has taken its share of the sale proceeds as mortgagee. This would be extremely unfair to Orion. On the other hand, Orion would not suffer any hardship if the sale of the property to Thomas Chan is allowed to stand. Land is regarded as physically and commercially unique. It is not easily replaced with another plot of land or with money *per se* – a fact recognised by the courts through (*inter alia*) the remedy of specific performance of contracts relating to land (see, *eg*, *Hexter v Pearce* [1900] 1 Ch 341 at 346 and *Rudd v Lascelles* [1900] 1 Ch 815 at 819).

11.111 The Court of Appeal's reliance on the matters set out in these five paragraphs is not, however, completely immune to criticism. In relation to the matters set out in the first paragraph, it may be true that ECI was willing to give up its right to acquire the property for the right (and as it turned out, an increasing) price. However, having concluded that there was no question of ECI having come to the court with unclean hands, it is not obvious what force ECI's willingness to compromise its rights if the right price were paid would have in respect of making an order of specific performance an inappropriate remedy since one's desire to strike a good bargain is not, in itself, usually taken to give rise to such inequity as would lead a court to refuse to grant equitable remedies.

11.112 In relation to the second paragraph, the Court of Appeal makes reference to ECI having behaved in a manner which led the defendant to believe it would not proceed to complete the purchase of the property. However, again, whether this would make it inequitable for the court to exercise its discretion in favour of ordering specific performance is doubtful. This is because a careful reading of the findings at first instance suggests that the first settlement was arguably found to have been one in which ECI promised to relinquish its rights to complete the purchase of the property in exchange for *payment* of the S$3.5m settlement figure by way of a cashier's order (*E C Investment* at [85]), and that payment never transpired. Notwithstanding that this was probably the most straightforward basis upon which specific performance might have been refused (on the basis that if the obligations arising under the option had been discharged by agreement there would then be nothing left to specifically enforce), if ECI *had* only agreed to release its rights under the option in exchange for *executed* consideration in the form of actual *payment* of the settlement sum, that

release would never have been effective since no such payment was made. This state of affairs was arguably unaffected by the second settlement which was, it seems, on the same terms save for the settlement sum which had been increased to S$5m: *E C Investment* at [86]. Far from leading the vendors on, it would seem that what had been found in the court below was that the legal rights under the option were *only* to be given up upon *payment*: nothing less would do.

11.113 In relation to the third paragraph, it is unclear why ECI's *reasons* for refusing to permit the defendant more time to make payment under the settlement agreements have any relevance in connection with the exercise of the court's discretion to grant an order of specific performance. It should be recalled that to begin with, the defendant had *lost* its right to cancel the option to purchase the property. That is to say, the defendant was *legally obliged* to convey the property to ECI. Although ECI agreed to release the defendant from that obligation *if* it was paid the settlement amount by the stipulated date, that payment did not occur. Even if this was a case where time would *not* have been of the essence, that would only preclude the possibility of discharge of the contract on account of the delay (*ie*, discharge by breach). However, that was *not* the issue before the court. This was *not* a case whereby ECI was seeking to *discharge* any contract on grounds of breach by reason of delayed performance. Quite the contrary – this was a case where a condition precedent to ECI becoming obligated to release the vendor from its obligations had not been complied with. That being the case, why should ECI's refusal to permit the defendant more time to pay in respect of the *subsequent* settlement agreements have any effect on its application to enforce its legal rights which had accrued at a prior point in time?

11.114 As for the fifth and final ground – again, this is problematic. The inequity to Orion, the second interveners, would seem to stem from Orion's decision to lend to an entity, the defendant, who was in a difficult financial situation *and* from Orion's own commercial decision to take security on the *proceeds* of the sale of the property. The "inequity" of leaving the second interveners in a position where they would recover little of that which they had lent to the defendant out of the security they had obtained over the proceeds of sale of the property is, again, not obvious since that was exactly what they had bargained for. They took the risk that their security might not realise very much, dependent as it was on the price which the defendant might realise were it to sell the property.

11.115 With respect, the only matters which might provide some support for the court's decision not to grant the order sought appear to lie roughly within the fourth paragraph set out above. Though that paragraph does not make the point explicitly, because of the failure to

apply for a stay pending the outcome of the appeal, by the time the appeal came to be heard, *indefeasible* title to the subject property had been conveyed to Mr Thomas Chan. Whatever equitable interest ECI might assert in relation to the property, were specific performance granted, such interest could have *no* impact on Mr Chan: since his title to the property had been successfully registered, and all adverse *caveats* had been cleared off the register (most notably that which had been filed by ECI), there could be *no* issue of competing priorities between Mr Chan and ECI. Consequently, given that Mr Chan had been granted indefeasible title to the property by virtue of his successful registration of the same, there would have been no obvious legal or equitable basis on which the court might have granted an order of specific performance to compel him to re-convey that indefeasible legal title to ECI. At best, this might be possible as between Mr Chan and the defendant – if the contract for sale between them were rescinded because of some relevant vitiating factor or was otherwise void. If *that* had occurred or could occur, ECI might then seek an order of specific performance against the defendant to convey title to the property to it, pending re-conveyance of title to the defendant from Mr Chan. However, there seems not to have been any relevant factor to vitiate the contract of sale extant between Mr Chan and the defendant. In short, even if ECI *had* shown that this was a possible case where specific performance might have been ordered against the defendant to convey title to the property in question to it, by the time of the appeal, the defendant had no such title. Indefeasible title to the property had passed to Mr Chan. Based on what was reported, nor did there seem to be any basis on which Mr Chan might be ordered to re-vest that title in the defendant, much less transfer that title to ECI. Making an order for specific performance against the defendant to convey title to property which it no longer held title to would be akin to compelling it to perform the impossible – and this is plainly one of the factors which will incline a court against making such an order. This, however, explains only the outcome in light of ECI's behaviour following the decision at first instance. It would provide no *general* guidance as to when and whether specific performance ought to be granted in respect of breaches of contracts for the sale of land. Perhaps that is as well. It may be that *E C Investment* is best seen as a decision to be understood solely in respect of its own unique facts and should not be taken as authority for any more general proposition.