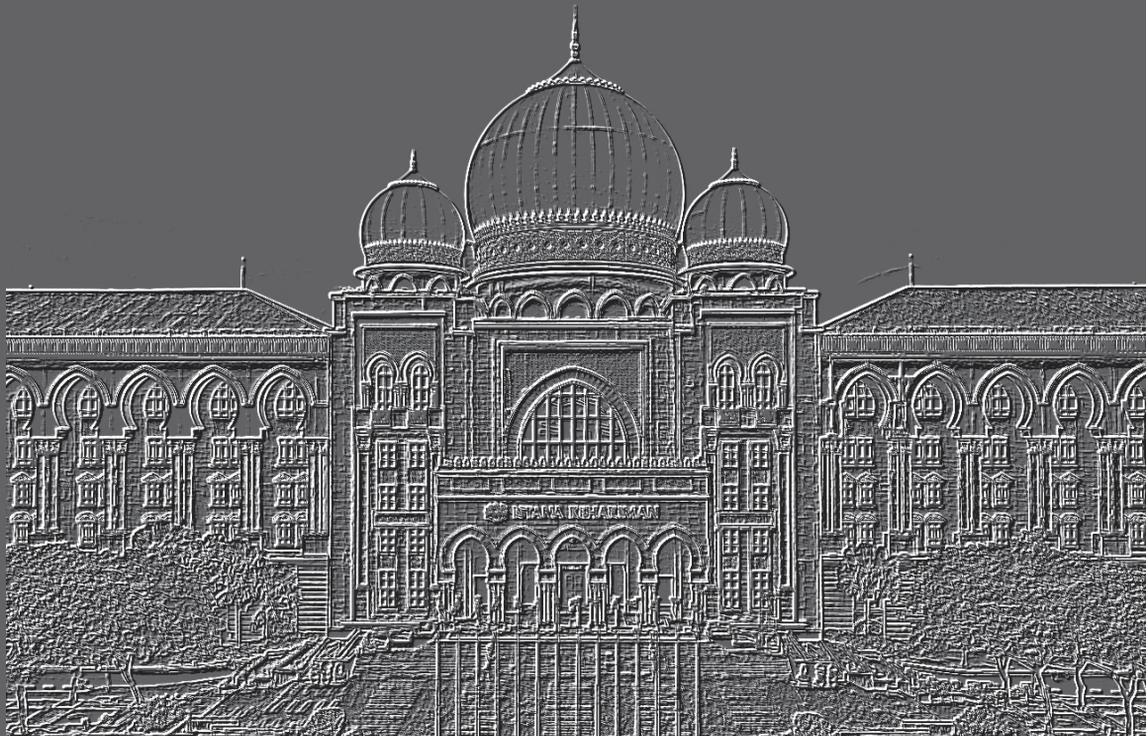




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PREFACE

It is with gratitude that I acknowledge the extraordinary honour and privilege of writing the preface for this Special Edition of the *Journal of the Malaysian Judiciary*. This edition is exceptional, not only in that it affords the reader an insightful perspective into significant areas of the law of Singapore, but more so because it is authored by eminent judges, academics, and experts in each of the particular areas of the law featured.

The Judiciaries of Singapore and Malaysia share a similar legal system founded on the English common law, although we may have progressed in different directions in the last five decades. Significantly, as nations, we share a similar culture and an interwoven history. The scope of our commonalities is wide, and it is inevitable that our judges as well as our legal stakeholders share a common interest in the evolution and progression of our laws, legal values and concepts over the years. This has served to enrich and diversify our judicial approaches and inevitably, our judgments when adjudicating on various legal issues arising in our respective jurisdictions.

The erudite and renowned Justice Andrew Phang, Judge of the Court of Appeal of Singapore, who is the guest editor for this special edition, has narrated and expressed the special collaboration and bond between our judiciaries so lucidly, that I can do no better than to echo his words and sentiments as perfectly set out in his Introduction to this Special Edition.

Suffice for me to reiterate that this special collaboration on publications takes root from the initiative first mooted by our previous Chief Justice, The Right Honourable Tan Sri Datuk Seri Panglima Richard Malanjum and the Honourable the Chief Justice of Singapore Sundaresh Menon in 2018. Together with the biennial tripartite conferences between Brunei, Singapore and Malaysia, our existing judicial ties are constantly and continuously maintained, evolved and strengthened.

This special publication provides a comprehensive summarisation of current legal thought and concepts on various areas of the law in Singapore, ranging from admiralty and shipping law to arbitration, contract, tort and land law, as well as intellectual property law, insolvency law, family law, conflict of laws and civil justice reforms. It is an invaluable asset in terms of research and reference.

I wish to record my sincerest appreciation to the learned authors of the ten articles in this edition, who have expended considerable time and effort in

their individual contributions. It must be said that each and every jurist in this special edition is an acknowledged expert in the field of law he or she has chosen to author.

The knowledge and skill of these jurists are evidenced by the quality of the scholarship and intellectual expertise apparent in these comprehensive and focused treatises on each of the subjects chosen. The reader benefits greatly from the mature legal reasoning and thinking in each of these articles.

It is also my absolute pleasure to specially acknowledge and thank Justice Andrew Phang for the exceptional lengths to which he has gone to ensure that the Special Edition of the *Journal of the Malaysian Judiciary* is a success. I also wish to particularly thank Justice Judith Prakash who first suggested this “exchange of publications” which entails the publication of a special edition of the *Journal of the Malaysian Judiciary* on the law in Singapore, and a special edition of the *Singapore Academy of Law Journal*, featuring a series of articles on specific areas of Malaysian law.

I conclude by noting that collaborations such as these publications serve, to some extent, to enhance an increased mutual understanding of our individual national laws and approaches to the law. This can only contribute positively to regional reciprocity, unity and comity.

Nallini Pathmanathan

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Introduction

It is a singular privilege and honour to have been asked to be guest editor for this special issue of the *Journal of the Malaysian Judiciary* which focuses on recent developments in Singapore law. This issue marks a very special collaboration between the judiciaries of Malaysia and Singapore (and stems from the initiative first mooted between the then Chief Justice of Malaysia, The Right Honourable Tan Sri Datuk Seri Panglima Richard Malanjum and the Chief Justice of Singapore, the Honourable the Chief Justice Sundaresh Menon). Indeed, a corresponding special issue on recent developments in Malaysian law will be published in the *Singapore Academy of Law Journal* (and whose guest editor for that issue will be Justice Datuk Nallini Pathmanathan of the Federal Court of Malaysia, a colleague and friend of many years). This is not surprising. There has always been a close bond between the judiciaries of Malaysia and Singapore. Individual visits by delegations over the years have culminated in a biennial tripartite judicial conference involving the judiciaries of Malaysia, Singapore and Brunei. This latest “exchange” of publications is testament to the close bonds between the Malaysia and Singapore judiciaries on the level of judicial scholarship as well. Indeed, it is the first of its kind and long may it continue.

In arriving at the topics for this special issue, we took into account not only the expertise as well as availability of writers but also (and more importantly) topics which would be of special interest to lawyers, judges as well as students in both jurisdictions (especially Malaysia) – not least because of the qualitative developments that have taken place in the subject area concerned.

I should also mention that both Malaysia and Singapore have been blessed with superb academic scholars. It is no surprise, then, that the products from their respective pens (or should I say keyboards) also grace the pages of this special issue (as well as those for the special issue for the *Singapore Academy of Law Journal*). In this regard, I would like to extend special thanks to Professor Leong Wai Kum, Professor Teo Keang Sood and Professor Gary Chan. Professor Leong needs no introduction. Her magisterial treatise, *Elements of Family Law in Singapore* (now in its recently published third edition), is the first port

of call for judges, lawyers and students alike in the context of Singapore family law, as is Professor Chan's seminal text, *The Law of Torts in Singapore* (presently in its second edition). Professor Teo epitomises the collaboration and friendship across our two jurisdictions. Indeed, he had taught at the University of Malaya before joining the National University of Singapore. Not surprisingly, his consummate expertise in land law spans both jurisdictions (see, for example, his seminal work entitled *Strata Title in Singapore and Malaysia* (presently in its fifth edition)). In this special issue, Professor Leong co-authors (together with her former and my former as well as present colleague, Justice Debbie Ong) the essay on recent developments in Singapore family law. In the same vein, Professor Chan authors the essay on recent developments in Singapore tort law whilst Professor Teo authors the essay on recent developments in Singapore land law.

However, as the old adage goes, "the law in the books" is often quite different from "the law in action". Whilst one ought not to draw too stark a distinction between the two (for, in truth, they always interact with each other), it is of the first importance to have essays that have been written from the practical perspective in general and the judicial perspective in particular. Indeed, there could, in any event, have been no other alternative given the very nature of the present exchange of scholarship between our two judiciaries. I am particularly encouraged by the fact that my colleagues were – despite their very hectic schedules – so willing to participate in this unique project when approached. Put simply, they, too, were inspired by the spirit of this seminal project and were therefore very glad to contribute towards it. I am therefore very grateful to Justice Judith Prakash for availing us of her expertise in the context of arbitration and to Justice Steven Chong in relation to conflict of laws. Justice Belinda Ang contributes an essay on recent developments in admiralty and shipping law, whilst Judicial Commissioner Dedar Singh Gill contributes an essay on recent developments in intellectual property law. Before joining the Bench, they were all experienced and expert practitioners in these fields of law as well as in commercial law generally. Justice Tay Yong Kwang contributes an important essay on recent developments in civil procedure – availing us of his many years of expertise in the field as well as his experience as Chairperson of the Civil Justice Commission (which recently submitted its report to the Honourable the Chief Justice Sundaresh Menon). Justice Kannan Ramesh and Justice Aedit Abdullah contribute an essay on recent developments

in insolvency law. They are eminently qualified to do so, having been heavily involved in various initiatives with regard to cross-border insolvency (including the Judicial Insolvency Network (“JIN”), a network of insolvency judges from around the world which aims to encourage collaboration amongst national courts in the context of the best practices in cross-border restructuring and insolvency). I should add that the remaining essay (on recent developments in Singapore contract law) is by myself (this is an area in which I have had a special interest since my time in legal academia).

It remains for me to express my deepest gratitude to all the contributors and to the Honourable the Chief Justice Sundaresh Menon for his encouragement and advice throughout this endeavour. I would also like to express my immense gratitude to Justice Datuk Nallini Pathmanathan and Ms Suraiya binti Mustafa Kamal as well as Ms Rachel Jaques for their generous assistance (without which the volume you now hold would not have been made possible). Finally (and most importantly), I trust that the essays in this volume will be of interest to the readers of this Journal.

Andrew Phang
Judge of Appeal
Supreme Court of Singapore

Shipowners' Contractual Liens as a Security Interest

by

Justice Belinda Ang Saw Ean*

This paper is an adaptation and update¹ of the paper entitled "Waking Up from the Shipowners' Nightmare!" presented at the Maritime Law Conference 2017 in which I discussed two High Court decisions involving shipowners' liens over freight (Duncan, Cameron Lindsay v Diablo Fortune Inc and another matter [2018] 4 SLR 240 and Five Ocean Corp v Cingler Ship Pte Ltd [2016] 1 SLR 1159)² and the impact of the 2017 amendments to Singapore's insolvency regime on maritime creditors' in rem rights against the backdrop of the slump in the shipping industry.³ In recent times, the demise of big names like Hanjin Shipping, Rickmers Trust Management Pte Ltd, Swiber Holdings, and Swiss Co is a signal to the rest of the shipping industry that no company is too big to fail.

[1] This article will discuss two Singapore decisions involving shipowners' contractual liens (lien on sub-freight and lien on cargo), the amendments to the Singapore's Companies Act⁴ (the "Companies Act") on registration of charges in 2018⁵ followed by the impact of Singapore's May 2017 insolvency regime on shipowners' contractual liens as security interest.

Lien over sub-freights and sub-hires

[2] It is common to find a standard contractual lien clause in most contracts of carriage. It is rare to find a challenge to a contractual

* Judge, Supreme Court of Singapore. I am also grateful to Deborah Koh and Tan Jun Hong for their very helpful comments and suggestions. All views expressed are personal and do not represent those of the Supreme Court of Singapore. All errors are entirely mine.

1 The law is accurate as at April 2019.

2 Held at KLRCA in Kuala Lumpur on October 12, 2017.

3 Kari Reinikainen, "More ships head to early grave", *Fairplay* (July 20, 2017) at p 18. Notably to asset value is the decline in the lifespan and hence the book value of ships because the average age of scrapped vessels has declined from 32 years in 2009 to 26 years in 2016.

4 Cap 50, 2006 Rev Ed.

5 The Companies (Amendment) Bill 2018 was passed in Parliament on August 6, 2018.

lien clause for want of registration because the opportunity to mount such a challenge is dependent on the existence of a confluence of precise factors that are not often in play.⁶ In 2017, a foreign liquidator successfully challenged the validity of a lien on the sub-freights clause in *Duncan, Cameron Lindsay and another v Diablo Fortune Inc and another matter*⁷ (“*Diablo (HC)*”). The Singapore High Court in *Diablo (HC)* held that a contractual lien on sub-freights was a charge⁸ registrable under section 131 of the Companies Act (a similar provision is found in section 353 of Malaysia’s Companies Act 2016 (Act 777). Section 131 reads:

131. (1) ... where a charge ... is created by a company there shall be lodged with the Registrar ... for registration, within 30 days after the creation of the charge, a statement containing the prescribed particulars of the charge, and if this section is not complied with in relation to the charge the charge shall, so far as any security on the company’s property or undertaking is thereby conferred, be void against the liquidator and any creditor of the company.

...

(3) This section applies to the following charges ...:

...

(f) a charge on the book debts of the company;

(g) a floating charge on the undertaking or property of a company;

...

6 *Diablo Fortune Inc v Cameron Lindsay Duncan* [2018] 2 SLR 129 (“*Diablo (CA)*”) at [2], per Chong JA. These factors are: first, a Singapore-incorporated charterer is involved (only Singapore companies are subject to the registration regime under s 131 of the Companies Act). Second, that charterer becomes insolvent during the performance of the charterparty. Third, the freight due from the third-party sub-charterer has not been paid over, and is therefore amenable to the exercise of the lien by the shipowner. Fourth, the insolvent charterer must be a substantial operator justifying the expense for the appointment of a liquidator. Finally, the validity of the lien is challenged by the liquidator so appointed (the liquidator being the proper plaintiff, on the liquidation of the chargor), to bring proceedings to avoid a charge for non-registration.

7 [2018] 4 SLR 240.

8 Either a floating charge under s 131(3)(g) of the Companies Act or a charge on book debts under s 131(3)(f) of the Companies Act.

[3] In *Diablo (HC)*, the contractual lien was not registered so it was held to be void against the liquidator and the creditors of the charterer, a Singapore-incorporated entity. The High Court's decision was upheld on appeal (see *Diablo (CA)*).

[4] Whilst legally correct, the High Court decision, when it was released in 2017, nevertheless caused dismay in Singapore amongst admiralty practitioners, shipowners and people in the insurance industry. This sentiment described herein highlights the tension between maritime and insolvency law. For shipowners and admiralty practitioners, there is no commercial reason why contractual liens should be registered. First, registration is impracticable and inconvenient given the volume of charters entered into worldwide, on a daily basis, that contain standard contractual lien clauses. Second, the duration of charters vary significantly, and many are only for a short term. Third, more to the point, charters are often concluded by shipbrokers and the contracts are contained in exchanges of emails culminating in fixture recaps. Fourth, most financing agreements which provide for a lien over the goods (or proceeds thereof) are "rolling agreements", meaning that they continue until terminated. Fifth, bills of lading also incorporate familiar clauses allowing lien on cargo for unpaid freight or hire, including other sums.

[5] Conversely, the proponents for registration, argue that registration of contractual liens would give creditors notice of the lien. More importantly, a shipowner with an unregistered contractual lien should not take priority over other creditors at the winding up of the charterer.

[6] Consequently, to enforce such a contractual lien clause as a security interest, shipowners would have to call upon their charterers (i.e. the chargors) to register lien clauses on, or shortly after, execution of the charterparty, where a Singapore-incorporated charterer is involved. Shipowners can register the contractual lien as a charge if the Singapore-incorporated charterers do not do so pursuant to section 132(1) of the Companies Act, which provides that an interested person (i.e. a shipowner chargee) may lodge the documents and particulars required for registration. Ordinarily, it is the chargor (charterer) who has to register the contractual lien because it is he who faces risk of penal sanction under the Companies Act if he fails to register the charge (section 132(1)). One final point is that existing holders of contractual liens may have to apply to have those liens registered out of time.

[7] But business people have been quick to get around this legal setback with a simple practical and workable solution, which is to use SPV companies not incorporated in Singapore to enter into charters. Steven Chong JA, in *Diablo (CA)*, recognised and echoed the inconvenience and impracticability of registration for liens on sub-freights and its negative impact on the local shipping industry, calling for legislative reform in this area. Fortunately, Singapore's Parliament responded with a review of section 131 of the Companies Act and an amendment that is well received as it is favourable to the shipping industry. I will come to the amendment in due course. But first, a quick narration of the facts of *Diablo (HC)*.

[8] In *Diablo (HC)*, the liquidators of Siva Ships International Pte Ltd ("Siva Ships"), a company incorporated in Singapore, sought a determination that the registered owners, Diablo Fortune Inc ("Diablo")'s lien over sub-freights or sub-hire due from V8 Pool Inc ("V8") to Siva Ships was void against the liquidators pursuant to section 131 of the Companies Act for want of registration.

[9] Diablo had bareboat chartered a vessel to Siva Ships who in turn entered a pooling arrangement with V8 whereby V8 agreed to pay Siva Ships charter hire based on the actual earnings from the pooling arrangement. Siva Ships was subsequently wound up in Singapore. In December 2016, Diablo sent V8 a notice exercising its lien under clause 18 of the bareboat charter. Clause 18 reads:

18. Lien

[Diablo] to have a lien upon all cargoes, sub-hires and sub-freights belonging or due to [Siva Ships] or any sub-charterers and any Bill of Lading freight for all claims under the Charter, and [Siva Ships] to have a lien on the Vessel for all moneys paid in advance and not earned.

[10] V8 did not make payment of the December charter hire to Siva Ships on account of that lien notice. By early January 2017, Siva Ships' liquidators learned that the vessel was on route to Spain pursuant to a sub-charter between V8 and Repsol Petroleo SA ("Repsol"), so Diablo issued Repsol a clause 18 lien notice in January 2017. The argument there was that freight due under that bill of lading was assigned to Diablo by virtue of clause 18 and as such, Diablo was entitled to receive freight from Repsol.

[11] The vessel was allowed to complete its voyage, cargo was discharged and certain payments were made pursuant to a settlement agreement. However, V8 withheld sums covered by the lien notices until the dispute over the validity of Diablo's lien was resolved. Diablo then commenced arbitration proceedings against Siva Ships in London and obtained protective orders from the Spanish courts over its two lien notices to prevent V8 and Repsol from paying out monies to any parties pending the outcome of Diablo's claim in arbitration.

[12] The liquidators obtained an order from the London High Court recognising the Singapore liquidation and an automatic moratorium or stay on all proceedings, including the London arbitration, was granted.

[13] The issues before the Singapore court were whether:

- i. a stay should be granted in favour of arbitration;
- ii. Singapore law should govern the registration of charges and priorities in insolvency matters;
- iii. the lien over sub-freights or sub-hire came within section 131 of the Companies Act and should be registered; and
- iv. an extension of time should be given to Diablo to register its lien under section 137 of the Companies Act.

[14] On the first issue of a stay in favour of arbitration in London, the High Court noted that the present dispute was concerned with whether the charge was void against the liquidators for want of registration, and did not pertain to the validity of the lien between Diablo and Siva Ships. A stay was refused since the express language of the arbitration clause did not cover the precise challenge raised by the liquidators. The High Court also added that the dispute was non-arbitrable, given that it engages the operation of Singapore's insolvency regime.⁹

[15] The second to fourth issues are relevant for present purposes. On the second issue, the High Court held that the law governing the registration of charges and the priorities of security interests in insolvency proceedings must be determined by the law of the country where the winding up is commenced. In the present case, Siva Ships was incorporated in Singapore and winding up proceedings were

⁹ *Diablo (HC)* at [14] and [20].

also commenced here. Therefore, section 131 of the Companies Act would apply.

[16] The third and most important question for shipping practitioners and shipowners was whether a lien over sub-freights or sub-hire (a contractual lien) was a “charge” under section 131 of the Companies Act. The English authorities have held that a contractual lien gives rise to an equitable assignment by way of a charge, which is registrable under the UK Companies Act and may be void for want of registration against a liquidator and creditors of the company. Such liens were characterised as registrable charges under the UK Companies Act,¹⁰ and registrable either as a charge on a book debt¹¹ or as a floating charge.¹²

[17] In contrast, in Hong Kong, a contractual lien is not characterised as a charge under section 334 of the Hong Kong Companies Ordinance (Cap 622) (the “HK Ordinance”). Section 334(4) expressly states that “[f]or the purposes of subsection (1)(d) and (j), if a company charters a ship from a shipowner, *the shipowner’s lien on the subfreights for amounts due under the charter is not to be regarded as a charge on book debts of the company or as a floating charge on the company’s undertaking or property*”. A consultation paper by the Hong Kong Financial Services and the Treasury Bureau, titled “Second Public Consultation on Companies Ordinance Rewrite” dated April 2, 2008, explains why a contractual lien is excluded from the definition of a charge (at paragraph 5.17):

Essentially a lien on subfreights is a provision in the charterparty (lease) of a vessel stating that the shipowners shall have a claim upon all amounts due under sub-charterparties for payments in respect of the headcharter. The provision gives the shipowner the personal right to intercept sub-charter payments before they reach the charterer but the provision nevertheless seems to lack the proprietary characteristics of a charge. Registration is also inconvenient from a commercial perspective since charterparties are usually negotiated by shipbrokers and not by lawyers and are normally of a relatively short duration.

10 See UK Companies Act 1948, s 95; UK Companies Act 1985, s 396; and UK Companies Act 2006, s 860.

11 *The Uglund Trailer* [1986] 1 Ch 471.

12 *The Annangel Glory* [1988] 1 Lloyd’s Rep 45.

[18] After a review of Singapore’s legislative history, the High Court concluded that the regime of registration of charges in Singapore is modelled after English and Australian legislation and despite numerous amendments to the Companies Act, section 131 of the Companies Act has remained unchanged unlike the situation in Hong Kong:

The regime of the registration of charges in Singapore is modelled after English and Australian legislation (*MDA v Sculptor Finance* at [30]). Singapore’s Companies Act (Act 42 of 1967) (“the Companies Act 1967”), which was enacted in 1967, is traceable to the UK Companies Act 1948. The Explanatory Statement to the Companies Bill 1966 (No 58 of 1966) states that the Bill follows closely the provisions contained in the Companies Act 1965 (No 79 of 1965) (M’sia) (“the Malaysian Companies Act 1965”). The Malaysian Companies Act 1965 was in turn based on the Companies Act 1961 (No 6839 of 1961) (Vic) of the State of Victoria which, according to the authors of “Modernising Company Law: The Singapore Experience” (2016) 34 *Company and Securities Law Journal* 157–165, was in turn a replica of the UK Companies Act 1948. The categories of charges under s 108(3)(f) and (g) of the Companies Act 1967 are essentially the same as those in s 95(2)(e) and (f) of the UK Companies Act 1948, and to date remains unchanged despite numerous amendments to the CA [Companies Act]. That the list of registrable charges under s 131 of the CA [Companies Act] is based on the UK Companies Act 1948 is also mentioned in the *Report of the Steering Committee for the Review of the Companies Act* (June 2011).¹³

[19] And while the High Court recognised the tension between admiralty and insolvency practitioners, the High Court concluded that ultimately, section 131 had the protection of unsecured creditors in mind. Pausing here, the rationale of protecting unsecured creditors was accepted by Parliament to be a lesser concern accepting the observation of the Court of Appeal in *Diablo (CA)* that liens on sub-freight are standard in charterparties and parties who deal with charterers are aware of such a lien clause.¹⁴

[20] Returning to the analysis in *Diablo (HC)*, the High Court preferred the English approach of a contractual lien operating as an equitable

¹³ *Diablo (HC)* at [40].

¹⁴ Second Reading speech by Ms Indranee Rajah, Second Minister for Finance on the Companies (Amendment) Bill 2018, August 6, 2018, at para 13.

assignment and found, in substance, the nature of the rights and obligations via a contractual lien consistent with the rights and obligations intended by a grant of a charge. The contractual lien had the characteristics of a floating charge as well as a book debt, and thus fell within the meaning of a charge under section 131, either as a floating charge under section 131(3)(g) or a charge on book debts under section 131(3)(f).

[21] The final issue was whether an extension of time for registration under section 137 ought to be granted. *Diablo* stated that it has never been the case nor the industry practice for a contractual lien to be registered. It was unaware of any such requirement under Singapore law.

[22] The High Court found that unawareness of the requirement for registration would suffice as inadvertence for the purposes of section 137. However, *Diablo* was unable to persuade the court to exercise the discretion to extend time in its favour. As *Siva Ships* had been wound up, an order extending time would not ordinarily be made save in an exceptional case such as fraud. No such exceptional case was shown, neither was it just and equitable to do so as it would have prejudiced unsecured creditors by giving *Diablo* an unfair advantage over them. A liquidator was bound by statute to distribute the net proceeds *pari passu* among the unsecured creditors. The application for extension of time was refused.

[23] *Diablo* filed an appeal, and pursued only the third issue – the characterisation of the lien on sub-freights. An *amicus curiae*, Professor Hans Tjio (from the Faculty of Law, National University of Singapore), was appointed, and a five-judge *coram* heard the appeal on March 5, 2018. After the hearing, the appeal was dismissed, and grounds for the decision were subsequently issued on May 21, 2018.

[24] The Court of Appeal rejected the analysis of the lien as a *sui generis* right to intercept sub-freight because such a contractual right would be unenforceable for lack of privity between the shipowner and the sub-charterer.¹⁵ Further, this analysis could not explain why payment to the shipowner would discharge the sub-charterer's debt to the charterer.¹⁶

¹⁵ *Diablo (CA)* at [26] and [34].

¹⁶ *Ibid*, at [29].

[25] The Court of Appeal also did not adopt the *amicus's* suggestion that the lien on sub-freight was an *agreement to create a charge on the occurrence of a contingent event*. First, the lien clause in question (similar to those in standard form charterparties) lacked specificity as it did not mention any contingent event.¹⁷ Second, the definition of “charge” in section 131 of the Companies Act included agreements to give or execute a charge.¹⁸ Third, such agreements evaded the *pari passu* rule fundamental to insolvency law because the charge would be a springing security imposed on the charterer’s assets when the notice of the lien was given; by then the charterer would be in a parlous financial situation.¹⁹

[26] The Court of Appeal preferred characterising a lien on sub-freights as an equitable assignment²⁰ and affirmed the High Court’s decision that the lien created a floating charge. Future sub-freights yet to be earned were equitably assigned to the shipowner by way of security, and the shipowner had a *dormant* right to claim those sub-freights in fulfilment of charterer’s obligations *until* notice was given.²¹ The Court of Appeal rejected the argument that the lien holder was different from a floating chargee because a lien on sub-freights did not confer a right of property (which the Court of Appeal narrowly defined as the ability to follow sub-freights paid).²² In practical terms, a floating chargee’s position before crystallisation was similar to that of a lien holder; both could not assert any proprietary right in respect of any specific asset.²³ On a conceptual level, while a floating charge conferred an immediate security interest, the chargee enjoyed a proprietary interest in the charged assets only after the event of crystallisation; the same applied to the holder of a lien on sub-freights.²⁴

[27] The Court of Appeal acknowledged that the requirement of registration was commercially inconvenient. It therefore suggested that legislative intervention be considered to exclude such liens from the requirement of registration. Shortly after the release of the

17 *Ibid*, at [61].

18 *Ibid*, at [66].

19 *Ibid*, at [65].

20 *Ibid*, at [30].

21 *Ibid*, at [36], [37] and [58].

22 *Ibid*, at [44].

23 *Ibid*, at [46].

24 *Ibid*, at [47].

decision, the Ministry of Law held a public consultation on proposed amendments to the Companies Act in respect of shipowners' liens.²⁵

The new section 131(3AC) of the Companies Act

[28] The Companies (Amendment) Bill 2018 was passed in Parliament on August 6, 2018 exempting shipowners' liens from the requirement of registration under section 131. As noted earlier, section 334(4) of the HK Ordinance similarly excludes shipowners' liens from the requirement of registration by stipulating that such liens do not amount to a charge on book debts of the company or a floating charge on the company's undertaking or property. However, Singapore's legislative amendment went further: not only is a shipowner's lien exempted from registration, the shipowner's lien still retains its nature as security, and takes priority over unsecured creditors and other secured creditors whose security was created after the relevant shipowner's lien was created.

[29] With regard to shipowners' liens that are already in existence before the effective date of these amendments, the new section 131(3AC) provides that these will only be considered registrable if, as at the effective date of the amendments, the company has been wound up, or a creditor has acquired a proprietary right or interest in the subject matter of the lien; however, "the government [would] endeavour to shorten this window of exposure by bringing the amendments into effect as soon as possible."²⁶

[30] The legislative changes (in effect from October 1, 2018), in the form of a carve out or "savings provision"²⁷ to exempt as many existing shipowners' liens from the requirement of registration as possible, are set out below:

25 See <<https://www.mlaw.gov.sg/content/minlaw/en/news/public-consultations/Public-Consultation-on-Proposed-Amendments-to-Companies-Act-in-respect-of-Shipowners-Liens.html>> (accessed on June 25, 2018).

26 Note by Minister Indranee Rajah on Companies (Amendment) Bill 2018, August 14, 2018, <https://www.mlaw.gov.sg/news/legal-industry-newsletter/note-by-minister-indranee-rajah-on-companies-amendment-bill-2018/> (accessed on January 4, 2020).

27 Second Reading speech by Ms Indranee Rajah, Second Minister for Finance on the Companies (Amendment) Bill 2018, August 6, 2018).

Section 131 of the Companies Act is amended —

(a) by inserting, immediately after subsection (3AA), the following subsections:

“(3AB) Despite subsection (3), a shipowner’s lien created by a company on or after the date of commencement of section 2 of the Companies (Amendment) Act 2018, whether as a charge on book debts of the company or a floating charge on the undertaking or property of the company, is not a charge to which this section applies.

(3AC) Despite subsection (3) or (3AA), a shipowner’s lien created by a company before the date of commencement of section 2 of the Companies (Amendment) Act 2018, whether as a charge on book debts of the company or a floating charge on the undertaking or property of the company, is a charge to which this section applies only if, as at that date —

- (a) an order for the winding up of the company has been made;
- (b) a resolution has been passed for the voluntary winding up of the company; or
- (c) a creditor of the company has acquired a proprietary right to or an interest in the subject matter of the lien.”; and

(b) by inserting, immediately after subsection (10), the following subsection:

“(11) In this section, “shipowner’s lien” means a contractual lien on —

- (a) subfreights;
- (b) subhires; or
- (c) bill of lading freight, created under a charter (or subcharter) of a ship for any amount due under the charter (or subcharter).”

Is a shipowner's contractual lien over cargo a non-registrable charge under the new section 131 of the Companies Act?

[31] The amendments in section 131(3AC) of the Companies Act were clearly addressed to solve the *Diablo* scenario and have not expressly included a shipowner's contractual lien over cargo. Moreover, the definition of "shipowner's lien" in subsection 11 lends support to this view. Consequently, such a contractual lien on cargo could require registration under section 131(3)(g) of the Companies Act²⁸ when the cargo is the subject of a floating charge which crystallises in the event of a default in payment of hire or freight.

Lien over cargo on board the chartered vessel to obtain payment

[32] Time charters commonly provide a shipowner with rights of lien over cargo to enforce payment of (sub) hire, (sub) freight and other sums due under the charter. For instance, clause 18 NYPE form is widely drafted as the lien on cargo is not only for payment of (sub) hire or (sub) freight but for "all claims under this Charter". If there is a lien clause (like clause 18) where a shipowner has a lien over cargo for sums due to the shipowner that are not paid because of a charterer's liquidation, would it be possible to utilise the device of the shipowner's right to intercept unpaid freight under an owner's bill of lading to satisfy (in full or in part) a Singaporean charterer's indebtedness, bypassing or overcoming the requirement of registration? The arguments hereafter are premised on the right to intercept requiring no registration.

[33] The contractual right to intercept is based on the bill of lading as evidence of a contract between the shipowner and the consignee or indorsee of the bill of lading, and the agency between the charterer and the shipowner for collection of the bill of lading freight. The reasoning is that unlike the operation of a lien where the freight is due to the charterer but is assigned to the shipowner, the right to intercept is founded on the shipowner's legal right to demand the bill of lading freight (assuming it has not been paid over like in *Dry Bulk Handy Holding Inc and another v Fayette International Holdings Ltd and another*,²⁹ directed to be paid to the shipowner, in the manner set out in the sub-charter between the charterer and third party. Of course,

²⁸ Which refers to "a floating charge on the undertaking or property of a company."

²⁹ [2013] 2 Lloyd's Rep 38.

there needs to be suitable contractual provisions in the applicable charter if an owner is to be entitled to exercise this right down the line. The Court of Appeal for British Columbia in *Byatt International SA v Canworld Shipping Co Ltd and Another (The "Loyalty")*³⁰ similarly held that this right of interception of payment of freight by the shipowner on the strength of the bill of lading was a right that ran through the chain of charterparties if there was a valid contractual claim by the owner through the head charterparty, and that the court should follow commercial reality, rather than what was thought to be most fair where the shipowner and a sub-charterer were contesting for money in court.³¹ Whilst some generalisation is possible, each outcome depends on the circumstances of each dispute and the individual charterparties involved in the carriage.

[34] What if the shipowner has been paid hire in full by the contracting charterer and it is the latter that has not collected hire from the sub-charterer? The further question is: will the shipowner as a form of trustee take steps to exercise rights under the owner's bill of lading? In *Five Ocean Corporation v Cingler Ship Pte Ltd*³² ("*Five Ocean*"), the shipowner was prepared to exercise the lien in the owner's bill of lading as trustee to protect its personal interest. *Five Ocean* is interesting as a checklist of issues needed to exercise a contractual lien over cargo was examined. A sale of cargo subject to a lien was ordered in *Five Ocean* even though there was no provision expressly allowing a sale of cargo. On the facts, the shipowner's reasonable care of cargo subject to a lien necessitated an application for sale to preserve the value of the lien.

Five Ocean Corp v Cingler Ship Pte Ltd

[35] The same reasoning recounted above on the application and effect of section 131 of the Companies Act on a contractual lien for sub-freight or sub-hire, prior to the amendments, could have arisen in *Five Ocean* if the sub-charterer, a Singapore incorporated company, had been wound up. Creditors had filed winding-up proceedings against the sub-charterer who managed to stave off winding-up proceedings by seeking protection by way of the scheme of arrangement process

30 [2013] BCCA 427.

31 A notice of lien had also been issued but was not decided on since the court had already found that Byatt's claim was valid on the first and independent alternative.

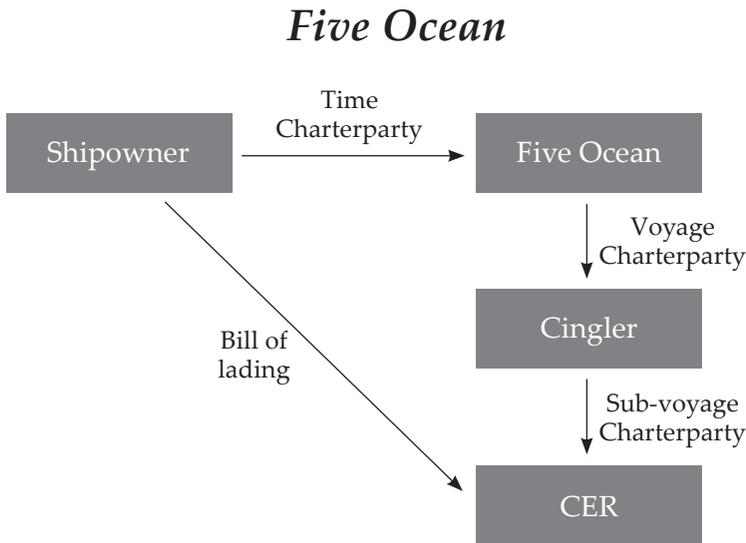
32 [2016] 1 SLR 1159.

to restructure its debts. From the wording of section 131, it appears that registration is only required if there is a winding up scenario where the charge would otherwise be void against "the liquidator and any creditor of the company". Such argument would fail under a scheme of arrangement.

[36] *Five Ocean* illustrates how the insolvency of the sub-charterer down the charterparty chain could burden the shipowner and frustrate its business operations and employment of its vessel even if its contracting charterer has paid the hire. Corrina Maritime Inc ("Corrina"), the shipowners, came to the aid of their contracting time charterers, Five Ocean, when the sub-charterer, Cingler Ship Pte Ltd ("Cingler"), became insolvent. It was in Corrina's interest to free the vessel of the cargo so it could be deployed again. Five Ocean was concerned that its contractual lien would be worthless as security as the unpaid freight, detention and expenses due from Cingler far exceeded the value of the cargo on board. Thus, Five Ocean as the plaintiff, applied for a sale of cargo to preserve the value of the cargo of steam coal as an interim measure in aid of arbitration between the parties in Singapore. This application was supported by Corrina, who filed supporting affidavits and also confirmed that it would abide by a court order made in the sale application. At the same time, Corrina and Five Ocean were also concerned that the cargo showed visible signs of heating damage, and the safety of the vessel and crew were in issue. The vessel was in international waters off the last nominated port of India because of the ongoing dispute and a delay by Cingler in nominating a discharge port. Five Ocean and Corrina had feared losing their lien rights if the vessel proceeded to an Indian port for discharge.

[37] Cingler had in turn voyage chartered the vessel to PT Commodities & Energy Resources ("CER"). Cingler failed to pay freight to Five Ocean when it became due and failed to nominate a discharge port on time. CER, interveners in the proceedings, did not pay sub-freight to Cingler because of a running account between Cingler and CER; additionally, they were embroiled in a separate dispute. Initially, CER, wanted an adjournment of the hearing to allow it time to negotiate the sale of the cargo to one "Adani group of companies". This was tricky as there was already a worldwide freezing order granted by the High Court of England over CER's assets as a result of an unrelated dispute, and a corresponding injunction had been granted over CER's assets in Singapore.

[38] The diagram below illustrates the relationship between the parties:



Five Ocean Corp v Cingler Ship Pte Ltd [2016] 1 SLR 1159

[39] The head voyage charterparty between Five Ocean and Cingler contained the usual lien clause (clause 8):

The owners shall have a lien over the cargo and on all sub-freights payable in respect of the cargo for freight, deadfreight demurrage claims for damages and for all other amounts due under this Charter Party including costs of recovering the same.

[40] The sub-voyage charterparty between Cingler and CER was on the Gencon 1994 form. Upon loading the cargo a set of Gencon 1994 form bill of lading was released to CER naming them as shipper and Adani Enterprises as the notify party. The bill of lading was consigned “to order” and signed by the load port agent as agent for and on behalf of the master of the vessel.

[41] Both the head voyage charterparty and the bill of lading were governed by English law. On the strength of the authorities and fact that the word “freight” was used in the bill of lading, the position at English law was that the charterparty incorporated in the bill of lading was the head voyage charterparty between Five Ocean and Cingler which gave Corrina a lien on the cargo and sub-freight and all other amounts described in clause 8.

[42] Corrina and Five Ocean separately gave notice of the lien and the exercise of lien over the sub-freight and cargo to Cingler, CER and Adani Enterprises. Parties were in settlement talks but no resolution was reached so Five Ocean issued a notice of arbitration. Cingler did not respond. Despite the existence of the section 210 scheme application, leave of court was obtained to enable the sale application to continue against Cingler. Cingler's counsel was present at the hearing and he did not oppose the application to sell the cargo.

[43] The issue in this case was whether Five Ocean could claim the benefit of a contractual lien on cargo against CER, to whom the cargo belonged and with whom Five Ocean had no contract, for unpaid freight and other sums owing to Five Ocean by Cingler. The hearing proceeded on the basis that the cargo belonged to CER and physical possession was with Corrina. Against this factual backdrop, two main questions arose in the sale application. First, Five Ocean's legal basis for bringing the sale application. Second, the court's power of sale, which is independent of the legal proposition that a typical lienee has no power of sale, and there was no provision for a sale in clause 8.

[44] On the first question, the High Court held that the lien clause for sub-freight gave Five Ocean, as equitable assignee, the right to payment of money owed by CER to Cingler. Five Ocean could "intercept" the unpaid sub-freight. Five Ocean was an equitable assignee, at least of the sub-freight, but as to its contractual lien over cargo, Five Ocean could not truly exercise it. Cingler did not own the cargo and possession of the cargo was with Corrina. Fortunately for Five Ocean, Corrina made use of the bill of lading to exercise its contractual lien over the cargo against CER, as trustee, for the benefit of Five Ocean. Hence, Five Ocean's legal basis for bringing the sale application – i.e. its *locus standi* – would be its beneficial interest in Corrina's exercise of the lien. This was not the same as the conventional understanding of a security interest granted by a "lien", as here, the right depended on the possession of the cargo before the lien could be exercised. Coupled with that beneficial right, as against Cingler, clause 8 gave Five Ocean the personal right to direct Corrina to postpone discharge and delivery of the cargo until the sums secured by Corrina's lien on sub-freight were paid. In the judgment, the combined rights in the cargo was termed collectively as Five Ocean's "right to detain possession".

[45] Following the decision in *Diablo (HC)* (and subsequently affirmed in *Diablo (CA)*), if there had been no cargo in Corrina's possession,

Five Ocean, by virtue of the lien clause, would have been the equitable assignee of the sub-freight earned by Cingler from CER, and upon giving notice of the exercise of lien to CER, the floating charge over the sub-freight would have crystallised, giving Five Ocean a proprietary interest in the sub-freight. This charge would only be defeated by a transfer to a bona fide purchaser of the asset without notice of the existence of the charge. Cingler in this case was insolvent but not in liquidation, so there was no requirement of registration under the former section 131 of the Companies Act. But the problem in *Five Ocean* was CER's assertion that due to the long running relationship between CER and Cingler, and the existence of a running account, Cingler had not demanded payment and no sub-freight was due to Cingler. The reality of exercising this proprietary right is of course more cumbersome and protracted when compared to exercising a lien over cargo in the possession of a cooperative shipowner who would have obtained an appropriate indemnity from its contracting charterer.

Court's power to sell cargo

[46] It is not controversial that in the absence of express agreement or statutory powers, a lien holder has no power to sell cargo on which it has a lien to realise the freight or hire due to it. However, the court has the power to order a sale of the cargo subject to a lien if, for example, the cargo is of a perishable nature or there is other good reason to sell.

[47] On statutory powers to order a sale, counsel for Five Ocean relied on the urgent interim sale provisions in the International Arbitration Act ("IAA") since the dispute would be decided at arbitration. The argument was that the nature of Five Ocean's right to detain possession was an "asset" which could be properly preserved by an order of sale of the cargo as an interim measure.

[48] The court had power to order interim measures in aid of arbitration³³ as the court had *in personam* jurisdiction over the parties. Cingler was a Singapore-incorporated company present in the jurisdiction while CER had submitted to jurisdiction, having intervened. The main legislative intention behind the enactment of section 12A of the IAA was to give the court powers over assets and evidence situated *in Singapore* and to make orders in aid of arbitrations that were *seated in Singapore and overseas*. As the cargo was

33 *Ibid*, at [39].

in international waters, the grant of the sale order would not interfere with the jurisdiction of any court.

[49] The High Court found that Five Ocean's right to detain possession *vis-à-vis* Cingler was not "security" in the conventional sense, but was in effect a mechanism to enforce payment of the sums due to Five Ocean under the head voyage charterparty over the cargo. As a chose in action, it was an "asset" which could be preserved under section 12A(4). Equally, Corrina's contractual lien was a chose in action and was an "asset" under the same provision.³⁴

[50] Next, could the right to detain possession of the cargo be preserved through an order for sale of the cargo? At first glance, an order for the sale of the cargo appeared inconsistent with the concept of a right to detain, which typically would not give rise to a right to sell unless expressly provided for in the contract.

[51] Besides the IAA, there is Order 29 rule 4 of the Rules of Court and there was clear evidence of the deteriorating condition of the cargo. The rationale behind Order 29 rule 4 is that where goods are perishable or are a wasting asset if kept, the value of the movable property which is the subject matter of the proceedings would be lost.³⁵ This rationale fits squarely into the intention behind the IAA provisions³⁶ to preserve the property which is or forms part of the subject matter.³⁷

[52] Thus, Five Ocean's right to detain possession could be effectively preserved through an order for sale. Its right to detain possession would then be transferred to the proceeds of sale. An order to sell represented a fair balance of the respective interests – preservation of the value of the cargo and the safety of the vessel and crew – in the absence of a satisfactory and reasonably agreed solution in place amongst Five Ocean, Cingler and CER. The last minute request for an adjournment of the sale application for CER to negotiate a sale with the Adani companies was pointless as they could still buy the cargo after the order of sale was made.

³⁴ Ibid, at [44]–[46].

³⁵ See *Emilia Shipping Inc v State Enterprises for Pulp and Paper Industries* [1991] 1 SLR(R) 411.

³⁶ Section 12A(4) read with s 12(1)(d).

³⁷ *Five Ocean* at [54].

Impact of Singapore's new insolvency laws on contractual liens as security interest

[53] At the outset, I mentioned the demise of Hanjin Shipping, a leading Korean shipping company whose ships, whether owned or chartered, used to sail around the globe to numerous ports. One cannot ignore the international dimension when an entity like Hanjin Shipping faces insolvency; there are cross-border issues that have to be addressed. Typically, the question is whether a foreign restructuring order, which usually contains a moratorium order, would be recognised, so that local proceedings, for instance, to exercise a contractual lien, could not start, or the sale application discussed earlier would have to stop. The answer to whether the foreign moratorium order has worldwide effect depends on whether the order is recognised in Singapore and the scope of the order. Any elaboration of this topic is for another occasion.

[54] On the domestic front, where there is an automatic or court moratorium brought under the amendments to the Companies Act, the discussions in this article will be confined to the treatment of contractual liens as security interests under the new section 211 of the Companies Act.

Moratoriums in schemes of arrangement

[55] Where creditors' schemes of arrangement are in place, an automatic moratorium (with worldwide effect that extends to debtors' related entities whether in Singapore or not, i.e. subsidiaries and holding companies may also apply for a moratorium)³⁸ kicks in, one prevailing view is that if an automatic or court-ordered moratorium in a scheme situation is in place, maritime claimants will have to apply for leave to proceed with their claims (in the same way that they have always had to do in liquidation and judicial management situations). Arguably, this view is not entirely accurate. One needs to bear in mind the nature of the (intended) proceedings, i.e. whether the proceedings are *in rem* or *in personam*. This is significant when one considers the wording of section 211B and proceedings brought under that provision.

38 IRDA, s 64 (see para [60] below).

[56] Section 211B of the Companies Act states:

211B. *Power of Court to restrain proceedings, etc., against company*

- (1) Where a company proposes, or intends to propose... an arrangement between the company and its creditors or any class of those creditors, the Court may, on the application of the company, make one or more of the following orders ... :
 - (c) an order restraining the commencement or continuation of any proceedings (...) against the company, except with the leave of the Court and subject to such terms as the Court imposes;
 - (d) an order restraining the commencement, continuation or levying of any execution, distress or other legal process against any property of the company, except with the leave of the Court and subject to such terms as the Court imposes; ...

[57] Proceedings brought under section 211B(1) are *in personam*, which is distinct from maritime claims that are brought *in rem*. The wordings of section 211B(1)(c) refers to “the commencement or continuation of any proceedings ... *against the company*”. *In rem* actions are against the vessel, the asset of the company rather than the company itself.

[58] Pausing here, similarly, under Malaysia’s Companies Act 2016, the power of the court to restrain proceedings under section 368 in schemes applies to “further proceedings in any action or proceeding against the Company”.

[59] Section 211B(1)(d) refers to an order restraining the “levying of any execution, distress or other legal process against any property of the company”. The words “other legal process” read in *ejusdem generis* could refer to similar legal processes like garnishee proceedings. If *The Daien Maru No 18*³⁹ is not distinguishable today, an arrest would fall outside the scope of these processes. Thean J there explained that an execution proceeding is to enforce a monetary judgment *in personam*. In contrast, a judgment *in rem* is against the *res* and such a judgment can be enforced against the *res* by a remedy *in rem*. In that case, the arrest of the vessel was to obtain security for the judgment.

39 [1983–984] SLR(R) 787.

[60] A carve out which will permit *in rem* writs to be issued during moratoriums is created by section 64(12) of the Insolvency, Restructuring and Dissolution Act 2018⁴⁰ (“IRDA”) and this carve out is reflective of the position argued for above. The IRDA is to be the new omnibus legislation that consolidates personal and corporate insolvency and restructuring laws. For the reasons stated, the wording of section 211B(1) does not bar the issuance of *in rem* proceedings if there is an automatic or court-ordered moratorium.

[61] On October 1, 2018, the IRDA was passed by Parliament and assented to by the President on October 31, 2018. The IRDA has not yet come into force. Section 64(12) provides:

Neither an order made by the Court under subsection (1) nor subsection (8) affects –

- (a) the exercise of any legal right under any arrangement (including a set-off arrangement or netting arrangement) that may be prescribed by regulations; or
- (b) *the commencement or continuation of any proceedings that may be prescribed by regulations.*

...

(Emphasis added)

[62] The regulations that will have to be implemented to accompany the IRDA when it comes into force are still being finalised by the Ministry of Law. The following text from the Second Reading speech by Senior Minister of State for Law, Mr Edwin Tong, on the Insolvency, Restructuring and Dissolution Bill on October 1, 2018 confirms that the filing of *in rem* writs will be carved out from the moratorium:

45. The new clause 64(12)(b) provides that neither an order by the Court under clause 64(1) nor the automatic moratorium under clause 64(8) affects “*the commencement or continuation of any proceedings that may be prescribed by regulations.*” This amendment empowers the Minister to prescribe by regulations that the commencement of specified proceedings, or the continuation of specified proceedings, or both, is not affected by the moratoria. *The intention is to apply this*

40 Act No 40 of 2018.

power in a targeted manner where necessary – in particular, with respect to writs for an action in rem against a vessel. The current practice, as I understand it, is that for urgent cases, *in rem* writs and applications for leave are to be filed simultaneously and the Supreme Court registry accepts such filings with the Court thereafter deciding if the claim may proceed. *The power under clause 64(12)(b) will be used to provide that the first step of the filing of an in rem writ is not itself impeded by the moratoria, and this is in order to preserve the claims against the vessels, because time stops running when you have filed the claim. However, leave of Court under clause 64(1)(c) or (8)(c) will still be required to continue with such proceedings.* A similar provision is also inserted at clauses 65(7)(b), 95(3)(b) and 96(5)(b).⁴¹

[63] Although the explanation during the second reading in Parliament is different from mine as expressed at paragraph [57], nonetheless, effectively, the carve out can be said to cohere with the position expressed above.

[64] Under Singapore law, *in rem* creditors like maritime lien holders and others whose *in rem* rights are derived from the High Court Admiralty Jurisdiction Act⁴² and have taken steps to file their *in rem* writs early enough are essentially distinguishable from the company's general body of creditors. They are regarded as secured claimants in admiralty proceedings. However, the introduction of new rescue financing provisions in the Companies Act (section 211E⁴³ for schemes of arrangement and section 227HA⁴⁴ for judicial management) allows the court to treat the rescue financing as part of the costs and expenses of winding up, or grant the rescue financier priority over all other creditors' claims (preferential and unsecured debts). If super priority for rescue financing is granted under either provision, *in rem* claims may be affected given the broad definition of "security interest" in sections 211E(9)⁴⁵ and 227HA(10)⁴⁶ that includes "lien". This terminology encompasses liens that are contractual, derived from common law or statutory.

41 See <https://www.mlaw.gov.sg/news/parliamentary-speeches/second-reading-speech-sms-edwin-tong-insolvency-omnibus-bill> (accessed on January 4, 2020).

42 Cap 123, 2001 Rev Ed.

43 Now s 67 of the IRDA.

44 Now s 101 of the IRDA.

45 Now s 67(9) of the IRDA.

46 Now s 101(10) of the IRDA.

[65] Going back to the scenarios discussed at the beginning of this article, a shipowner's contractual lien or charge would be compromised given the wide definition of security interest. But significantly, the definition of security interest is confined to any proceedings brought under section 211E and section 227HA only; hence the earlier comments on section 211B(1)(c) and (d) are not affected. As can be seen from the case of *Re Attilan Group Ltd*,⁴⁷ it is not so easy to put together a rescue. An attempt to obtain super priority under section 211E(1)(a) and (b)⁴⁸ failed on the facts in *Re Attilan Group Ltd* as the court held there had been insufficient evidence of reasonable efforts expended to secure financing without any super priority. Super priority disrupts the expected order of priority and the courts should be astute to grant such status unless strictly necessary. Recently, in *Re AT Reservations Network Pte Ltd*,⁴⁹ the High Court, on April 8, 2019, allowed a super priority rescue financing pursuant to section 211E(1)(b) over preferential creditors under section 328(1)(a) to (g)⁵⁰ for a company involved in the online travel business after the judge was satisfied that all reasonable efforts had been expended to secure alternative financing. The case is the first that has allowed such financing to be in non-monetary terms, with the financing taking the shape, in part, of an inventory of hotel rooms and travel benefits in amusement and theme parks owned and operated by the financier. Notably, *Re AT Reservations Network Pte Ltd* is on section 211E(b) while section 328(1) creditors are typically employees, the Central Provident Fund and the Inland Revenue, thus, the provisions relating to security interest as defined in section 211E(9) are not engaged.

Conclusion

[66] These recent decisions on contractual liens are anchored on traditional legal principles and recent changes to insolvency legislation arguably do not alter but instead, preserve the importance of these contractual liens. At a different level, whilst the body of maritime laws protects *in rem* creditors in the interests of commerce, the slew of amendments to the Companies Act favour the rescue of businesses in distress over creditors. This difference could play out in a proper

47 [2018] 3 SLR 898.

48 Now s 67(1)(a) and (b) of the IRDA.

49 HC/OS 963 of 2018.

50 Now s 203 of the IRDA.

case: a clash of jurisprudence bringing to the forefront the tension between two opposing legal regimes. The maritime industry is one key component of Singapore's economy. The expectations of shipowners and merchants engaged in international trade and commerce for the harmonious conduct of international trade and commerce should be protected, and this means adhering to the body of maritime law that is internationally recognised.

Recent Developments in Singapore Arbitration Law

by

*Justice Judith Prakash**

Introduction

[1] As the business of the Singapore International Arbitration Centre (“SIAC”) has developed over the past few years, Singapore has become a popular centre for the resolution of international commercial disputes by arbitration. This in turn has led to an increase in the number of cases coming before the courts of Singapore which arise out of arbitration agreements, arbitration proceedings and arbitration awards. Our courts have therefore had the opportunity to consider and rule on many aspects of arbitration law generally and the UNCITRAL Model Law on International Commercial Arbitration (“the Model Law”) specifically. The Model Law was made a part of Singapore law by the International Arbitration Act¹ (“IAA”) and arbitration cases often require the examination both of articles of the Model Law and of sections of the IAA. Over the years there has been a plethora of cases. This led some years ago to the High Court drawing up a list of judges with special experience in arbitration law. Thus, nowadays most arbitration cases will be channelled to judges on this list so as to further develop expertise in this area and to promote consistency. This article highlights a few recent and interesting developments in arbitration law.

Whether there is a valid arbitration agreement

[2] A number of recent cases in Singapore have considered the issue of whether there is a valid arbitration agreement which is enforceable against the parties to the contract. I will discuss some of them.

[3] The issue of the validity of an arbitration agreement usually arises in the context of court proceedings which have been started by the

* Judge of Appeal, Supreme Court of Singapore. All views expressed are personal and do not represent those of the Supreme Court of Singapore. All errors are entirely mine.

1 Cap 143A, 2002 Rev Ed.

claimant to recover liquidated sums or damages from the defendant for an alleged breach of contract. Where the relevant contract contains an arbitration clause, the defendant will usually apply to the court for a stay of the action in favour of arbitration. Under section 6(2) of the IAA, where such an application for stay is made, the court must stay the proceedings unless it is “satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed”.

[4] The preliminary question that arises in such applications is: what standard of review should the court adopt in determining whether a valid arbitration agreement exists? This issue was first considered by the High Court in *Malini Ventura v Knight Capital Pte Ltd and others*.² In that case, arbitration proceedings were started against the plaintiff on the basis of a guarantee containing an arbitration clause. She responded by commencing court proceedings for a declaration that there was no arbitration agreement between her and the defendant because her signature on the guarantee had been forged. The defendant in turn applied for the court action to be stayed under section 6 of the IAA.

[5] The parties disputed the standard of review that should be applied in determining whether there was an arbitration agreement for the purposes of section 6 of the IAA. The defendant submitted that it was only necessary for the court to be satisfied on a *prima facie* basis that there was a valid arbitration agreement. The plaintiff contended, however, that before section 6 of the IAA could be engaged, the court had to be satisfied on the usual civil standard, that is, a balance of probabilities, after a full trial, that she had indeed signed the arbitration agreement. The plaintiff cited academic comment and English case authorities, particularly the case of *Nigel Peter Albon v Naza Motor Trading Sdn Bhd*³ where the High Court of England held that in an application for a stay, where the conclusion of the arbitration agreement was in doubt, the court can try and should decide the issue of whether the agreement had been concluded. This has been called “the full merits” approach.

[6] Sitting in the High Court, I was not persuaded by the English position. I distinguished it on the basis that the IAA in contrast to the English legislation was enacted to incorporate the Model Law

2 [2015] 5 SLR 707.

3 [2007] 2 All ER 1075.

into Singapore law and it strictly circumscribed court intervention in arbitral proceedings. Given that the regime established by the IAA gave primacy to the arbitral tribunal, the court would be imposing too heavy a burden on the applicant for a stay if the court had to be satisfied of the existence of an arbitration agreement on a balance of probabilities before section 6 of the IAA can be engaged. A *prima facie* standard of review was appropriate: it would “satisfy the rights of both parties” (at [36] of the judgment).

[7] The issue was considered by the Court of Appeal (“CA”) in *Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals* (“*Tomolugen*”).⁴ The CA confirmed that a *prima facie* standard of review should be adopted when determining whether to grant a stay for the purpose of section 6 of the IAA. This *prima facie* review extended to: (1) the existence of a valid arbitration clause; (b) the existence of a dispute within the scope of the clause; and (3) whether the clause was null and void, inoperative or incapable of being performed. The CA gave four reasons for this decision. First, the *prima facie* approach cohered better with the approach envisaged by the drafters of the IAA. Second, the *prima facie* approach was more consistent with the *kompetenz-kompetenz* principle which held that the arbitrators had the right and ability to rule on their own jurisdiction. Third, the concern that the *prima facie* approach would result in the duplication of resources was overstated and on the contrary it might deter plaintiffs from commencing court proceedings because under it a stay would be granted, except where the arbitration clause was clearly invalid or inapplicable. Fourth, the use of the word “satisfied” in section 6(2) of the IAA did not indicate that the full merits approach was appropriate.

[8] Thus, in Singapore, to resist a stay under section 6, the plaintiff has to show that there is no arbitration agreement or that the purported agreement is null and void, inoperative or incapable of being performed. The first situation usually arises when a plaintiff asserts that he or she has not entered into the arbitration agreement at all. The other three situations are more diverse.

[9] In the case of *Insignia Technology Co Ltd v Alstom Technology Ltd*⁵ the arbitration clause was described as “pathological” and therefore

4 [2016] 1 SLR 373.

5 [2009] 3 SLR(R) 936.

incapable of being performed or void or inoperative because it provided for an arbitration administered by the SIAC under International Chamber of Commerce rules. The challenge was dismissed at first instance and on appeal, the CA upheld the clause on the basis that where parties “have evinced a clear intention to settle any dispute by arbitration, the court should give effect to such intention, even if certain aspects of the agreement may be ambiguous, inconsistent, incomplete or lacking in certain particulars” (at [31]).

[10] More recently, the courts had the opportunity to consider whether an arbitration clause that (1) only entitles one party to compel its counterparty to arbitrate a dispute (the “lack of mutuality” characteristic); and (2) makes arbitration optional (the “optionality” characteristic) amounts to an arbitration agreement. In *Dyna-Jet Pte Ltd v Wilson Taylor Asia Pacific Pte Ltd*⁶ (“*Dyna-Jet (HC)*”), the relevant clause in the contract read:

Dyna-Jet and [Wilson Taylor] agree to co-operate in good faith to resolve any disputes arising in connection with the interpretation, implementation and operation of the contract. ...

Any claim or dispute or breach of terms of the Contract shall be settled amicably between the parties by mutual consultation. If no amicable settlement is reached through discussions, *at the election of Dyna-Jet, the dispute may be referred to and personally settled by means of arbitration proceedings, which will be conducted under English law; and held in Singapore.* (Emphasis added.)

A dispute subsequently arose between the parties and they attempted, but failed, to reach a negotiated settlement. Dyna-Jet then commenced a suit in the High Court against Wilson Taylor. Wilson Taylor in turn applied to have the suit stayed pursuant to section 6 of the IAA.

[11] Vinodh Coomaraswamy J heard the stay application at first instance. After an extensive review of relevant Commonwealth cases, the judge held that an arbitration clause with the lack of mutuality and optionality characteristics may amount to an arbitration agreement: *Dyna-Jet (HC)* at [61(a)] and [61(b)]. Coomaraswamy J thus held that a clause which confers an asymmetric right on one party to elect

6 [2017] 3 SLR 267.

whether to arbitrate a future dispute is nevertheless an arbitration agreement: *Dyna-Jet (HC)* at [61(c)]. On appeal, the CA agreed with Coomaraswamy J on this point in *Wilson Taylor Asia Pacific Pte Ltd v Dyna-Jet Pte Ltd*⁷ (“*Dyna-Jet (CA)*”). However, it held that the only plausible way to construe the phrase “*at the election of Dyna-Jet*” in the arbitration clause was that it gave Dyna-Jet *alone* the option to choose whether any dispute arising in connection with the contract was to be resolved either by arbitration or litigation. Since Dyna-Jet had clearly chosen to refer the dispute to litigation by commencing the court proceedings, it was plain that the dispute never fell within the scope of the clause. This was the consequence of the characteristic of optionality possessed by the arbitration clause which entailed that the clause did not place the parties under a present obligation to arbitrate but would give rise to an arbitration agreement only if and when Dyna-Jet elected to arbitrate a specific dispute in the future. In the absence of such an election, the dispute would not be a “matter which is the subject of the agreement” and therefore there was no existing arbitration agreement (at [23]–[24]).

[12] The issue of defective arbitration clauses was revisited by the High Court in *KVC Rice Intertrade Co Ltd v Asian Mineral Resources Pte Ltd and another suit*⁸ (“*KVC Rice*”). In this case, the plaintiffs entered into two separate contracts to sell rice to the defendants. Each contract contained a bare arbitration clause, that is, a clause that was silent as to the seat of arbitration and the means of appointing arbitrators. The first clause provided for disputes to be “referred to and finally resolved by arbitration as per Indian Contract Rules”. The second provided for disputes to be “referred to and finally resolved by arbitration as per Singapore Contract Rules”.

[13] After disputes arose between the parties, the plaintiffs commenced court actions against the defendants, who applied for the suits to be stayed pursuant to section 6 of the IAA. The plaintiffs did not dispute the validity of the arbitration clauses. However, the plaintiffs contended that the arbitration agreements were “incapable of being performed” because the defendants had refused to cooperate in the establishment of an arbitral tribunal.

7 [2017] 2 SLR 362.

8 [2017] 4 SLR 182.

[14] Pang Khang Chau JC granted a stay of proceedings on the basis that:

- (a) Under section 8 of the IAA read with Article 11(3) of the Model Law, the President of the SIAC Court of Arbitration (“the SIAC President”) could appoint an arbitrator to break a deadlock between the parties regarding the appointment of arbitrators (at [34]); and
- (b) There was a *prima facie* case that the SIAC President could make the necessary appointment *even where the arbitration agreement did not specify the place of arbitration*, if he considered after due inquiry that the place of arbitration was Singapore (at [45]).

[15] *KVC Rice* has been criticised. First, it has been argued that as a matter of principle, bare arbitration clauses are insufficiently certain and are, accordingly, void and unenforceable.⁹ Second, it has been observed that the court proceeded on the questionable basis that Singapore law was the governing law of the arbitration agreements, and it is unclear if Article 11(3) of the Model Law applies if there is no agreement on the place of arbitration.¹⁰

The law governing the arbitration agreement

[16] Article 34(2)(a)(i) of the Model Law states that a court may set aside an arbitral award if “the [arbitration] agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State”. Article V(1)(a) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“the New York Convention”) provides that recognition and enforcement of an award may be refused on the same ground.

[17] By what law is the substantive validity of an arbitration agreement to be determined? The law governing the arbitration agreement may not be the same as the law governing the main contract incorporating the arbitration agreement.

9 See Nicholas Poon, “Reconsidering the Enforceability of Bare Intention to Arbitrate” (2017) 29 SAclJ 540 at paras 16–24.

10 See Darius Chan, “How Should ‘Bare Arbitration’ Clauses be Enforced by the Courts?” *Singapore Law Gazette* (April 2017).

[18] The law in Singapore, as decided by Steven Chong J in *BCY v BCZ*¹¹ (“BCY”), follows the English position as set out in *Sulamérica Cia Nacional de Seguros SA and others v Enesa Engenharia SA and others*¹² (“*Sulamérica*”) in the judgment of Moore-Bick LJ. This involves a three-step analysis: (1) Have the parties *expressly* stipulated a choice of law governing the arbitration agreement? (2) If not, have the parties *impliedly* chosen a law to govern the arbitration agreement? (3) In the absence of any express or implied choice of law, which system of law has the closest and most real connection with the arbitration agreement? In practice, the latter two questions will merge because “identification of the system of law with which the agreement has its closest and most real connection is likely to be an important factor in deciding whether the parties have made an implied choice of proper law” (*Sulamérica* at [25]).

[19] It is rare for parties to expressly state the law governing the *arbitration agreement* specifically. Much will therefore depend on whether they can be said to have *impliedly* chosen such law. Importantly, parties usually intend the whole of their relationship to be governed by the same system of law (*Sulamérica* at [11]). Consequently, in the absence of any indication to the contrary, “an express choice of law governing the substantive contract is a strong indication of the parties’ intention in relation to the agreement to arbitrate” (*Sulamérica* at [26]). In other words, there is a presumption that the parties intend the law governing the main contract to also govern the arbitration agreement. That presumption may, however, be rebutted by specific factors, such as the terms of the arbitration agreement or the effect of applying the law of the contract to the arbitration agreement (*Sulamérica* at [26]). Where the arbitration agreement is freestanding (i.e. not part of any other contract), there will usually be insufficient basis to find an implied choice of law. In that case the question is which system of law has the closest and most real connection with the arbitration agreement. The choice of the seat of arbitration would then likely be “overwhelming” (*Sulamérica* at [26]) since the courts of the arbitral seat “exercise the supporting and supervisory jurisdiction necessary to ensure that the procedure is effective”.¹³

11 [2017] 3 SLR 357.

12 [2013] 1 WLR 102.

13 *Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi AS v VSC Steel Co Ltd* [2013] EWHC 4071 (Comm) at [101].

[20] These principles are illustrated by *Sulamérica* itself. That case involved two insurance policies expressly governed by Brazilian law, containing arbitration agreements designating London as the arbitral seat. Since Brazilian law governed the main contracts, this suggested an implied choice of Brazilian law to govern the arbitration agreement, but for two factors. First, the parties must have foreseen and intended that the *lex arbitri* (here, English law) would apply to the conduct and supervision of the arbitration, and would likely have intended English law to govern *all* aspects of the arbitration agreement, including matters touching on the formal validity of the agreement and the jurisdiction of the arbitrators (at [29]). Secondly, there was a suggestion that under Brazilian law, the arbitration agreement would be enforceable only with both parties' consent. Since there was no evidence that the parties intended to enter into a one-sided arrangement of that kind, it was doubtful that the parties intended the arbitration agreement to be governed by Brazilian law (at [30]). In the circumstances, the court could not accept that the parties had impliedly chosen Brazilian law to govern the arbitration agreement. Turning to the third step of the analysis, the court determined that the arbitration agreement had the "closest and most real connection with the law of the place where the arbitration [was] to be held and which [would] exercise the supporting and supervisory jurisdiction necessary to ensure that the procedure [would be] effective" (at [32]). English law therefore governed the arbitration agreement.

[21] *Sulamérica* was first analysed locally in *FirstLink Investments Corp Ltd v GT Payment Pte Ltd and others*¹⁴ ("*FirstLink*"), a decision by an assistant registrar ("the AR"). The AR, while adopting the three-step analysis in *Sulamérica*, disagreed with the presumption that the parties intended the law of the contract to also govern the arbitration agreement. He gave three reasons for this:

- (a) It could not always be assumed that commercial parties wanted the same system of law to govern (1) their substantive obligations under the contract; and (2) the resolution of disputes when problems arose. During the breakdown of a commercial relationship, the parties' desire for neutrality would come to the fore and primacy ought to be accorded to the law governing the arbitration (at [13]).

14 [2014] SGHCR 12.

- (b) The parties would generally intend arbitral awards to be binding and enforceable, and would focus their attention on ensuring the validity of the arbitration agreement under the law of the seat so as not to fall foul of Article 23(2)(a)(i) of the Model Law or Article V(1)(a) of the New York Convention (at [14]).
- (c) The *lex arbitri* governed the arbitration, including the supervisory court's powers to determine a jurisdictional dispute in relation to the validity of an arbitration agreement. It was "entirely conceivable" that the parties would want this same system of law to govern the validity of the arbitration agreement, so as to "ensure consistency between the law and the procedure of determining the validity of the arbitration agreement" (at [15]).

[22] The AR therefore decided that the parties would usually have impliedly chosen the *law of the seat* – rather than the law governing the contract – as the law governing the arbitration agreement (at [16]). He accordingly held that, since the parties had elected Sweden as the seat of arbitration, they had also impliedly selected the law of Sweden as the proper law applicable to the arbitration agreement (at [17]).

[23] BCY overruled *FirstLink* in this respect and agreed with *Sulamérica* that the parties would, in the absence of contrary evidence, have intended the law governing the contract to also govern the arbitration agreement. This was supported by both authority (particularly the cases of *Piallo GmbH v Yafriro International Pte Ltd*¹⁵ and *Cassa di Risparmio di Parma e Piacenza SpA v Rals International Pte Ltd*¹⁶ ("*Rals (HC)*") and principle. Chong J (as he then was) responded to the arguments in *FirstLink* as follows:

- (a) When the arbitration agreement forms part of a main contract, it is reasonable to assume that the contracting parties intend their entire relationship to be governed by the same system of law (at [59]). This is not controverted by the doctrine of separability, which "serves the narrow purpose ... of ensuring that any challenge that the main contract is invalid does not, in itself, affect the validity of the arbitration agreement"; it does

15 [2014] 1 SLR 1028.

16 [2016] 1 SLR 79.

not “insulate the arbitration agreement from the substantive contract for all purposes” (BCY at [60] and [61]; *Sulamérica* at [26]). Moreover, though the parties may well have elected the arbitral seat for its neutrality, the *lex arbitri* governs the *procedure* of the arbitration; the application of the substantive legal principles of the seat might not be neutral. In fact, the choice of law governing the main contract might have been driven by a preference for neutrality (at [63]).

- (b) An arbitration agreement would only fall foul of Article 23(2)(a)(i) of the Model Law or Article V(1)(a) of the New York Convention if it was invalid “under the law to which the parties have subjected it or, failing any indication thereon, under the law of [the seat]”. Validity under the law of the seat therefore only arose for consideration if the parties had not (expressly or impliedly) subjected the arbitration agreement to any law. This led inexorably to the question whether the parties had impliedly chosen another law to govern the arbitration agreement (at [64]).

[24] Chong J did not appear to have directly dealt with the third argument in *FirstLink* (see paragraph [21(c)] above), which is in any event unconvincing: the parties’ preference for a single law to govern the entire contract is probably far stronger than their desire for a single law to govern the procedure and substance of the supervisory court’s determination of a jurisdictional objection. BCY affirms *Sulamérica*’s three-step analysis in entirety.

[25] There are some areas of controversy that remain in this area:

- (a) Firstly, the validation principle: “If an international arbitration agreement is substantively valid under any of the laws that may potentially be applicable to it, then its validity will be upheld, even if it is not valid under any of the other potentially applicable laws.” (as expressed by Gary Born). This principle is enshrined in (for example) Swiss law, under which an arbitration agreement is valid so long as it conforms to *any one of* the parties’ chosen law, the law governing the underlying contract, or Swiss law.¹⁷

17 Gary B Born, “The Law Governing International Arbitration Agreements: An International Perspective” (2014) 26 SAclJ 814 at para 66.

The same applies in Spain and Peru.¹⁸ While recognising the parties' intent to enter into an effective and binding arbitration agreement, the validation principle essentially reasons backwards from the desired outcome (i.e. the upholding of the arbitration agreement) to the law which is held to govern that agreement. For that reason, it was rejected by Vinodh Coomaraswamy J in *Rals (HC)* at [89] (“[t]hat ... would be to allow the tail to wag the dog”). Moreover, the validation principle is too blunt a tool to decide between competing systems of law if the arbitration agreement would be valid under all of them. The better approach, though perhaps only a degree removed from the validation principle, is that adopted by the court in *Sulamérica* at [30] and Chong J in *BCY* at [74]: the fact that the arbitration agreement would be invalid under the law of the contract may weigh against the presumption that the parties intended that law to govern their entire relationship. The validation principle is thus imported through the device of the parties' implied intentions into the second step of the *Sulamérica* analysis, but is not determinative, as other factors may be relevant to evidencing the parties' implied choice.

- (b) **Secondly**, the second step of the *Sulamérica* analysis (implied choice) becomes more complicated when the parties have not expressly designated the law governing the contract or the seat of the arbitration. In *BMO v BMP*¹⁹ (“*BMO*”), for example, the main contract did not contain an express choice of law, and the arbitration agreement did not state the arbitral seat but stated only that the SIAC 2013 Rules should apply. Belinda Ang Saw Ean J observed that the parties had elected Vietnamese law for certain contractual provisions and probably did not intend for different laws to govern different parts of the contract. She therefore found that the parties had chosen Vietnamese law to govern the contract, and had therefore *impliedly* chosen Vietnamese law to also govern the arbitration agreement (at [39]). This essentially involved two levels of implication. She also noted, in support of this conclusion, that the parties had not *expressly* chosen an arbitral seat, though Singapore was presumed the seat by operation of

18 “Back to the Future: From *Sulamérica* to FirstLink and Now Back to *Sulamérica*” 22 No 1 IBA Arb News 37 at 39.

19 [2017] SGHC 127.

rule 18.1 of the SIAC Rules 2013 (at [40]). While this decision was reversed on appeal, the reversal related to another point and the CA made no criticism of the holding on governing law.

[26] *FirstLink* also involved an arbitration clause with no stated seat and a main contract with no stated national governing law. The arbitration clause stated simply that disputes would be arbitrated by the Arbitration Institute of the Stockholm Chamber of Commerce (“SCC”), and the contract stated that it was “governed by and interpreted under the laws of Arbitration Institute of the [SCC]”. The AR construed the reference to the SCC as evidence of “an objective intention to elect the *lex arbitri* of Sweden as the curial law applicable to the arbitration”, because section 46 of the Swedish Arbitration Act (1999) extended the application of that Act to arbitral proceedings taking place in Sweden. Having found that the parties had impliedly elected Swedish law as the *lex arbitri*, the AR concluded that they had also impliedly chosen Swedish law to govern the arbitration agreement.

[27] These cases suggest the potential for intersection between the *Sulamérica* analysis and arbitration clauses which border on pathological and/or form part of a main contract with no express governing law. They also illustrate how inferences about the parties’ implied choice of law may grow more tenuous where the substantive law and *lex arbitri* are not already expressly stated.

Stay of proceedings by a non-party

[28] Section 6(1) of the IAA confers standing to apply for a stay only upon “any party to the [arbitration] agreement”. That would seem to imply that a non-party to an arbitration agreement would not have a standing to make an application for a stay. The Singapore courts have held, however, that in the exercise of their case management powers, they may grant a stay of court proceedings in favour of arbitration even though the applicant for the stay was not a party to the arbitration agreement and was not directly involved in the arbitration proceedings.

[29] In the 2017 case of *Gulf Hibiscus Ltd v Rex International Holdings Ltd and another*,²⁰ a shareholders’ agreement had been entered between three

20 [2017] SGHC 210.

parties, *viz*, the plaintiff, a company called RME and another company referred to as Schroder. The shareholders' agreement contained an arbitration clause. The defendants in the law suit were the intermediate holding company of RME and the ultimate holding company of RME. The plaintiff brought proceedings against the defendants on various bases, including legal and factual disputes that arose from alleged breaches of the shareholders' agreement. The defendants applied for a stay of court proceedings on the basis that the claims raised in the suit were premised on or overlapped with the alleged breaches of the shareholders' agreement and should therefore be referred to arbitration in accordance with that agreement. The AR granted the stay and the plaintiff appealed to the judge in chambers. Aedit Abdullah JC (as he then was) upheld the stay. He recognised that the defendants were not parties to the arbitration agreement and therefore had no standing to seek a stay under the IAA. He held, however, that the court could grant a stay pursuant to its inherent case management powers, premised on the "wider need to control and manage proceedings between the parties for a fair and efficient administration of justice" rather than being "predicated on holding parties to any agreement" (at [59]). The judge also held that such a case management stay could be ordered even if the arbitration had not yet been commenced. On the facts, it was correct to stay the Singapore court proceedings on account, amongst other things, of (a) a significant overlap in factual and other issues between the court proceedings and any arbitration; (b) a risk of inconsistent findings in adjudication and arbitration; and (c) likely duplication of witness and evidence in both fora. The stay was, however, subject to two provisos: (1) the defendants who sought a stay must be bound by the findings of fact in any arbitration; and (2) they must also undertake to do all things necessary to enable the relevant disputes to be resolved expeditiously by arbitration.

[30] The above decision was issued in August 2017. It turned out that the provisos were very important. In April 2018, the plaintiff applied for the lifting of the stay on the ground that the conditions had been met for such an application to be made. On April 30, 2018, Aedit Abdullah J ordered that the stay be lifted at the close of business on May 31, 2018 unless arbitration was commenced or another order of court was granted before then. The defendants have appealed against this decision but the appeal has not yet been heard. The reasons for the decision can be found at *Gulf Hibiscus Ltd v Rex International Holding*

Ltd and another.²¹ Basically, the judge found that both sides had not moved the case along through arbitration as expeditiously as possible. The court was entitled to lift the stay in the event of undue delay through the exercise of its general discretion. That discretion flowed from the fact that the stay was imposed in the exercise of the court's case management powers. As a case management stay is imposed by the court pending a particular determination or outcome, the court does not become *functus officio* after the stay is granted and matters arising after the stay may affect its operation and form the material for the court's consideration in deciding whether to lift or maintain the stay. Justice Abdullah pointed out that considering that the overriding objective was one of ensuring the resolution of an extant dispute, the better course would be to lift the stay if no progress was made in resolving that dispute through the alternative dispute resolution process of arbitration.

Limiting the effect of section 10 of the IAA and Article 16 of the Model Law on the right to challenge the jurisdiction of the tribunal

[31] Article 16 of the Model Law sets out the framework relating to the jurisdiction of the arbitral tribunal. Article 16(1) reflects the *kompetenz-kompetenz* principle and states expressly that the arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. Article 16(2) specifies the procedure for challenging the tribunal's jurisdiction. It states, *inter alia*, that a plea that the tribunal does not have jurisdiction must be raised not later than the submission of the statement of defence. Following on that, Article 16(3) sets out how the tribunal should deal with such a plea in that it provides that the tribunal may rule on the plea either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party has 30 days to appeal to the court against that decision. Section 10 of the IAA provides that the appeal shall be to the High Court and thereafter to the CA.

[32] The question that has arisen before the courts is whether a respondent who challenges jurisdiction but does not appeal a ruling on jurisdiction by the tribunal within the specified 30 days can, at a subsequent time after the issue of the final award, rely on the lack of

21 [2019] SGHC 15.

jurisdiction of the tribunal to either set aside the final award or resist enforcement of the final award. The answer to this question depends on whether Article 16(3) and section 10 of the IAA are considered to have preclusionary effect.

[33] The Singapore courts first considered this question, albeit in *obiter*, in *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV and others and another appeal*²² (“*Astro Nusantara*”). This case arose out of an arbitration involving several defendants. During the proceedings, some of the defendants challenged the jurisdiction of the tribunal on the basis that they were not parties to the arbitration agreement. The tribunal, ruling on this plea as a preliminary issue, rejected it. Thereafter, the arbitration continued and resulted in a final award against all the defendants. The claimant sought to enforce the final award in Singapore and the relevant defendants resisted enforcement on the basis that the tribunal had not had jurisdiction over them. The CA agreed that there had not been jurisdiction in respect of these defendants and refused to enforce the final award against them. The question of the preclusive effect of Article 16(3) was not directly relevant as these defendants were not seeking to set aside the final award but only to resist enforcement. The CA did, however, observe that Article 16(3) may have a preclusive effect in respect of the setting aside application. In this regard, the view of Justice G P Selvam in *Tan Poh Leng Stanley v Tang Boon Jek Jeffrey*²³ that the right to request the High Court for a decision on jurisdiction after the tribunal has ruled on jurisdiction as a preliminary issue is only a request that does not bar a challenge by an applicant to set aside the award on the ground of lack of jurisdiction, was cited.

[34] The issue of the preclusive effect of Article 16(3) came up for direct decision in the recent case of *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Service (Private) Limited*²⁴ (“*Rakna*”). The case arose out of a contract between two Sri Lankan parties, whom I shall refer to as RALL and AGMS, for the provision of certain security services in Sri Lanka. Relying on the arbitration clause in the contract, when a dispute between the parties arose, AGMS instituted arbitration proceedings in Singapore under the rules of the SIAC. A three-person

22 [2014] 1 SLR 372.

23 [2000] 3 SLR(R) 847.

24 [2019] SGCA 33.

tribunal was constituted, albeit without the participation of RALL. Subsequent negotiations between the parties resulted in a settlement agreement. RALL then informed the SIAC that the arbitration could not proceed because the dispute had been settled but AGMS disputed this on the basis that RALL was in breach of its obligations under the settlement. The tribunal, by a majority, held that it had jurisdiction notwithstanding the settlement and proceeded with the arbitration. RALL refused to participate in the proceedings. Later the tribunal, again by a majority, issued a final award in favour of AGMS. RALL then applied under Article 34 of the Model Law to set aside the final award and AGMS contended that RALL was precluded from doing so because it had not availed itself of the challenge procedure under Article 16(3) and section 10(3).

[35] In the High Court, the judge accepted the submission made by AGMS and dismissed RALL's application to set aside the award. In his judgment, *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Private) Limited*²⁵ ("GD"), he reasoned that the preclusive effect of section 10(3) and Article 16(3) applied to a party that had stayed away from the arbitral proceedings in the same way as it applied to a party who was participating in the proceedings and had not challenged a ruling on jurisdiction by the tribunal. He observed that all the considerations of finality, certainty, practicality, costs, preventing dilatory tactics and settling the position at an early stage at the seat where the arbitral tribunal has chosen to decide jurisdiction as a preliminary issue militated against allowing a respondent to reserve its objections to the last minute and indulge in tactics which would result in immense delays and costs (GD at [65]–[74]). RALL appealed and this gave the CA the opportunity to consider an issue which had never previously been the subject of a binding decision.

[36] The CA reached the opposite conclusion to that of the judge: it held that the preclusive effect of Article 16(3) did not extend to a respondent who had completely stayed away from the arbitration proceedings. Such a respondent was able, therefore, after the issue of the final award to apply to set it aside on the basis that the tribunal had had no jurisdiction over the matter. In relation to the facts of the case, the CA held that from the date of the settlement the mandate given to the tribunal to decide the dispute between the parties had ended.

25 [2018] SGHC 78.

Accordingly, the award contained decisions that were beyond the scope of the submission to arbitration and RALL was not precluded from applying to set it aside on this basis.

[37] In arriving at its conclusion, the CA considered the opinions of the drafters of the Model Law, those of academics and statements made on an *obiter* basis by judges in earlier cases (which I have referred to earlier). To summarise these, first, the Secretariat of the working party had considered that a party who had not participated in an arbitration at all may still object to jurisdiction at the setting aside stage. It had thereby recognised that a different regime from that set out in Article 16(3) should apply to a non-participating party. Second, in previous cases involving arbitration, although the preclusionary effect of Article 16(3) was not directly in issue, judges had commented that it did not bar a challenge by a non-participating party to set aside an award on the ground of lack of jurisdiction. Third, the CA discussed academic opinion and observed that academics had expressed divergent views on the issue. The CA therefore concluded that the position on the preclusive effect of Article 16(3) was unsettled and had been left by the drafters to the individual national courts to decide in accordance with their own jurisprudence.

[38] The issue being open, the court then reasoned from principle. The backdrop recognised by the CA was that Article 16(3) was adopted in order to effect a compromise between the policy consideration of avoiding wastage of resources and the policy consideration of preventing parties from trying to delay arbitral proceedings by bringing challenges before the court. It reasoned that the requirement of Article 16 that parties to an arbitration bring out their challenges to jurisdiction at an early point of the proceedings presupposes that parties are *before* the arbitral tribunal and that a party to an arbitration agreement who is served with a notice of arbitration by a counterparty has no option but to participate in the ensuing proceedings. The court then noted that when a dispute arises under a contract containing an arbitration agreement, it is the party who wishes to take proceedings to enforce its claim that is obliged to arbitrate pursuant to the general law as enforced by the stay provision (section 6) in the IAA. The counterparty may, of course, defend itself in the arbitration but is under no duty to do so. The law does not compel a respondent against whom arbitration proceedings have been started to take part in those proceedings and defend his position. Such a respondent is perfectly

entitled to keep away from the arbitration and let the opportunity to challenge the tribunal's jurisdiction afforded to him by Article 16 go unutilised, albeit this may be a risky strategy.

[39] The court posed the question as to whether when a non-participating respondent was found to have a valid objection to the tribunal's jurisdiction, that objection should be disregarded because of Article 16(3). Its answer was that in the absence of a clear duty on the respondent to participate in the arbitration proceedings imposed by either the Model Law or the IAA, it was difficult to conclude that a non-participating respondent should be bound by the award no matter the validity of his reasons for believing that the arbitration had been wrongly undertaken. This was especially so since *Astro Nusantara* had established in Singapore that such a respondent would be entitled to resist enforcement of the award on the basis of jurisdiction. Giving Article 16(3) preclusive effect in such circumstances would mean putting a respondent who had justifiable grounds for contesting jurisdiction to the additional cost of having to defend against enforcement of the award in, potentially, many jurisdictions as he would not have been able to procure the setting aside of the award by the supervisory court. A respondent who had a valid reason for not participating at all in the arbitration proceedings would not contribute to wastage of costs because it would have been the claimant's decision to proceed with the arbitration when it should not have.

[40] *Rakna* has, as far as I am aware, broken new ground, at least in common law jurisdictions. So far reaction to the decision has been mixed. One commentary from a law firm has stated that "the possibility that a Respondent could deliberately store up its challenge to jurisdiction for the post-award phase does not appear to be consistent with the policy of the Model Law and suggests that *Rakna* might begin to erode the balance struck by the Model Law and the IAA".²⁶ Another law firm considered that the judgment provided "welcome clarity on the scope of the preclusive effect of Article 16(3) of the Model Law".²⁷ It will be interesting to see how courts in other jurisdictions deal with the issue of the scope of Article 16(3) when the same arises before them.

26 "Boycotting an arbitration – is it an option?", commentary by Linklaters Singapore Pte Ltd posted on *Singapore Law Watch* in July 2019.

27 "Challenging an arbitral tribunal's finding on arbitration", commentary by Ashurst ADTLaw posted in *Singapore Law Watch* in July 2019.

Losing the right to arbitrate – Repudiation and waiver

[41] Earlier, I discussed the right of a defendant to court proceedings to insist that the dispute be submitted to arbitration in accordance with a pre-existing arbitration agreement between the defendant and the claimant in the court proceedings. In *Marty Ltd v Hualon Corp (Malaysia) Sdn Bhd (receiver and manager appointed)*²⁸ (“*Marty v Hualon*”), there was a reversal of this situation: the claimant wanted to arbitrate but the counterparty contended that the claimant’s right to do so had been lost.

[42] Hualon Corp (Malaysia) Sdn Bhd (“Hualon”), acting through its receiver, had started arbitration proceedings against Marty Ltd (“Marty”) (a British Virgin Islands (“BVI”) company) under the auspices of the SIAC pursuant to an arbitration clause in the company charter of a Vietnamese company that provided that disputes between members of the company should first be resolved through negotiation and conciliation, and if this could not be done “the disputes shall be submitted by any Party for final settlement to Singapore International Arbitration Centre (SIAC) in accordance with the Rules of laws of SIAC”. Both Hualon and Marty were members of the Vietnamese company and bound by its charter. Marty challenged the jurisdiction of the tribunal and when the tribunal rejected the challenge, Marty renewed it in court. It asserted that Hualon had either waived its right to arbitrate or had repudiated the same by commencing a law suit against Marty.

[43] The facts giving rise to the contentions of repudiation and waiver were that, in July 2014, some years after his appointment, the receiver had procured the commencement of a suit by Hualon against Marty in the courts of the British Virgin Islands (“the BVI action”) claiming, *inter alia*, that certain transfers of shares in the Vietnamese company to Marty were invalid and that those shares belonged to Hualon. At the same time, Hualon obtained an injunction from the BVI court which restrained Marty from disposing of the disputed shares. Marty responded to these proceedings by asserting that the BVI court was *forum non conveniens* and the BVI action should be stayed in favour of the courts of Malaysia or, alternatively, Vietnam. This jurisdictional challenge was dismissed by the BVI court in February 2015. Shortly

28 [2018] 2 SLR 1207.

thereafter, Hualon's receiver "discovered" the arbitration clause and, in March 2015, Hualon filed its notice of arbitration with the SIAC. It proposed that the BVI action be stayed pending the outcome of the arbitration but took no concrete steps to effect a stay at that point. On March 26, 2015, Marty applied for summary judgment in the BVI court or for the BVI action to be struck out. Some weeks later, on April 20, 2015, Hualon applied to the BVI court to stay the BVI action pending the arbitration. This application was heard on May 18, 2015 and judgment was reserved. In October 2015, Hualon applied for an extension of its interim injunction but the same was later discharged on Marty's application. Subsequently, an order was made by the BVI court for security for Marty's costs to be provided by Hualon. In the event, Hualon did not meet the deadline for such provision and the BVI action was struck out on March 22, 2016.

[44] It was against this backdrop that Marty challenged the tribunal's jurisdiction. The tribunal dismissed this challenge on April 19, 2016, leading to an application by Marty to the High Court to decide the question of jurisdiction pursuant to the provisions of section 10(3) of the IAA. Among other arguments, Marty contended that Hualon had waived its right to arbitrate and, further, had committed a repudiatory breach of the arbitration clause which Marty had accepted. The High Court judge rejected both arguments.²⁹ In relation to the waiver argument, she held that a party in the position of Hualon (i.e. a party who had wrongly started court litigation) could never waive its right to arbitrate. Hualon was the party in breach of the arbitration clause and in that sense the wrongdoer, whereas only an innocent party could waive its rights by election. In any event, on the facts, Hualon had not waived its right to arbitration because it did not have actual knowledge of the arbitration clause at the material time. On the other argument, while the judge accepted that Hualon had breached the arbitration agreement by commencing the BVI action, she held that this was not a repudiatory breach. Hualon had only commenced litigation because it was not aware of the arbitration clause and thus did not possess the necessary repudiatory intent. In any event, Marty had not accepted the breach because it had not taken steps in the BVI court proceedings.

29 *BMO v BMP* [2017] SGHC 127.

[45] Marty successfully renewed its challenge on appeal to the CA. The CA decided³⁰ that Hualon had evinced repudiatory intent when it started the BVI proceedings and made contentions in its statement of claim which indicated that it had disavowed the charter of the Vietnamese company, including the arbitration clause contained therein. On the question of acceptance, the CA held that acceptance had to lie in accepting the BVI court's jurisdiction and engaging the BVI action on the merits. Marty's jurisdictional challenge was not such an engagement but its later application for summary judgment in its favour or to strike out Hualon's action did engage the jurisdiction of the BVI court because it requested the BVI court to determine the claim on the merits. This was therefore an acceptance of Hualon's repudiation. Thus the CA held that Hualon had lost its right to have the dispute decided by arbitration.

[46] This decision was notable because it departed from many earlier authorities on the repudiatory effect of the commencement of court proceedings by a party in breach of an arbitration agreement. Hitherto, the view taken was that commencement of court proceedings could not in itself be regarded as repudiating an obligation to arbitrate. In contrast, in *Marty v Hualon*, the CA considered it strongly arguable that the commencement of court proceedings was itself a *prima facie* repudiation of the arbitration agreement.³¹ This was a step further than that taken by counsel for Marty who was content to put his case on the basis that the commencement of the BVI action was not sufficient in itself to amount to repudiation and that what was required for repudiation was that the court case be maintained without qualification.

[47] In coming to its conclusion, the CA was influenced by principles of party autonomy and holding parties to the bargain that they had freely chosen to make. The CA explained its reasoning this way:³²

54 ... This is because parties who enter into a contract containing an arbitration clause can reasonably expect that disputes arising out of the underlying contract would be resolved by arbitration and indeed have a contractual obligation to do so. Thus, where court proceedings are commenced without an accompanying explanation

30 *Marty Ltd v Hualon Corp (Malaysia) Sdn Bhd* [2018] 2 SLR 1207.

31 *Ibid*, at [54].

32 *Ibid*.

or qualification and the relief sought will resolve the dispute on the merits, the defending party in the court proceedings is entitled to take the view that the party who commenced those proceedings (“the claimant”) no longer intends to abide by the arbitration clause. It would, however, still be open to the claimant to displace this *prima facie* conclusion by furnishing an explanation for commencement of the court proceedings, either on the face of the proceedings themselves or by reference to events and correspondence occurring before the proceedings started which showed objectively that it had no repudiatory intent in doing so. But in the absence of any explanation or qualification, the commencement of court proceedings in the face of an arbitration clause is, in our view, sufficient to constitute a *prima facie* repudiation of the arbitration agreement.

[48] The CA found support for this view in the English case of *Sadrudin Hashwani v Nurdin Jivraj*³³ which held that by actively relying on an arbitration clause in one agreement the claimant had repudiated the arbitration clause in another relevant contract. The court was aware, however, that there were a number of authorities which had expressed the opposite view. It noted that many of these authorities were not strong because of the lack of legal argument on the point. The cases that more strongly supported the view that commencement of legal proceedings *per se* is insufficient to amount to the repudiation of an arbitration agreement, relied on the case of *The Mercanaut*,³⁴ a 1980 decision of the English High Court.

[49] The CA considered the facts and the reasoning of *The Mercanaut* in some detail and concluded that the reasoning there was thin. In that case, charterers of a ship had commenced arbitration proceedings against the shipowners but were unsure if arbitration or litigation was the right course of action. Subsequently, due to the imminent expiry of a limitation period, the charterers commenced court proceedings. It was argued that by so doing the charterers had repudiated the arbitration agreement. Lloyd J rejected this argument, finding that because it was clear that the charterers only started court proceedings due to the shipowners’ refusal to extend the limitation period, no reasonable person would have thought that by doing so they had intended to repudiate the arbitration agreement. That reason was sufficient for

33 [2015] EWHC 998 (Comm).

34 *Rederi Kommanditselskaabet Merc-Scandia IV v Couniniotis SA (The Mercanaut)* [1980] 2 Lloyd’s Rep 183.

the decision but Lloyd J went further to state that commencement of proceedings on their own could never be evidence of a repudiatory intent. The judge relied on the well-established principle that a party can only be found to have repudiated a contract if he had evinced an intention not to be bound and, if such intention was inferred from conduct, this conduct had to be clear and unequivocal. To the CA in *Marty v Hualon* this declaration implied that Lloyd J thought that issuing court proceedings would be equivocal as to a party's attitude towards the arbitration clause that bound it, and thus such an unequivocal intention could not be inferred. The CA doubted³⁵ whether that approach was correct in general terms because the party to a contract that contained an arbitration clause was entitled to expect that disputes arising out of the said contract be arbitrated. Thus, if court proceedings rather than arbitration proceedings were commenced by the claimant, it would be expected that the claimant would either furnish an explanation for doing so or qualify the scope of the court proceedings or the relief sought. The failure to take any such steps would lead naturally to the inference that the claimant no longer intended to be bound by the arbitration agreement. It would be noted that the facts of *The Mercanaut* were very different in that the charterers had already commenced arbitration proceedings and were compelled by the rapidly approaching time bar to file a claim in court to preserve their claim. In such a situation, commencement of action could hardly indicate an unequivocal intention to engage on the arbitration and the shipowners would have known so from the outset.

[50] The view taken by the CA as to the repudiatory nature of starting court proceedings was not applied in the case itself as *Marty* had not relied on this position. It is clear that in the future, however, the CA will decide cases on the basis that the commencement of court proceedings *per se* by a party who is subject to an arbitration agreement is *prima facie* repudiatory of such party's obligations under that agreement. It remains to be seen whether courts in other jurisdictions will take the same view or would prefer the position enunciated in *The Mercanaut*. The latter position has long been accepted as the law by academic writers and judges in other jurisdictions without, it has to be said, much analysis. The Singapore courts have thus sailed into uncharted waters.

³⁵ *Marty v Hualon* at [60].

[51] Having decided the appeal in *Marty v Hualon* on the basis of repudiation, the CA did not decide whether the doctrine of waiver by election applied. It expressed some doubt about the correctness of the holding that a party in Hualon's position could never have waived its right to arbitrate. The judge had considered that waiver by election could only be asserted by the innocent party and Hualon was not such a party as it was in breach of the arbitration clause. The CA observed that while waiver by election typically involved a response by the "waiving" party to the other party's breach of contract, this need not always be the case, since there might be situations in which there was no breaching or innocent party. However, where a party to an arbitration agreement breached that agreement by starting court proceedings, there was a thorny issue as to whether the party in breach could be said to have waived the right to arbitration by asserting his right to go to court, because it could be thought that by entering into the arbitration agreement, the contract breaker had given up his right to go to court.³⁶ The CA did not go further into this issue as it was not necessary for its decision in the case. It may be doubted whether the doctrine of waiver would have much attraction for parties in Singapore in the future since there is now a robust doctrine of repudiation in such situations.

Court assistance to arbitration proceedings

[52] Both the IAA and the legislation covering domestic arbitration proceedings, the Arbitration Act,³⁷ contain provisions empowering the court to assist arbitration proceedings. Court assistance serves an important function when the arbitral tribunal has not been constituted or has no power to grant or enforce certain measures. The court has power to grant interim measures, in particular injunctions, under section 12A of the IAA and under section 31 of the Arbitration Act. The powers conferred by the sections are similar.

[53] The court's power to grant interim measures in assistance of international arbitration is contained in section 12A of the IAA, which reads:

³⁶ Ibid, at [93], [95] and [96].

³⁷ Cap 10, 2002 Rev Ed.

Court-ordered interim measures

- 12A. (1) This section shall apply in relation to an arbitration —
- (a) to which this Part applies; and
 - (b) *irrespective of whether* the place of *arbitration* is in the territory of *Singapore*.
- (2) Subject to subsections (3) to (6), for the purpose of and in relation to an arbitration referred to in subsection (1), the High Court or a Judge thereof shall have the *same power of making an order* in respect of any of the matters set out in section 12(1)(c) to (i) *as it has for the purpose of and in relation to an action or a matter in the court*.
- (3) The High Court or a Judge thereof may refuse to make an order under subsection (2) if, in the opinion of the High Court or Judge, the fact that the place of arbitration is outside Singapore or likely to be outside Singapore when it is designated or determined makes it inappropriate to make such order.
- (4) If the case is *one of urgency*, the High Court or a Judge thereof may, on the application of a party or proposed party to the arbitral proceedings, make *such orders* under subsection (2) as the High Court or Judge thinks necessary *for the purpose of preserving evidence or assets*.
- (5) If the case is *not one of urgency*, the High Court or a Judge thereof shall make an *order* under subsection (2) *only* on the *application* of a party to the arbitral proceedings (upon notice to the other parties and to the arbitral tribunal) *made with the permission of the arbitral tribunal or the agreement in writing of the other parties*.
- (6) In every case, the High Court or a Judge thereof shall make an order under subsection (2) *only* if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively.
- (7) An order made by the High Court or a Judge thereof under subsection (2) shall cease to have effect in whole or in part (as the case may be) if the arbitral tribunal, or any such arbitral or

other institution or person having power to act in relation to the subject-matter of the order, makes an order which expressly relates to the whole or part of the order under subsection (2).

(Emphasis added.)

[54] Section 12A was part of the 2010 amendments to the IAA, and was intended to replace the now repealed section 12(7) of the IAA. Section 12A made two notable changes to the earlier law. First, the court was given jurisdiction to grant relief in favour of foreign arbitral proceedings, i.e. arbitrations not seated in Singapore. The CA had held that the previous section 12(7) of the IAA did not give the court jurisdiction to do so.³⁸ The current section 12A(1) states that it applies “irrespective of whether the place of arbitration is in the territory of Singapore”. Second, it clarifies the relationship between the courts and the arbitral tribunals and demarcates the situations in which the courts should render assistance.

[55] Under section 12A of the IAA, the court is empowered to grant interim measures in respect of certain matters. These matters are listed in section 12(1)(c) to (i) of the IAA and include, among other things, the giving of evidence by affidavit; the preservation, interim custody or sale of any property forming the subject-matter of the dispute; preservation of evidence; and an interim injunction or any other interim measure.

[56] The statutory framework can be broken up into three main questions for the court:

- (a) First, does the arbitral tribunal or any other entity vested with powers by the parties have the power and ability to act at the material time to grant the interim measure sought? If so, the court cannot grant such measures: section 12A(6) of the IAA. This is an initial jurisdictional threshold that has to be crossed.
- (b) Second, is the case urgent? If so, the court can make an order on the application of only one party to the arbitration proceedings if it thinks it necessary to preserve evidence or assets. If not, the court can only make an order if one party applies (i) with notice to the other parties and the tribunal; and (ii) with the

³⁸ *Swift-Fortune Ltd v Magnifica Marine SA* [2007] 1 SLR(R) 629 at [59].

tribunal's permission or the written agreement of the other parties: section 12A(4) and (5) of the IAA.

- (c) Third, even if the court has the power to grant the interim measure, it may refuse to do so if it is inappropriate to make such an order because the place of arbitration is outside Singapore or likely to be outside of Singapore: section 12A(3) of the IAA.

[57] The consideration of these issues signals a concern with undue court interference with the tribunal's powers and jurisdiction over the arbitration. The court only renders assistance where the tribunal cannot do so and even then only with the tribunal's permission or the parties' agreement. In such cases, the matter is less controversial as the court is clearly acting with the knowledge and blessing of the tribunal and the parties. Where the case is urgent, however, the court has the power to act on only one party's application and without the tribunal's permission. The requirement of urgency in section 12A(4) and the further requirement that the court must think the interim measure necessary for the preservation of evidence and assets were stressed in *Five Ocean Corp v Cingler Ship Pte Ltd (PT Commodities & Energy Resources, intervener)*³⁹ ("*Five Ocean Corp*"). In that case, the plaintiff chartered a ship from the shipowners and the defendant sub-chartered the ship from the plaintiff. The defendant became insolvent and failed to pay freight. It did not respond to a notice to arbitrate issued by the plaintiff and the plaintiff then applied in the High Court for an interim sale of the cargo aboard the ship, asserting a contractual lien over the same. However, the cargo did not belong to the defendant and, being on the ship, was in the possession of the shipowners rather than the plaintiff. Thus, the novel question that arose was how the plaintiff could exercise its lien over the cargo if the defendant had no ownership and the plaintiff had no physical possession of the cargo. Belinda Ang J concluded that the plaintiff's contractual right was manifested as a right to "*detain possession of the cargo*", which was similar in effect to the security interest of a lien (at [46]). Presumably, because of its similarity to a security interest which was an interest exercisable against property, Ang J found that the plaintiff's right to retain possession and prevent discharge was an asset capable of being preserved under section 12A(4) of the IAA.

39 [2016] 1 SLR 1159 at [41].

The situation was accepted as urgent, the urgency arising from the fact that cargo aboard a vessel was deteriorating in condition and there was a non-negligible risk of its value diminishing over time. Thus preservation of its value justified an urgent application for sale pending the constitution of the arbitral tribunal.

[58] The meaning of “assets” in section 12A(4) of the IAA is fairly settled in Singapore law and the leading case is *Maldives Airports Co Ltd and another v GMR Male International Airport Pte Ltd*⁴⁰ (“*Maldives Airports*”). In *Maldives Airports*, the Maldivian Government had granted a 25-year concession agreement to the respondent for the respondent to operate the airport. Following a change in government, the new Maldivian Government claimed that the agreement was void or frustrated and gave the respondent seven days to vacate. The respondent commenced arbitration proceedings with Singapore as the agreed seat and sought an injunction to prevent the Maldivian Government from taking possession of the airport. The High Court judge granted the injunction but the CA set it aside because it did not consider the balance of convenience to lie in favour of the grant of an injunction.

[59] The CA considered whether the respondent’s contractual rights under the agreement were “assets” capable of preservation under section 12A(4). It held that “assets” in this subsection included choses in action such as contractual rights, but only those which, if lost, would not be adequately remediable by an award of damages. In other words, a qualifying chose was likely to have been specifically enforceable at the suit of the contracting party. Therefore, the respondent’s right to be given proper notice before termination and its right to have disputes arbitrated, being remediable by damages, were not assets capable of preservation (at [49]). However, its right to exclusive occupation under the lease in the agreement, being an interest in land, was an asset capable of preservation under section 12A(4) of the IAA (at [51]).

[60] In holding so, the CA rejected the wider position suggested by the English Court of Appeal that “assets” (in the English equivalent of this subsection – section 44(3) of the English Arbitration Act) referred to all choses in action. Clarke J, in *Cetelem SA v Roust Holdings Ltd*,⁴¹ found that there was no reason to limit the types of choses in action

40 [2013] 2 SLR 449.

41 [2005] EWCA Civ 618.

given the existing limitations on the court's power, namely, that the case be urgent and the order be necessary (at [57]). The CA thus drew a distinction between contractual rights adequately remediable by damages and rights that are not. To put it another way the distinction was between (i) rights that would ordinarily be preserved through specific performance or an injunction; and (ii) rights whose breach would give rise to a secondary obligation to pay damages.

[61] The Singapore court can also exercise powers outside of section 12A to support arbitration proceedings. The most frequently utilised of these powers is the power to grant a stay and make related orders under sections 6 and 7 of the IAA. In this connection the court has often been asked to grant a permanent anti-suit injunction to restrain parties to arbitration agreements or proceedings from pursuing foreign litigation in breach of the arbitration agreement. In *R1 International Pte Ltd v Lonstroff AG*,⁴² the applicant sought an anti-suit injunction to restrain the defendant from pursuing Swiss court proceedings. It succeeded in obtaining an interim injunction of this nature and sought to make it permanent. The High Court found that the arbitration clause had not been incorporated into the contract between the parties, but if it had, the court's power to grant permanent anti-suit injunctions supporting international arbitrations was not derived from section 12A of the IAA because that section only provided for interim injunctions. It stemmed from section 4(10) of the Civil Law Act, which states:

Injunctions and receivers granted or appointed by interlocutory orders

- (10) A Mandatory Order or an injunction may be granted or a receiver appointed by an interlocutory order of the court, either unconditionally or upon such terms and conditions as the court thinks just, in all cases in which it appears to the court to be just or convenient that such order should be made.

[62] On appeal, the CA found that the arbitration clause had been incorporated and granted the anti-suit injunction, although it did not discuss the court's power to grant such injunctions and the attendant requirements (*R1 International Pte Ltd v Lonstroff*).⁴³ In a more recent case by the High Court, *Hilton International Manage (Maldives) Pvt Ltd v*

42 [2014] 3 SLR 166.

43 [2015] 1 SLR 521 at [77].

Sun Travels & Tours Pvt Ltd,⁴⁴ the plaintiff (Hilton) sought a permanent anti-suit injunction against the defendant (Sun), who had commenced Maldivian court proceedings after an arbitration proceeding between the parties had concluded and partial and final awards (the “Awards”) had been rendered. In determining whether the court should grant the injunction, it noted the following:

- (a) The court’s power to grant permanent anti-suit injunctions stemmed from section 18(2) read with paragraph 14 of the First Schedule to the Supreme Court of Judicature Act,⁴⁵ which gave the court power to “grant all reliefs and remedies at law and equity” (at [43]).
- (b) Article 5 of the Model Law did not limit the court’s power to grant the permanent injunction as this was not a matter regulated by the Model Law. This was especially so if the arbitration proceedings had concluded, as there would be no concern over excessive judicial interference in ongoing arbitral proceedings (at [46]).
- (c) Where proceedings were brought in breach of an arbitration agreement, the supervisory court would readily grant an anti-suit injunction to restrain such proceedings, provided the application was made without delay and the foreign action was not well-advanced (at [48]).

[63] The novel question in the case was whether foreign court proceedings could be said to be in breach of the arbitration agreement when the arbitration had already concluded, or, in other words, whether the negative obligation not to seek relief in any other forum except arbitration in an arbitration agreement continued even after the entire arbitration had concluded. Belinda Ang J chose to characterise this as a breach of a second negative obligation in an arbitration agreement, namely the obligation not to set aside or otherwise attack an arbitral award in jurisdictions other than the seat of the arbitration (at [54]). This could also amount to an abuse of the foreign court process and be vexatious and oppressive conduct. In such cases, however, she stated that the court ought to be more circumspect in deciding

44 [2018] SGHC 56.

45 Cap 322, R5, 2014 Rev Ed.

whether to grant a permanent anti-suit injunction, since the question as to whether the foreign proceedings were an abuse of process was primarily a matter for the foreign court to determine.

[64] This case provides a few issues for thought, such as the extent to which Article 5 of the Model Law restricts the court's powers to intervene to support international arbitration. It also explores the various obligations that can arise from an arbitration agreement, and how and to what extent the court should intervene to enforce these obligations. Finally, because of the delay in the plaintiff's application, the court did not issue an anti-suit injunction but rather an injunction preventing the defendant from relying on the judgment obtained from the civil proceedings that it had commenced in the Maldives.

[65] The case then went on appeal. The CA in *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd*⁴⁶ set aside the order for an injunction, characterising it as an anti-enforcement injunction. The basis of the setting aside was that due to considerations of comity and equity, an anti-enforcement injunction applied for *after* the issuance of a court judgment, should only be issued in exceptional circumstances. The considerations behind this principle were that such an injunction would preclude other foreign courts from considering whether the judgment in question should be recognised and enforced and, secondly, it would be an indirect interference with the execution of the judgment in the jurisdiction where the judgment was given and where the judgment can be expected to be obeyed.⁴⁷ The CA did observe, however, that in normal cases involving an arbitration agreement it would suffice to show that there was a breach of such an agreement, and anti-suit relief would ordinarily be granted unless there were strong reasons not to, provided it was sought promptly and before the foreign proceedings were too advanced.⁴⁸

[66] The CA also upheld the declarations granted by the High Court which declared that the Awards were final, valid and binding on the parties and that Sun's claim in the Maldivian suit was in respect of disputes between Sun and Hilton that had arisen out of the contract between them and any consequential proceedings would be in breach

46 [2019] 1 SLR 732; [2019] SGCA 10.

47 *Ibid*, at [114].

48 *Ibid*, at [68].

of the arbitration agreement. The CA observed specifically that the court's power to grant declaratory relief (derived from section 18 of the Supreme Court of Judicature Act read with paragraph 14 of the First Schedule thereof) applied in all cases including proceedings in the context of arbitration.⁴⁹ It noted that the first declaration reiterated section 19B of the IAA and confirmed the finality, validity and binding nature of the Awards and the second was appropriate to signify that Sun had breached the arbitration agreement by instituting civil proceedings in the Maldivian courts when arbitration awards on the same dispute had already been issued. The CA considered that the declaratory orders served to uphold the integrity of the arbitration agreement and the Awards issued on the basis of that agreement.⁵⁰ In this way, the CA signified its support for arbitration proceedings even though it was not in a position to impose the requested injunction.

Conclusion

[67] As can be seen from this brief survey of some recent decisions, over the past few years, the Singapore courts have been presented with a number of interesting issues arising out of arbitration proceedings and the Model law. In some cases, the courts have followed well-laid out paths but in others they have struck out in new directions. As the arbitration industry in Singapore develops further, no doubt the courts will be presented with new challenges and new opportunities to develop the law in this area.

49 *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732; [2019] SGCA 10 at [133].

50 *Ibid*, at [141]–[142].

Towards “Bold and Innovative” Civil Justice Reforms: The Civil Justice Commission’s Proposed Rules of Court

by

Justice Tay Yong Kwang*

Introduction

[1] In 2015, Singapore’s Chief Justice Sundaresh Menon announced at the Opening of the Legal Year that he had constituted a Civil Justice Commission (“CJC”) with a mandate that “will not be confined to reform but will extend to considering transformational changes to the litigation process aimed at reducing the costs of litigation, enhancing efficiency and effecting modernisation”.¹ The Chief Justice also envisaged that the CJC would examine issues such as:²

- (a) The simplification of the Rules of Court;
- (b) The elimination of time consuming and costs-wasting procedural steps;
- (c) The avoidance of outdated language while preserving established legal concepts;
- (d) Leveraging on advancements in information technology; and
- (e) Allowing greater judicial control of the litigation process to ensure the proportionate conduct of litigation.

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1 Chief Justice Sundaresh Menon, *Response at the Opening of Legal Year 2015* at [45], available online: Supreme Court of Singapore website, <[https://www.supremecourt.gov.sg/docs/default-source/default-document-library/media-room/response-by-cj--opening-of-the-legal-year-2015-on-5-january-2015-\(final\).pdf](https://www.supremecourt.gov.sg/docs/default-source/default-document-library/media-room/response-by-cj--opening-of-the-legal-year-2015-on-5-january-2015-(final).pdf)> (accessed on April 17, 2019).

2 Ibid.

He expected the CJC's recommendations to be "both bold and innovative".³

[2] The CJC submitted its report⁴ ("CJC Report") and proposed rules of court⁵ ("CJC Rules") on December 29, 2017 with the hope that its "humble efforts will go some way towards fulfilling the Chief Justice's expectations".

[3] This article seeks to provide a quick overview of the main features in the CJC Report and in the CJC Rules as they stood on December 29, 2017. There has been a public consultation since that date and the CJC Rules are in the process of being modified after taking into consideration the views expressed in the public consultation. As the process is ongoing, this article does not reflect the modifications that are being considered. In essence, the CJC Rules empower the court to do what is right in each case so long as what the court does is not contrary to law. As explained in the CJC Report:⁶

The key to the new Rules that the Civil Justice Commission ("CJC") proposes is the liberty to do right for each case. The Court and the parties are guided by the spirit of the rules, not shackled by the letter of the law. The hope is that no one will be denied justice because of accidental procedural flaws committed in the course of litigation or due to the perceived lack of a procedure for dealing with a particular problem that has arisen before the courts.

[4] When applying the CJC Rules, the parties in litigation and the court will not need to refer to foreign rules or procedural case law. There will be no need for time consuming and costs-incurring research to trace the provenance of rules.⁷ This is because the CJC Rules represent a fresh new approach tailored for local litigation and the proposed procedures are not rooted in or inspired by any foreign experience.⁸

3 Ibid, at [46].

4 Civil Justice Commission Report, available online: Supreme Court of Singapore website, <<https://www.supremecourt.gov.sg/Data/Editor/Documents/Annex%20Civil%20Justice%20Commission%20Report.pdf>> ("CJC Report") (accessed on April 17, 2019).

5 Proposed Rules of Court, available online: Supreme Court of Singapore website, <<https://www.supremecourt.gov.sg/docs/default-source/default-document-library/media-room/annex-d0c443533f22f6eceb9b0ff0000fcc945.pdf>> ("CJC Rules") (accessed on April 17, 2019).

6 CJC Report, n 4 above, p 1 at [1].

7 Ibid, at [3].

8 Ibid.

Instead, the parties and the court will be guided by a prescribed set of ideals akin to constitutional principles. Chapter 1 Rule 3 of the CJC Rules states:⁹

- (1) These Rules are to be given a purposive interpretation.
- (2) These Rules seek to achieve the following Ideals in civil procedure:
 - (a) Fair access to justice;
 - (b) Expeditious proceedings;
 - (c) Cost-effective work proportionate to –
 - (i) the nature and importance of the action;
 - (ii) the complexity of the claim as well as the difficulty or novelty of the issues and questions it raises; and
 - (iii) the amount or value of the claim;
 - (d) Efficient use of court resources; and
 - (e) Fair and practical results suited to the needs of the parties.
- (3) The Court shall seek to achieve the Ideals in all its orders or directions.
- (4) All parties have the duty to assist the Court and to conduct their cases in a manner which will help to achieve the Ideals.

[5] This paper does not propose to examine the CJC Rules at length. Instead, it seeks to discuss how the Rules are meant to function individually and as part of a new approach to civil litigation. Some of the salient features of the Rules will be highlighted here.

Changing litigants' and lawyers' mindsets and attitudes

[6] At present, it is not uncommon for parties to adopt a “sue first, talk later” kind of approach to any dispute. This usually entails using the litigation process as a means to either compel the other party to respond or to obtain evidence from the other party to bolster one’s own case. The CJC Rules are structured in the hope of bringing about a change in attitude towards disputes and conflicts by signalling clearly to a party contemplating litigation and his lawyer that:

⁹ CJC Rules, n 5 above, at p 17.

- (a) The potential plaintiff (now called a claimant) should, before stepping into the litigation arena, contemplate and use other avenues to resolve the dispute and to sue only as a matter of last resort;
- (b) When it is clear that the dispute cannot be resolved other than by litigation, the potential claimant should be confident about proceeding on the strength of his own case and should not sue in the hope of discovering and then capitalising on any weakness of his opponent;
- (c) He must realise that there could be a fixed amount of costs to pay the other party if he fails in his court action, particularly when he makes unrealistic claims for high amounts. Similarly, he will not get extra costs by prolonging the litigation unreasonably. In the same vein, the defendant who knows that his defence will probably not succeed should try to reach an early resolution of the dispute and not try to delay by denying liability. He must realise that there could be a fixed amount of costs to pay even if he decides subsequently to concede and to agree to judgment before trial. Further, if he prolongs the litigation unreasonably, the court could penalise him by making him pay more than the fixed amount of costs; and
- (d) All parties in litigation must expect that the court will take control of the case once it is filed in court and will move the case through the litigation process expeditiously.

[7] To achieve these objectives, Chapter 3 Rule 1(1) prescribes a duty for the parties to consider amicable resolution of their disputes by any non-litigation means before the commencement and during the course of any action.¹⁰ The court will be empowered to order the parties to undergo a non-litigation method of resolution in special cases¹¹ or may make appropriate costs orders¹² if it is not satisfied that the duty has been discharged properly.

[8] Upon the commencement of civil proceedings, the parties can expect to go through the process depicted by the following flowchart overleaf.¹³ The court will take control almost immediately after an

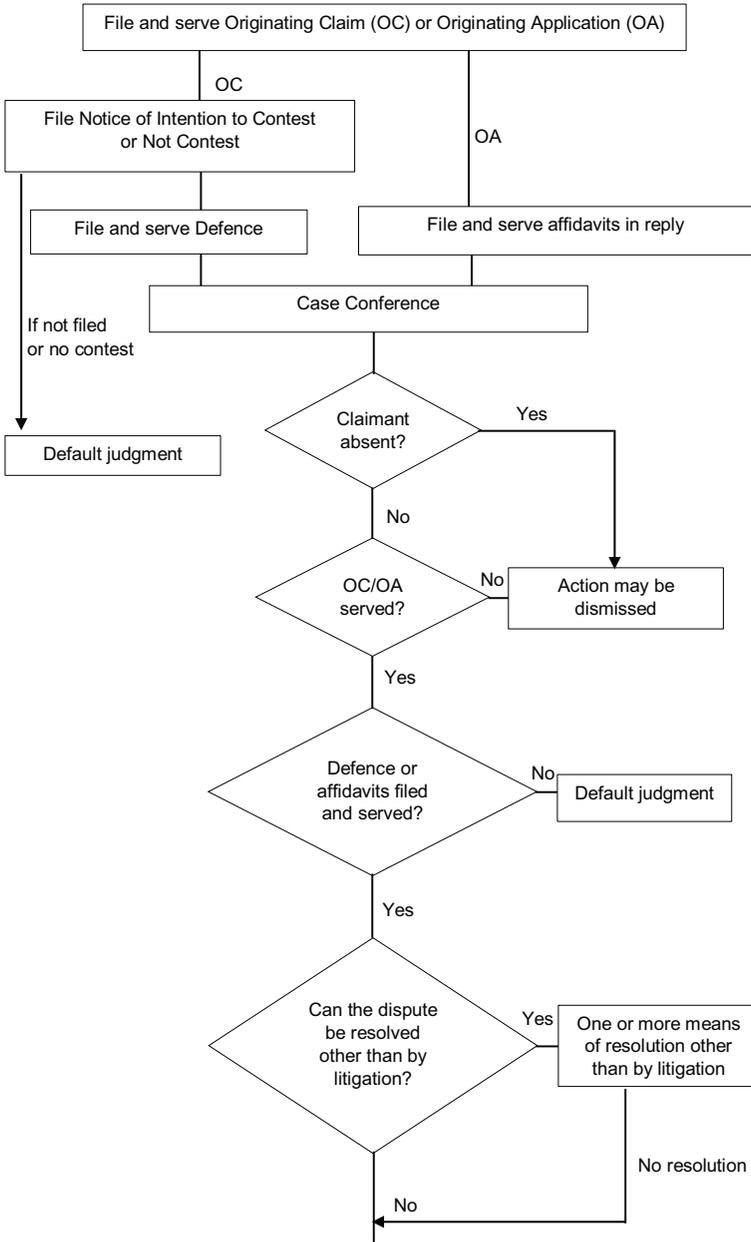
10 CJC Rules, *ibid* n 5, at p 30.

11 *Ibid*, at p 30, Ch 3 r 3.

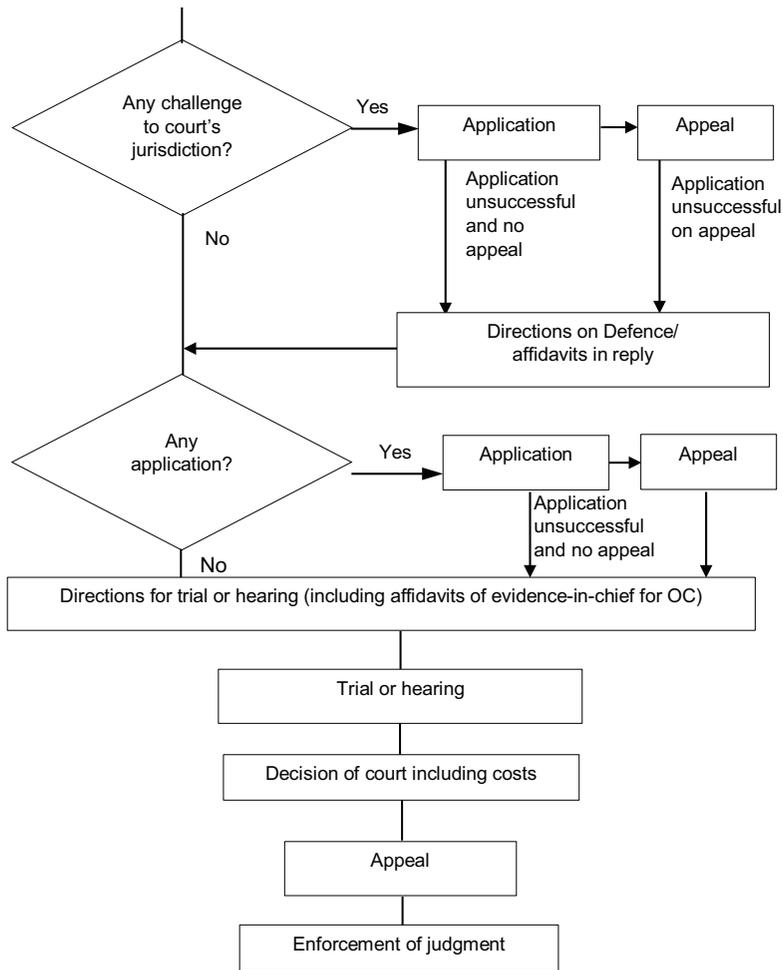
12 *Ibid*, at pp 133 and 137, Ch 16 rr 2(2)(a) and 5(c).

13 *Ibid*, at pp 14–15. This assumes that the court does not make any orders under Ch 7 r 7.

action is commenced instead of leaving the parties to determine the pace and the intensity of the proceedings. Asserting such judicial control “ensures that disputes do not become procedural skirmishes which waste time and costs and often do not bring the parties any closer to the main battlefield”.¹⁴



14 CJC Report, n 4 above, p 2 at [6].



Pre-trial

[9] The Case Conference is one of the centrepieces of the CJC Rules. It is the “command centre” where the court sets the timelines and the tone of the proceedings.¹⁵ For instance, the court determines the number of applications that the parties can file and when the parties can file them. Chapter 7 Rule 8(2) of the CJC Rules prescribes that “[a]s far as possible, the Court shall order a single application pending trial to be made by each of the parties”,¹⁶ with Rule 8(7) making it clear that

15 CJC Rules, n 5 above, at p 46, Ch 7 r 2.

16 Ibid, at p 48.

“[n]o application may be taken out by any party at any time other than as directed at the Case Conference or with the Court’s approval” except certain enumerated applications, such as an application for an injunction.¹⁷ In other words, the court’s approval is required to file further applications beyond those directed at a Case Conference. Further, to avoid scheduled trials being disrupted or even adjourned, Chapter 7 Rule 8(10) provides that, as a general rule, no application can be taken out within 14 days before the commencement of the trial and until the court has determined the merits of the action.¹⁸ Similarly, there is to be no amendment of pleadings within 14 days before the commencement of the trial except in a special case.¹⁹

[10] In appropriate cases, affidavits of evidence-in-chief are ordered before any application is taken out. Chapter 7 Rule 7(1) provides that:²⁰

... after pleadings have been filed and served but before any exchange of documents, the Court may, in any particular case or class of cases, order the parties to file and serve their list of witnesses and the affidavits of evidence-in-chief of all or some of the witnesses.

[11] Discovery of documents (now referred to as production of documents in the CJC Rules), which takes up a disproportionate amount of time, energy and costs, will be curtailed. Chapter 8 Rule 1(1) lays down the principle that “a claimant is to sue and proceed on the strength of his case and not on the weakness of the defendant’s case”.²¹ Unless the parties agree or the court otherwise orders, there will be no general discovery and parties will have to disclose all documents which they will be relying on for their case.²² Parties may not seek production of “train of inquiry” documents.²³ The test is one of materiality, i.e. the requesting party must properly identify a specific document and show that it would be material to the issues in the case before the court will consider ordering its production.²⁴ Parties are also generally prohibited from seeking production of any document that is part of a party’s internal correspondence, whether

17 Ibid, at p 49.

18 Ibid, at p 50.

19 Ibid, at p 52, Ch 7 r 13(3).

20 Ibid, at p 48.

21 Ibid, at p 60.

22 Ibid, at p 61, Ch 8 r 2(1)(a).

23 Ibid, at p 62, Ch 8 r 5(1)(a).

24 Ibid, at pp 61–62, Ch 8 r 3(1).

in paper form or in an electronic format (e.g. email, SMS or instant messaging service).²⁵

Trial

[12] The CJC Rules give the court powers to conduct trials more effectively and expeditiously. As a general rule, the parties will be required to have a common expert.²⁶ The court may direct that further witnesses be called²⁷ and further documents be produced.²⁸ The court may also ask any question that it thinks necessary to decide the case fairly but shall allow the parties to ask the witnesses further questions arising out of the court's questions.²⁹

Appeals

[13] Appeals in applications pending trial will be simplified with the dispensation of formal grounds of decision and Cases, while greater formality is required for appeals on the merits after trial. For appeals in applications pending trial, the court may give a summary of the points it has decided without the need for a written judgment or grounds of decision.³⁰ The appeal in such matters will proceed on the documents filed by the parties before the court below.³¹ Appellate courts at all levels will not intervene in procedural matters unless substantial injustice will be otherwise caused. Chapter 13 Rule 11 provides that "In procedural matters, the appellate Court shall allow the lower Court maximum autonomy and intervene only if substantial injustice will be caused otherwise".³²

Costs

[14] Scale costs will apply for liquidated and quantifiable claims between party and party unless the parties otherwise agree or the court otherwise orders.³³ As explained in the CJC Report:³⁴

25 Ibid, at p 62, Ch 8 r 5(1)(b).

26 Ibid, at p 65, Ch 9 r 3.

27 Ibid, at p 56, Ch 7 r 21(1).

28 Ibid, at p 62, Ch 8 r 4.

29 Ibid, at p 81, Ch 11 r 9(1).

30 Ibid, at p 96, Ch 13 r 14(1). See also p 99 (r 17(1)); p 101(r 20(1)) and p 104 (r 24(1)).

31 Ibid, at p 96, Ch 13 r 14(4). See also p 99 (r 17(4)); p 101 (r 20(4)) and p 104 (r 24(4)).

32 Ibid, at p 94.

33 Ibid, at p 138, Ch 16 r 10(1).

34 CJC Report, n 4 above, p 29 at [2].

Essentially, the costs allowed will be a percentage of the amount of claim or of judgment on a tiered basis with a maximum amount of costs allowed prescribed for each tier. The total costs allowed will be the cumulative costs allowed at each tier. Fixed percentages rather than ranges of amounts were prescribed at each tier because the ranges will have to be broad and flexible and in practice, that would lead again to disparity and uncertainty. Stage costs are also not ideal. While ostensibly providing an incentive for the litigants to settle early to reduce costs, in reality they often provide the perverse incentive to prolong the proceedings until the final stages are reached in order to attract more costs for the solicitors.

Further, to discourage unnecessary satellite litigation, no costs will be ordered for applications before judgment unless there is unreasonable conduct on the part of any of the parties.³⁵ The rationale for adopting such a fixed costs regime is also explained in the CJC Report:³⁶

The philosophy in the new Rules is to signal clearly to parties that there is a fixed price the moment they decide to resolve the dispute in court. This allows them to weigh the consequences and whether it is worthwhile to incur the legal costs and if necessary, to make financial provisions for the litigation (especially for corporate litigants). There is no incentive for solicitors to prolong or complicate the proceedings by taking out multiple applications and appeals because there is only one fixed price. No costs for applications will be ordered unless there is unreasonable conduct on the part of any of the parties. On the other hand, there is every incentive to try to resolve the dispute quickly and obtain the fixed price for less time and effort so that the solicitors can then have the capacity to take on more cases.

[15] Scale costs will also obviate the need to assess (the term in the CJC Rules used in place of “tax” in the current Rules) party-and-party costs. Where scale costs do not apply, costs shall be fixed or assessed by the court which heard the matter.³⁷ Under the existing procedure, the issue of costs is often ordered to be dealt with by the Registrar. That entails a further hearing and the parties having to explain to the Registrar the circumstances leading up to the order for costs. An appeal (by way of review) to the court which heard the matter may

35 CJC Rules, n 5 above, at p 136, Ch 16 r 4(2).

36 CJC Report, n 4 above, p 30 at [4].

37 CJC Rules, n 5 above, at p 133, Ch 16 r 2(3).

follow the Registrar's decision, adding further to the time and costs spent by the parties. The new procedure saves time and costs and is more efficient because the court which heard the matter is obviously the best forum to decide the costs issues and the amounts payable.

Enforcement of judgments and orders

[16] The CJC Rules consolidate the various modes of enforcement, such as garnishee order and writ of seizure and sale, into one composite process for speed and simplicity. A successful party seeking to enforce any judgment or order (now termed an "enforcement applicant") will need to take out only one application for an enforcement order. The enforcement order authorises the Sheriff and the bailiffs to seize and to sell all movable and immovable properties of whatever description belonging to the judgment debtor³⁸ (now termed an "enforcement respondent"). The Sheriff is the Registrar of the Supreme Court and the bailiffs are staff of the Supreme Court and the State Courts. However, new legislation may in the near future open up the enforcement role to the private sector. Fixed costs are provided for taking out an application for an enforcement order so that the total amount owing by the debtor can be computed quickly and accurately. This streamlining of the enforcement process should lessen costs while speeding up things significantly for the successful party.

Conclusion

[17] The CJC Rules are drafted to be sufficiently flexible in at least two respects. First, the Rules empower the court to do what is right as long as it is not prohibited by law. The premise is that litigants' rights should be determined more on their merits and less on technicalities. Where a certain outcome is clearly called for, a party should not be denied that outcome merely because of a perceived lacuna in the procedural rules. Second, the Rules can be tailored to meet the particular requirements of any class of cases. For instance, for claims of smaller value, such as Magistrates' Court cases, the Chief Justice may direct that certain rules do not apply so as to speed up the process and to reduce costs.³⁹ Similarly, the Rules may be modified to cater to the needs of more complex and specialised litigation.

38 Ibid, Ch 17 r 2(2).

39 Ibid, p 16, Ch 1 r 2(6).

[18] The CJC Rules represent significant changes to the rules of engagement for civil proceedings, in keeping with the Chief Justice’s mandate to make “bold and innovative” recommendations.⁴⁰ The collective will and spirit of everyone in the legal fraternity will make the new Rules work for the good of society because the new Rules are crafted with local conditions in mind and aim to achieve justice in the best way possible for all who have to be involved in civil litigation.

⁴⁰ See n 3 above.

Resolving Conflict of Laws: An Essential Tool to Resolve Conflicts between Parties

by

Justice Steven Chong*

Introduction

[1] The study and practice of the conflict of laws, or private international law, is almost inescapable in modern litigation practice. It is inherently embedded in the fabric of any form of cross-border litigation. As business relationships and dealings increasingly extend across and beyond national borders, so too the disputes arising from the breakdown of those relationships. It is not uncommon for such disputes to have connections with multiple jurisdictions. In this regard, the diversity and choice of legal systems can pose unique challenges and risks to the parties as well as the lawyers advising them. Such risks include the uncertainty in the choice of jurisdiction and law and concomitantly the cost of transacting and resolving cross-border disputes, and crucially, the eventual outcome of the dispute. This is all the more so in Asia, which consists of a mix of common law countries, civil law countries and hybrid systems. The upshot of all this is that lawyers must now not only have a good working knowledge of the differences between the substantive rules applying to a dispute, they must also be *au fait* with the rules that select the substantive rules for application – the rules for resolving the conflict of laws.

[2] The subject of private international law is thus important and deeply pervasive in at least two respects. First, conflict issues may be said to impact on almost every stage in the life-cycle of a commercial case. Even before the commencement of proceedings, one might ask: where should the action in the event of a dispute be brought? This is a question of choice of forum or choice of jurisdiction. Next, in

* Judge of Appeal, Supreme Court of Singapore. I would like to acknowledge the valuable assistance of my law clerks, Ms Du Xuan and Mr Reuben Ong for their assistance in the research for this article. However, all errors remain mine alone. Further, all views expressed are personal and do not represent those of the Supreme Court of Singapore.

the course of determining any dispute with connections to multiple jurisdictions, the court must ascertain: what law should be applied in determining the dispute? This is a choice of law inquiry. Finally, after a judgment has been rendered, the successful party (and perhaps the unsuccessful party as well) will then be concerned with issues of recognition and enforcement of the foreign judgment. Would a judgment rendered by the courts of Country X be recognised and enforced by the courts of Country Y?

[3] Second, conflict issues arise in almost every conceivable area of the law. From the law of commercial contracts, to tort law, equity and trust law and even insolvency and matrimonial law, conflict of laws issues are becoming increasingly prevalent in our jurisprudence. In Singapore, for example, there have been more cases involving conflict of laws issues since the year 2000 than there were in the entire 20th century.¹ By all indications, we can expect this to continue in the light of recent international and regional trends. The ASEAN Economic Community (“AEC”) was formed in 2015, and today it is a market valued at US\$2.6 trillion and home to 622 million people.² This will no doubt increase the number and size of cross-border transactions, and will lead to an inevitable increase in cross-border litigation.

[4] It is against this background that ASEAN judiciaries must continue to keep our jurisprudence on conflict of laws relevant, and attuned to evolving commercial and social realities. In this spirit, this article seeks to outline key developments in Singapore law in the area of conflict of laws over the last few years, by tracing the consistently pragmatic approaches that the courts have adopted in seemingly disparate areas of law.

1 LawNet, a repository of Singapore cases maintained by the Singapore Academy of Law, records a total of 156 cases with the search term “Conflict of Laws” decided between 2000 and the present, against just 64 cases decided between 1900 and 2000. Filtering the results by the decade in which they were decided, the results showed that there were: 90 cases in the 2010s, 66 cases in the 2000s, 45 cases in the 1990s, eight cases in the 1980s, six cases in the 1970s, one case in the 1960s, one case in the 1950s, and three cases from 1900 to 1950.

2 ASEAN, “ASEAN Economic Community” <<https://asean.org/asean-economic-community/>> (accessed on July 19, 2019).

Developments in Singapore law

Commercial and corporate law

[5] Unsurprisingly, the world of commercial and corporate law is where the increasing importance of a sound approach to conflict of laws would be most intuitive and obvious. Where commercially-minded parties are concerned, the goal is invariably one of maximising commercial certainty by giving effect to the parties' intentions as much as possible, and by encouraging the use of contractual devices such as exclusive or non-exclusive jurisdiction clauses. In recent years, the Singapore courts have consistently adopted a pro-contractual approach in this regard, by holding parties to their commercial bargains in the absence of strong reasons not to do so. This can be illustrated by two recent landmark cases by the Singapore Court of Appeal.

[6] In *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* ("*Vinmar*"),³ the Singapore Court of Appeal demonstrated a strong commitment to the primacy of contractual bargains and party autonomy by departing from a line of previous Court of Appeal decisions which had somewhat diluted the contractual effect of exclusive jurisdiction agreements. The appellant *Vinmar* had entered into contracts to purchase chemical commodities from the respondent *PTT*, which contracts contained exclusive jurisdiction clauses in favour of the English High Court. When disputes arose between the parties, *PTT* initiated proceedings in Singapore in breach of the exclusive jurisdiction agreement. *Vinmar's* application for a stay of the Singapore proceedings was refused by the Singapore High Court on the basis that *Vinmar* did not have a genuine defence to *PTT's* claim. The High Court followed a line of Court of Appeal authorities to the effect that the absence of a genuine defence would constitute strong cause to refuse a stay of proceedings which were commenced in breach of an exclusive jurisdiction agreement. Such an approach has been rationalised on the basis that absent any merits in the defence, the court would infer that such a defendant does not *genuinely* desire trial in the selected foreign court and accordingly, the court should exercise its discretion to refuse a stay. On appeal, the Court of Appeal departed

3 [2018] 2 SLR 1271. *Vinmar* was cited with approval by the New South Wales Court of Appeal in *Australian Health & Nutrition Association Ltd v Hive Marketing Group Pty Ltd* [2019] NSWCA 61.

from this line of authorities, and held that the merits of the defence were irrelevant to the question of whether there was strong cause to refuse a stay in the face of an exclusive jurisdiction agreement. The Court of Appeal noted that to hold otherwise would suggest that the parties intended to exclude the application of the clause in the most obvious cases of liability, an approach which simply did not accord with commercial reality.

[7] The Court of Appeal adopted both normative and doctrinal arguments in arriving at its decision. Crucially, it recognised that the central principle of party autonomy pervaded the law governing the enforcement of exclusive jurisdiction agreements, and that since such jurisdiction agreements are agreements to bring *all* disputes to a particular forum regardless of the merits of those disputes, it is irrelevant to consider the absence of a meritorious defence in determining whether the agreement should be enforced. In ruling as such, the Court of Appeal in *Vinmar* upheld the concept of party autonomy as being of paramount importance in the area of international commercial litigation and conflict of laws, and stated that such exclusive jurisdiction agreements would be given full effect save for very limited situations involving abuse of process or denial of justice. The Court of Appeal also observed that departure from the previous line of authorities would promote coherence in the law since the absence of merits of a defence is equally irrelevant in the context of stay applications on the ground of *forum non conveniens*, arbitration agreements and anti-suit injunctions.

[8] The second case that merits close examination is *Shanghai Turbo Enterprises Ltd v Liu Ming*⁴ (“*Shanghai Turbo*”), where the Court of Appeal considered issues of submission to jurisdiction and the effect of non-exclusive jurisdiction clauses, and took a sensible and holistic approach to both issues. The dispute in that case was between the appellant company listed on the Singapore Stock Exchange and the respondent, its former chief executive officer, who was a Chinese national. The substantive dispute concerned alleged breaches of contract between the appellant and the respondent as its former employee, but preliminary procedural matters relating to service out of jurisdiction and the effect of a non-exclusive jurisdiction clause favouring Singapore took centre stage.

4 [2019] 1 SLR 779.

[9] The court first considered the issue of submission to jurisdiction, and in particular whether the respondent's participation in a summons filed by non-parties to the suit amounted to a submission to the jurisdiction of the Singapore court, despite the respondent's express reservation of rights to challenge the court's jurisdiction. In finding that the respondent's participation in the summons did amount to an invocation of the Singapore court's jurisdiction and an implied acceptance that the court had jurisdiction to try the suit, the court noted that the respondent was not compelled to respond or otherwise participate in the summons, since it was an application brought by the non-parties against the appellant and not against the respondent. Even though the respondent had expressly reserved his rights to dispute the jurisdiction of the Singapore court, the Court of Appeal held that such reservation could not salvage his conduct which was clearly intended to invoke the court's jurisdiction. The court noted the observation in earlier cases such as *Australian Timber Products Pte Ltd v Koh Brother Building & Civil Engineering Contractor (Pte Ltd)*⁵ that an act which would otherwise be regarded as a step in the proceedings will not be treated as such if the applicant had expressly reserved his right to seek a stay, but opined that this did not lay down a blanket rule that no conduct would ever amount to a submission to jurisdiction merely because it was accompanied by a reservation of that party's right to challenge jurisdiction. The Court of Appeal thus cautioned against parties approbating and reprobating simultaneously, and emphasised that the core inquiry in every case is whether the defendant's conduct demonstrates an unequivocal, clear and consistent intention to submit to the jurisdiction of the court. This is a pragmatic approach that is likely to encourage parties to conduct their cases with fairness and consistency.

[10] The second issue that the court considered pertained to the applicability and effect of a non-exclusive jurisdiction clause in the parties' contract, which stipulated that the agreement "shall be governed by the laws of Singapore /or People's Republic of China and each of the parties hereto submits to the non-exclusive jurisdiction of the Court of Singapore /or People's Republic of China". The Court of Appeal held, disagreeing with the High Court judge, that the first portion of this clause, an invalid choice of law, could be severed from

5 [2005] 1 SLR(R) 168.

the second part of the clause, the non-exclusive choice of forum. Thus, the non-exclusive jurisdiction clause remained applicable despite the invalid choice of law, and governed the present dispute. The court then considered the effect of such a clause, and specifically whether the clause was only one of the factors to be considered in the *Spiliada* framework (see *Spiliada Maritime Corporation v Cansulex Ltd*⁶ (“*Spiliada*”)), or whether the respondent had to show strong cause why the matter should not be heard in Singapore. The court ultimately agreed with the approach of the Hong Kong Court of Appeal in *Noble Power Investments Ltd and another v Nissei Stomach Tokyo Co Ltd*.⁷ The effect of a clause by which the parties submit to the non-exclusive jurisdiction of the courts of a particular forum is that while the plaintiff may sue in any jurisdiction, the plaintiff is promised on the defendant’s submission if the claim is brought in the named jurisdiction. Such effect is not premised on the named forum being seised of jurisdiction apart from the existence of the non-exclusive jurisdiction clause. In such a case, since any challenge to the exercise of jurisdiction amounts to an attempt to be released from the non-exclusive jurisdiction clause, even where the defendant applies to stay proceedings in a named jurisdiction in favour of another named jurisdiction in the same clause, the defendant would have to show strong cause to justify such a result.

[11] The court further opined that a non-exclusive jurisdiction clause would not have the effect of requiring a *plaintiff* to show strong cause if he seeks to sue in a jurisdiction other than that named in the clause, as a non-exclusive jurisdiction clause leaves open the possibility that there is another appropriate jurisdiction that is not named in the clause. In such a case, the court will apply the usual *Spiliada* test, taking into account the usual connecting factors, with the weight of the non-exclusive jurisdiction clause being dependent on the circumstances of the case. This once again reflects a commercially sensible approach that gives due effect to the intention of parties – in inserting a non-exclusive jurisdiction clause into their agreement, parties clearly intend to stipulate acceptable jurisdictions in which their future disputes might be properly resolved, but without foreclosing the possibility of resolving those disputes in other unnamed jurisdictions.

6 [1987] AC 460.

7 [2008] HKCA 255.

[12] As a foil to the robust application of the “strong cause” test in both *Vinmar* and *Shanghai Turbo*, the Singapore Court of Appeal’s decision in *Trisuryo Garuda Nusa Pte Ltd v SKP Pradiksi (North) Sdn Bhd and another and another appeal*⁸ (“*Trisuryo*”) provides an illustration of when the high threshold of “strong cause” may be met such that a party may sue in breach of an exclusive jurisdiction clause. In *Trisuryo*, the parties agreed for shares in two Indonesian companies (“the PT Shares”) to be transferred to a Singapore-incorporated special purpose vehicle, *Trisuryo Garuda Nusa Pte Ltd* (“TGN”). The transfers were accomplished by way of two deeds, each of which contained an exclusive jurisdiction clause in favour of the Indonesian courts. After the parties’ relationship broke down, two Malaysian investment holding companies (“the SKP Companies”) commenced an action in Singapore (Suit 252 of 2016 (“Suit 252”)) against TGN, claiming that TGN had failed to transfer the PT Shares back to them, in breach of an alleged trust agreement by which TGN held the PT Shares on trust for them. TGN sought a stay of proceedings in Suit 252 on the basis that Suit 252 was commenced in breach of exclusive jurisdiction clauses in the deeds, and also on the grounds that Singapore was *forum non conveniens*.

[13] The Court of Appeal first considered whether the SKP Companies’ claim in Suit 252 – that the transfer of the PT Shares was subject to the retention of their beneficial rights – fell within the scope of the jurisdiction agreement in the deeds. The SKP Companies argued that it did not, because the trust arrangement was made pursuant to an oral agreement which was separate and distinct from the deeds. The court rejected this argument, holding that the claim fell within the scope of the jurisdiction agreement because it was directly inconsistent with the warranty in Article 2 of the deeds which required that full and unqualified title to the shares would be transferred. Pertinently, the court also observed, drawing on authorities decided in the context of arbitration agreements, that the construction of such clauses would typically proceed on the assumption that rational businessmen were likely to have intended that any dispute arising out of their relationship should be decided by the same tribunal.

[14] Having determined that the dispute fell within the scope of the exclusive jurisdiction clauses, the question then was whether there

8 [2017] 2 SLR 814.

were exceptional circumstances amounting to strong cause which justified refusing the grant of a stay. In determining the governing law of the SKP Companies' claim against TGN, the court held that the contractual choice of law analysis applied, since the claim was based on an alleged trust which arose by agreement of the parties. The court found that the circumstances pointed to an implied choice of Singapore law to govern the dispute, given that the parties had made a considered decision to choose Singapore as the place of incorporation of the special purpose vehicle which held the PT shares, and, more crucially, it was almost inconceivable that the parties would have chosen a governing law that would not even recognise the type of equitable rights and obligations sought to be conferred and imposed through the alleged trust agreement. This being the case, the court found it material that the SKP Companies would be irretrievably prejudiced were they left to pursue such an action for breach of trust in Indonesia, not because of any lack of substantive merit in their claim, but purely because the Indonesian courts would find that such a claim had no legal basis given the equitable nature of the right sought to be enforced. Were the stay to be granted, "clear and compelling" prejudice would be occasioned, and this amounted to strong cause justifying a refusal to stay the Singapore proceedings despite the exclusive jurisdiction clauses in favour of the Indonesian courts. Under the *Vinmar* framework, this would have constituted "denial of justice" to justify a refusal of the stay application, which can equally be enunciated as a principle which seeks to protect the substance and enforceability of commercial agreements.

Arbitration

[15] It would not be controversial to state that no individual field of legal practice is as immersed in the world of private international law as is international arbitration, and it would therefore not come as a surprise that many landmark decisions on conflict of laws have arisen against the backdrop of an arbitration. Most recently, in *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd*⁹ ("*Hilton*"), the opportunity arose for the Singapore Court of Appeal to clarify what is perhaps one of the most delicate areas of private international law – the grant of anti-suit and anti-enforcement

9 [2019] 1 SLR 732.

injunctions and the different shades of meaning that comity can take on in determining whether such a remedy should be granted.

[16] In *Hilton*, a dispute between the parties was brought before an arbitral tribunal, which led to two awards against the appellant, Sun Travels & Tours Pvt Ltd (“Sun”). The respondent, Hilton International Manage (Maldives) Pvt Ltd (“Hilton”), sought to enforce the awards against Sun in the Maldives. Before Hilton could do so, Sun commenced an action in the Maldivian courts, essentially re-litigating the issues already decided in the arbitration. Instead of applying for anti-suit relief from the seat court (i.e. the Singapore court), Hilton challenged the Maldivian action on jurisdictional grounds. The jurisdictional challenge failed and the Maldivian court eventually issued judgment in favour of Sun, with findings which were essentially the opposite of those made by the arbitral tribunal. At this point, Hilton sought once more to enforce the award in the Maldives, but this attempt failed on account of the Maldivian judgment. It was only then that Hilton applied for an anti-suit injunction in the Singapore High Court. The High Court declined to grant the anti-suit injunction, reasoning that the Maldivian proceedings were already too far advanced, but instead granted an anti-enforcement injunction to prevent Sun from relying on the Maldivian judgment against Hilton’s enforcement proceedings.

[17] The Court of Appeal allowed the appeal against the injunctive order after a wide-ranging discussion of the two cornerstone principles underpinning the grant of anti-suit injunctions: comity and equity. On comity, the court placed an important nuance on the commonly-held view that comity is not a concern where an anti-suit injunction is sought to protect interests arising from an agreement to arbitrate. While accepting that comity loses some significance in such cases (since the local court is not arrogating to itself jurisdiction over a dispute but is merely enforcing the parties’ agreement), the court emphasised that it would be incorrect to say that in such cases comity considerations can never be engaged. This was because the “comity of nations” referred not just to the need to avoid offending the foreign court, but was also concerned with demonstrating appropriate respect for the operation of different legal systems, which entailed avoiding the wastage of judicial time and costs that would inevitably be occasioned by the abandonment of proceedings enjoined by the intervening court. On this view, considerations of comity would almost certainly be engaged when contemplating the grant of an anti-suit or anti-enforcement

injunction, inasmuch as such orders are very likely to result in some wastage of the foreign court's judicial time and resources.

[18] In related vein, the court emphasised the link between a party's delay in seeking an anti-suit injunction and its effect on the court's consideration of comity. Since considerations of comity entailed avoiding wastage of the foreign court's judicial time and resources, in general, the longer the delay and the more advanced the foreign proceedings have reached, the stronger these considerations of comity would be. It might, in such circumstances, be tempting for a party to justify its delay in seeking an anti-suit injunction on the basis that it was legitimate to raise jurisdictional objections in the foreign court. In rejecting this argument, the court reasoned that, on the contrary, to enjoin foreign proceedings after the foreign court has expressly assumed jurisdiction over the matter would achieve the "reverse of comity".

[19] The appeal in *Hilton* was against an anti-enforcement injunction, and in this connection, the court took the view that the considerations of comity outlined in respect of anti-suit injunctions applied *a fortiori* to anti-enforcement injunctions since it is inherent in the nature of the relief sought that the foreign proceedings would have reached an advanced stage with the foreign court having issued a judgment. In addition to this, two additional considerations further militated against the grant of the anti-enforcement injunction. First, such an injunction would preclude other foreign courts from considering whether the judgment in question should be recognised and enforced. Second, it would be an indirect interference with the execution of the judgment in the very jurisdiction where the judgment was given and where the judgment may be expected to be obeyed. For these reasons, a party seeking an anti-enforcement injunction must additionally show that there are exceptional circumstances that warrant the exercise of the court's jurisdiction. Recognised exceptions included cases where the judgment in question was obtained by fraud, or where the applicant had no knowledge that the judgment in question was being sought until *after* the judgment was rendered.

[20] Finally, the court observed that the principles just discussed could equally be explained on the basis of principles of equity. Anti-suit and anti-enforcement injunctions are, ultimately, a form of *equitable* relief, entitlement to which may be lost through dilatoriness and unconscionable conduct. Therefore, an anti-enforcement injunction

may be granted after judgment has been rendered *if* the applicant had no knowledge that the judgment in question was being sought; without the element of knowledge, the aggrieved party's delay in seeking the injunction against the judgment would not in itself be inequitable or unconscionable such as to bar equitable relief. In a similar vein, equitable considerations would militate in favour of granting an anti-enforcement injunction where the foreign judgment was procured by fraud.

Equity and trusts

[21] Whereas areas of law such as contract and tort tend to have their own separate and distinct sets of private international law rules, the rules which apply to claims in equity are chameleonic in nature, and derive from the foundational source of the equitable relationship in question: *Rickshaw Investments Ltd and another v Nicolai Baron von Uexkull*¹⁰ ("*Rickshaw*") at [80].¹¹ The Court of Appeal dealt with an equitable claim in the recent case of *Rappo, Tania v Accent Delight International Ltd*¹² ("*Rappo*"). The dispute in *Rappo* arose after the breakdown of the relationship between Mr Dmitry Rybolovlev, a Russian magnate, and Mr Yves Charles Edgar Bouvier, a businessman in the international art scene. Over the years, Mr Bouvier had assisted Mr Rybolovlev with amassing a significant art collection, but the relationship turned sour after Mr Rybolovlev discovered that Mr Bouvier had been inflating the sale prices of the artworks purchased by the respondents, which were companies held by the Rybolovlev family trusts. The respondents claimed that Mr Bouvier had been acting as their agent in the purchase of the various artworks, and had, by inflating the sale prices of those artworks, breached fiduciary duties owed to them. The respondents brought suit in Singapore, and the appellants sought a stay in favour of Switzerland or Monaco.

[22] The Court of Appeal allowed the appeals and granted the stay. Applying its previous decision in *Rickshaw*, the court found that the duties which Mr Bouvier allegedly owed to the respondents originated in the understanding reached between Mr Bouvier and

10 [2007] 1 SLR(R) 377.

11 *Rickshaw* has been subsequently considered by the New South Wales Court of Appeal in *Nicholls v Michael Wilson & Partners Limited* [2010] NSWCA 222 and *Murakami v Wiryadi & Ors* [2010] NSWCA 7.

12 [2017] 2 SLR 265.

Mr Rybolovlev when they orally agreed that the former would assist the latter in procuring the artworks. As such, the legal foundation of the respondents' claim for breach of fiduciary duties was essentially contractual. Therefore, the most significant connecting factor was the governing law of the relationship between Mr Bouvier and the respondents, not least because the substantive dispute centred on the precise nature of that relationship – i.e. whether Mr Bouvier had been acting as agent (in which case fiduciary duties might arise), or as an independent seller (in which case they would not). Having considered the course of dealings between Mr Bouvier and Mr Rybolovlev (including four written agreements entered into over the course of that relationship, all of which stipulated a choice of Swiss law and for exclusive jurisdiction of the Swiss courts), the Court of Appeal held that Swiss law governed the relationship.

[23] The court also made some pertinent observations on the availability of equitable remedies as a factor in the *second* stage of the *Spiliada* analysis. In this regard, the respondents had argued that a stay of the Singapore proceedings would result in a denial of substantial justice because they would be unable to obtain certain remedies that would otherwise have been available in Singapore, and not in Switzerland; Switzerland, being a civil law jurisdiction, does not offer equitable remedies, e.g. constructive trusts and tracing. The court found this submission questionable, and noted that the remedies available were more a function of the choice of governing law than of the choice of forum; even if they were allowed to proceed in Singapore, the respondents would not have enjoyed any juridical advantage since the application of Swiss law to the dispute (by a Singapore court) would have precluded recourse to equitable remedies which were not recognised under Swiss law in any case. Further, the court held that as a matter of principle, the mere fact that a party is, by reason of a stay, unable to obtain the benefit of the procedures or remedies of the forum will not by itself amount to denial of substantial justice. This reflected the general policy that courts should be very slow to pass judgment on the quality of justice obtained in a foreign court. Additionally, where parties have expressly or impliedly chosen the law of a particular jurisdiction to govern their relationship, it does not behove them to later rely on the unavailability of particular remedies under that law in rejecting the jurisdiction of that foreign court, as the absence of those remedies would have been within their contemplation at the time of entering into their relationship.

[24] A third important aspect of the *Rappo* case concerned the relevance of the capabilities of the Singapore International Commercial Court (“SICC”) in the *forum non conveniens* analysis. In this regard, the fact that a foreign law applied to the dispute at hand would ordinarily carry less weight if the Singapore courts, through the international judges of the SICC, were familiar with and adept at applying that foreign law. That said, the court made clear that the mere possibility of a transfer did not invariably serve to sweep aside all jurisdictional objections in favour of adjudication in Singapore; the onus would still be on the plaintiff to articulate the particular quality or feature of the SICC that makes it more appropriate for the dispute to be heard in Singapore by the SICC.

Shipping

[25] Given the transnational nature of shipping contracts, conflict of laws issues arise almost invariably in many of such cases. It is especially relevant in the context of shipping disputes because of the prevalence of forum shopping. The reason for this prevalence is self-evident. Ships sail from port to port, giving rise to connecting factors between the commercial activities conducted on the vessel, and many different legal jurisdictions. The comparative differences in the procedural and substantive maritime law of these various ports of call create variety and choice, which lies at the root of forum shopping. It is thus incumbent on the court to adopt a pragmatic and consistent stance in the treatment of such cases, whilst remaining sensitive to the commercial realities in the industry.

[26] Such was the approach adopted recently by the Singapore High Court in *Best Soar Ltd v Praxis Energy Agents Pte Ltd*.¹³ The dispute in that case was between the plaintiff company which was incorporated in the British Virgin Islands and the defendant company which was incorporated in Singapore. The plaintiff owned a vessel which was time chartered to a third party, and the defendant had contracted to supply bunker fuel to the vessel. The defendant issued invoices for the delivered bunker fuel, but the plaintiff disputed liability for the invoiced sum and the invoiced sum remained unpaid. The defendant therefore arrested the vessel in Beirut, Lebanon, pursuant to an arrest order issued by the Executive Bureau in Beirut (“EBB”), which is a

13 [2018] 3 SLR 423.

division of the First Instance Courts in Lebanon with jurisdiction to decide matters relating to enforcement proceedings. The defendant thereafter commenced a substantive action in Beirut to recover the unpaid invoices for the bunkers against the plaintiff and other charterers, following which the plaintiff filed an objection in the Beirut proceedings on the basis that the vessel was wrongfully arrested. The plaintiff then commenced proceedings against the defendant in Singapore, seeking *inter alia* a declaration of wrongful arrest and an injunction to restrain the defendant from pursuing the proceedings in the Lebanese courts. The defendant sought a stay of the Singapore proceedings on grounds of *forum non conveniens* and also on case management grounds.

[27] In granting the stay of the Singapore proceedings, the High Court applied the *Spiliada* factors and was persuaded by the fact that the alleged wrongful arrest took place in Lebanon, and that as a general principle the place where a tort was committed is *prima facie* the natural forum for that tortious claim. In this particular case, the place of tort was not fortuitous, as the arrest of the vessel was made pursuant to an order issued under the laws of Lebanon. The court also noted that the wrongful arrest claim would be resolved under Lebanese law, and that the risk of conflicting judgments was especially of concern since it concerned the correctness or otherwise of the EBB arrest order. Considerations of international comity also favoured Lebanon as the more appropriate forum, as the court making the arrest order is the more appropriate court to determine whether the arrest was wrongful under Lebanese law. Whereas the plaintiff sought to argue that it would suffer a serious disadvantage in the Lebanon courts because of the lack of express procedure for discovery or cross-examination of witnesses, the High Court noted that these were merely differences between the common law system in Singapore and the civil law system in Lebanon, which did not amount to denial of substantial justice. The court further opined, *obiter*, that had it not granted a stay on *forum non conveniens* grounds, it would have granted a limited stay of the Singapore proceedings on case management grounds, given the fact that the Lebanon proceedings were at a more advanced stage and the concerns of international comity. On appeal, the Court of Appeal agreed with the findings and reasoning of the High Court, recognising the commercial reality that a ship can be arrested anywhere in the world and that this was a risk that shipowners necessarily had to assume.

Insolvency

[28] The proliferation of transnational businesses necessarily means that the insolvency of such businesses would similarly transcend territorial boundaries. Where creditors and assets are located in multiple jurisdictions, the commencement of parallel insolvency or restructuring proceedings might not be the most efficient solution for all concerned. Cross-border restructuring and the principle of modified universalism have thus emerged as the bold new way forward, and Singapore has taken concrete steps to position itself as a restructuring hub. In line with this position, the Singapore courts have increasingly adopted innovative and commercially-sensible approaches to ensure that genuine cross-border restructuring efforts are not foiled by anachronistic principles of law.

[29] This is perhaps most keenly illustrated by Singapore's departure from the *Gibbs* rule. The *Gibbs* rule is a controversial principle in insolvency law which imposes severe limitations on cross-border restructuring efforts. In brief, the principle provides that the discharge of a debt under the bankruptcy law of a foreign jurisdiction is only effective if it amounts to a discharge under the law applicable to the debt. The principle was recently upheld in the English Court of Appeal in *Bakhshiyeva v Sberbank of Russia and others*,¹⁴ despite criticisms that the rule seems increasingly anachronistic in a world where the principle of modified universalism has been the inspiration of much cross-border cooperation in insolvency matters and has been recognised as forming part of the common law.

[30] Singapore however took a bold step in departing from this rule in *Re Pacific Andes Resources Development Ltd and other matters*¹⁵ ("*Pacific Andes*"). In *Pacific Andes*, some of the creditors argued that the Singapore court should not assume jurisdiction over the applications for moratorium relief brought by the debtor companies against proceedings by creditors in Singapore and elsewhere, because the debts owed to these creditors were governed by Hong Kong law. Thus, based on the *Gibbs* principle, which remained good law in Hong Kong, any discharge of the debts by a Singapore court order would not be recognised in Hong Kong.

14 [2018] EWCA Civ 2802.

15 [2018] 5 SLR 125.

[31] The High Court in *Pacific Andes* examined the criticisms of the *Gibbs* rule, including its flawed doctrinal basis and the incompatibility of the rule with the theory of modified universalism on which the UNCITRAL Model Law is based. Further, the refusal to recognise a foreign bankruptcy discharge is tantamount to refusing foreign insolvency proceedings, which are necessary for the equitable and orderly distribution of a debtor's property. Thus, the *Gibbs* rule had the undesirable effect of impeding any holistic restructuring of a debtor company with global presence. The High Court thus declined to adopt the *Gibbs* rule in its entirety, and reformulated the principle by endorsing the recommendations of Professor Ian Fletcher, a leading insolvency law academic and critic of the *Gibbs* rule. Thus, if one of the parties to a contract governed by the law of Country X is the subject of insolvency proceedings in Country Y with which he has an established connection, then the possibility of such proceedings in Country Y must have been within the parties' reasonable expectations when they entered into their contractual relationship, such as to furnish a ground for discharge of the debt in Country X.

[32] The reasoning in *Pacific Andes* was endorsed by the United States Bankruptcy Court for the Southern District of New York in its recent decision in *In re Agrokor D D et al.*¹⁶ Judge Martin Glenn in that case agreed with the observations of Justice Kannan Ramesh in *Pacific Andes* that a creditor's autonomy is relevant in the context of an insolvency proceeding only to the extent that it does not impede the underlying public policy that governs collective insolvency or bankruptcy proceeding.

[33] In keeping with Singapore's readiness to embrace universalist trends in cross-border insolvency law, the High Court's decision in *Re Opti-Medix Ltd (in liquidation) and another matter*¹⁷ is equally noteworthy.¹⁸ The companies in that case were incorporated in the British Virgin Islands ("BVI"), and had their main business of factoring receivables from medical institutions in Japan. Bankruptcy orders were subsequently granted by the Tokyo District Court, and the applicant

16 591 BR 163 (Bankr SDNY 2018). The decision in *Pacific Andes* was also considered by the English High Court in *Bakhshiyeva v Sberbank of Russia* [2018] EWHC 59 (Ch) and the Hong Kong Court of First Instance in *Re CW Advanced Technologies Ltd* [2018] HKCFI 1705.

17 [2016] 4 SLR 312.

18 This case has been cited by the Hong Kong Court of First Instance in *Re China Fishery Group Ltd* [2019] HKCFI 174.

was appointed as their bankruptcy trustee. The companies had primarily Japanese creditors, and a few smaller Singapore creditors. The applicant sought recognition in Singapore of his appointment as the bankruptcy trustee, even though he was not appointed by the court in the companies' place of incorporation (the BVI). Liquidation in the BVI was unlikely since the companies had no operations there. The applicant highlighted the growing acceptance of locating the primary place of insolvency proceedings at the Centre of Main Interest ("COMI") of the company concerned, and emphasised that Japan was the only possible COMI in the instant case.

[34] The High Court granted recognition of the Japanese bankruptcy orders and the appointment of the applicant as the bankruptcy trustee. Whereas the recognition of foreign liquidators in Singapore proceedings was not a novel matter, the distinctive feature of this case was that the liquidation was in a jurisdiction other than the debtor company's place of incorporation. The High Court observed that there has been a general movement towards a universalist approach in cross-border insolvency, and that this movement should come with greater readiness to go beyond traditional bases for recognising insolvency proceedings. In adopting a practical approach, the High Court commended the practice of identifying the COMI as providing strong connecting factors, and did not see itself as being constrained by the silence of the legislative regime or the UNCITRAL Model Law in this regard. The High Court also opined that business practicality and international comity would favour an approach of recognising a foreign order where the interests of the forum are not adversely affected by such recognition.

Matrimonial and family law

[35] Matrimonial and family law is typically an area of the law which is traditionally viewed with domestic lenses. However, in recent times, such cases have rapidly acquired an international dimension with complex and challenging cross-border elements. This is especially so in Singapore, which hosts a significant and growing population of transient expatriate workers. In 2015, 27% of marriages in Singapore were "international", i.e. involving a Singaporean citizen marrying a non-resident.¹⁹ One previously niche area of matrimonial law has

19 Ministry of Social and Family Development, "Statistics on Transnational Marriages", <<https://www.msf.gov.sg/media-room/Pages/Statistics-on-transnational-marriages.aspx>> (accessed on July 19, 2019).

received particular attention in recent years – the law on international parental child abduction – and two recent cases of the Court of Appeal merit a closer examination.

[36] The first is *TSF v TSE*,²⁰ the facts of which might not have felt out of place in the script of a blockbuster film. *M* was a young boy born in London in mid-2012 to a Singaporean father and a Mongolian mother. His parents were married in June 2011 in Singapore but moved to London due to the father's employment posting. *M* was born in London in 2012 but was brought back to Singapore for a visit in 2014, whereupon the father commenced divorce proceedings against the mother in Singapore, and the mother filed separate proceedings in London for the return of *M* to England. In the course of the nearly four-year legal saga, both the mother and father took extraordinary, extra-legal measures in the course of seeking custody of *M*. On her part, the mother was involved in a failed plan to forcibly remove *M* from the grandparents' care with the aid of operatives from a child recovery organisation who had entered Singapore illegally by boat to carry out the operation. For her involvement in the failed attempt, the mother was sentenced to serve an imprisonment term of ten weeks. On his part, the father absconded from the UK to Singapore in breach of English court orders impounding his passport, first by attempting to fraudulently obtain new travel documents from the Singapore Consulate in Dublin, and, when that failed, by travelling as a stowaway to Ankara, Turkey, where he confessed his situation to the Singapore Embassy and was finally allowed to return to Singapore. On his return to Singapore, the father served a term of imprisonment of three weeks for his conviction in providing false information to the Singapore Consulate in Dublin.

[37] Our focus, however, is on the *legal* battle between the mother and father before the Singapore and English courts, in which the mother sought to secure *M*'s return to England while the father sought to keep him in Singapore. By the time of the appeal, several orders had been made by the English courts requiring the father to return *M* to England, but none was complied with. The father was thus committed by the English court for contempt. As a result of the parties' respective conduct outlined above, neither of them was able

20 [2018] 2 SLR 833.

to freely travel to the jurisdiction where the other parent resided. This state of affairs made it all the more challenging to decide on the appropriate custody order given the unavoidable negative impact on the other parent irrespective of the eventual custody order in favour of either parent. At the High Court,²¹ one of the key issues of private international law was the effect which the English custody order had on the proceedings, in particular, whether it constituted a *res judicata*. In this regard, the High Court judge found that the English order did not result in any issue estoppel because there was no identity of subject matter. The answer to the question of what constituted *M*'s best interests, though canvassed before both the English and the Singapore courts, was not some immutable fact, but was more akin to an ambulatory circumstance itself capable of change. In other words, the question before the English judge was really whether, *as at the time of that hearing* (i.e. November 2016), *M*'s return to England would serve his best interests. The answer to that question could well yield a different answer by the time the matter reached the Singapore courts, and it was incumbent on the High Court to undertake a fresh inquiry into what would be in *M*'s best interests *as at the time of the Singapore proceedings*.

[38] The High Court also observed that even if issue estoppel could be established, the court was not debarred by any estoppel operating *as between the parties* from discharging its statutory duty under section 3 of the Guardianship of Infants Act (Cap 122) to apply the welfare principle in deciding matters concerning the upbringing and custody of a child. The High Court held that in order to fulfil that statutory duty, the court must have the discretion, having regard to all the circumstances, to allow parties to re-open any issue concerning the welfare and upbringing of a child which has been decided by a court of competent jurisdiction elsewhere. As to when the court would exercise its discretion to re-open a decided issue, the judge noted that a court would *not* do so if it is satisfied that there had been a "full and proper inquiry" of that issue in the previous litigation, and that this imperative must be accompanied with appropriate respect for the foreign court in accordance with the need to uphold the comity of international affairs, save in cases where the foreign proceedings were

21 *TSH and another v TSE and another and another appeal and another matter* [2017] SGHCF 21.

tainted by a breach of natural justice. These points were, however, not raised in the appeal, which only dealt with the judge's conclusion that it was in *M*'s best interests for him to be returned to England.

[39] The second case is *TUC v TUD*²² ("*TUC v TUD*"), in which a specially constituted three-judge coram of the Family Division of the High Court set out the legal test for determination of the habitual residence of a child for the purposes of The Hague Convention on the Civil Aspects of International Child Abduction ("*Hague Convention*"). The Hague Convention has a relatively narrow and modest objective – it establishes a structure under which countries cooperate to locate and return abducted children to the country of the child's habitual residence. It does not purport to govern the resolution of the *substantive dispute* with respect to the child's guardianship and custody, and is concerned only with the *physical* return of the child to the country of his habitual residence so that the courts of that country may then determine his status on the merits.

[40] *TUC v TUD* concerned a father's application under section 8 of the International Child Abduction Act (Cap 143C) ("*ICAA*") for an order that his two children be returned from Singapore to the USA, which, according to the father, was the children's place of habitual residence. The mother, with whom the children resided in Singapore, resisted the father's application on two grounds. First, she argued that by the time of the hearing, the children were no longer habitually resident in the USA, but were instead habitually resident in Singapore. Second, she argued, relying on an exception contained in Article 13(a) of the Hague Convention, that the father had consented to the retention of the children in Singapore. The High Court allowed the father's appeal, finding that the children were habitually resident in the USA, and that the father had not consented to their retention in Singapore.

[41] On the issue of habitual residence, the court held that the question of habitual residence was to be assessed with reference to the date on which the allegedly wrongful retention (or removal) of the child is said to have taken place. In that regard, the court noted that even in cases where the parents have agreed that the child may be brought to another jurisdiction for a period of time, the point at which the child's retention becomes wrongful may well occur *before*

22 [2017] 4 SLR 877.

the expiry of that agreed period of time if the parent who brought the child away intimates prior to the end of that period that the child will not be returned.

[42] As regards the legal test to be applied, the court found the approach applied by the High Court in *TDX v TDY*²³ (in the context of an application to stay custody proceedings on the ground of *forum non conveniens*) instructive inasmuch as the habitual residence of a child is also a significant factor in stay applications based on *forum non conveniens* grounds. In essence, the court is required to look at a broad range of factors which cluster around two main concerns: the degree to which the child is settled or integrated in a country, and the intention of *both* parents as to whether the child is to reside in that country. It was emphasised that the child's habitual residence is a question of fact, as distinct from domicile or citizenship, which are legal concepts. In fleshing out this legal test, the court endorsed the views of Debbie Ong JC (as she then was) in *TDX v TDY*, that the weight to be given to each factor would depend on the circumstances. For example, where older children are concerned, the inquiry may focus on objective factors such as their length of stay in the new country, their living conditions there and whether they had attended school or worked there, as well as subjective factors such as their perceptions of being in the new country. On the other hand, where very young children are concerned, subjective factors (e.g. the child's perceptions and intentions) take a backseat to the objective factors and the parents' intentions. On the subject of the relevance of the parents' intentions, the court carefully considered and eventually concluded that the unilateral intent of a single parent cannot be a factor to be considered in determining the habitual residence of the child. This would be especially so where one parent agrees to a temporary relocation of the child as a conciliatory gesture; in such cases, the court thought it unsatisfactory that the unilateral intention of the abducting parent be ascribed any weight in determining whether the child's habitual residence had changed. This was not to say that a proof of a *joint* intention to relocate would in all cases be necessary. Rather, the parents' *joint* intentions may well be of significant weight, even where the period of residence has been relatively short.

23 [2015] 4 SLR 982.

[43] On the facts of *TUC v TUD*, as the children were very young at the time of the relocation, the court observed that greater weight should be placed on the parents' intention in assessing their habitual residence. After a careful review of the email messages exchanged between the parties, the court found that there was no shared intention on the part of the parties to relocate to Singapore; while the mother may have subjectively intended to settle down in Singapore, it was clear that the father agreed to move to Singapore only because he was trying to save the marriage and to be with the children while doing so. Nor did the objective circumstances support a finding that the habitual residence of the children had changed during their stay in Singapore, since the length of their stay had not been significant (about four months).

[44] The second issue concerned the question of consent under Article 13(a) of the Hague Convention. On this point, the court approved the following principles: (a) it is the removing parent who bears the burden of proof to justify the removal and to establish that the removal was done with the consent of the other parent; (b) consent must be proved on the balance of probabilities, and the test for consent is whether the left-behind parent had unequivocally consented to the removal or retention of the child; and (c) consent under Article 13(a) will be vitiated if it was obtained by deceit, fraud, misrepresentation or non-disclosure.

[45] Applying these principles to the facts, the court found that the father had not consented to the children being retained by the mother in Singapore. This conclusion was arrived at largely, once more, on the basis of the email messages exchanged between the parties, which showed that the purpose for which the father came to Singapore (and consented to the children remaining in Singapore) was for reconciliation with the mother; he never consented to the children remaining in Singapore if he and the mother were to be divorced.

Anti-suit injunctions

[46] From the above review of the many diverse applications of conflict of laws principles, it would be self-evident that litigants often seek to commence proceedings in a jurisdiction which they perceive to be most advantageous from their perspective. This assessment would necessarily be the converse assessment by the other party, and therein lies the inherent tension in any forum selection exercise. Not infrequently, their quest to do so would involve a breach of an

agreement to refer the dispute to a chosen forum either by way of an exclusive foreign jurisdiction clause or an arbitration agreement. The reality is that when parties draft a contract, insufficient attention is devoted to the choice of law and jurisdiction. Unfortunately, the critical importance of making an informed choice of governing law and jurisdiction would only manifest itself *after* the dispute has arisen. Hence, such disputes usually translate into a race and contest over the choice of the forum and such contests are typically resolved by way of procedural orders such as a stay of proceedings and/or an anti-suit injunction.

[47] For this reason, it is inherent in the nature of disputes involving multi-jurisdiction connections that one of the parties would apply to stay foreign proceedings or to seek anti-suit injunctive remedies to restrain the pursuit of foreign proceedings. In this context, it is useful to examine the law on anti-suit injunctions in the light of a very recent decision of the Singapore Court of Appeal – *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra*.²⁴ In this case, proceedings were first commenced in Singapore by Mr Salgaocar against Mr Darsan for a declaration that Mr Darsan held various assets on trust for him, an order for the return of the trust assets, and an account and inquiry of all traceable proceeds of the assets. Central to Mr Salgaocar’s case was that the transfer of the sole share of a BVI-incorporated company (“the Share”) pursuant to a letter of demand constituted an admission of an oral agreement concluded in 2003 between Mr Darsan and Mr Salgaocar that the former would hold the assets on trust for the latter. It is relevant to highlight that the company in turn owned several units of valuable real estate in Singapore. In his defence, Mr Darsan denied the existence of the 2003 agreement and claimed that the transfer was instead made pursuant to an oral sale agreement in 2014. Although there was no specific claim for the Share in the Singapore action (because the Share had already been transferred to Mr Salgaocar), it was clear that the existence of a 2014 sale agreement (which was raised by Mr Darsan as a defence to Mr Salgaocar’s claim in trust based on the 2003 agreement) was very much in issue in the Singapore action. The Singapore action came to a halt when Mr Salgaocar passed away which led to a dispute between his wife and daughter over the appointment of the administratrix to represent the estate. A day after the estate

24 [2019] SGCA 42.

informed the court that the administration dispute had been resolved and that the Singapore action would proceed, Mr Darsan commenced an action against Mr Salgaocar's estate in the BVI for the return of the Share on the basis that Mr Salgaocar had failed to make payment for the Share pursuant to the 2014 sale agreement. In response, the estate applied for an anti-suit injunction in Singapore to restrain Mr Darsan from proceeding with the BVI action. The High Court judge denied the estate's application chiefly because he was under the mistaken impression (based on the state of the pleadings before him) that the subject matter of the suit in the BVI (i.e. the 2014 sale agreement) was not before the Singapore court. The estate appealed against the order and while the appeal was pending, applied to stay the BVI action. The BVI court, largely following the cue from the Singapore High Court, found that BVI was the natural forum for Mr Darsan's claim, and further that the Singapore High Court judgment gave rise to an issue estoppel on the issue of natural forum, and accordingly denied the stay application.

[48] On appeal, the Singapore Court of Appeal was thus confronted with a new development which was not before the High Court. Mr Darsan relied on the confluence and sequence of the BVI court's decision not to stay the BVI action (which, it must be emphasised, was rendered *prior* to the hearing of the appeal before the Singapore Court of Appeal) to resist the appeal on the grounds of issue estoppel and comity.

[49] The Court of Appeal observed that although this was not the first occasion when a court has had to hear an application for an anti-suit injunction to restrain foreign proceedings *subsequent* to a refusal of that same foreign court to stay the foreign proceedings, it appears to be the first time in which it has been suggested that a decision not to stay proceedings can give rise to an issue estoppel in respect of a subsequent anti-suit injunction application in the competing forum. The court found that the doctrine of issue estoppel could not apply in the manner suggested by Mr Darsan because it would lead to arbitrary outcomes. If issue estoppel applied as suggested, the court that is second in time would effectively always be precluded from considering the application before it, though the application is strictly speaking different from that which was considered by the foreign court. This cannot be legally correct and is not supported by the case law. To suggest otherwise would effectively mean that the outcome

of any such applications would be dependent on the scheduling of the hearings by the courts over which the parties would have no control whatsoever.

[50] In relation to the comity argument, Mr Darsan claimed that the denial of the stay by the BVI court would require a *stricter* test such that an anti-suit injunction should only be granted if the Singapore Court of Appeal is satisfied that there is a need to (a) protect the domestic court's own jurisdiction; or (b) prevent evasion of its public policies. In other words, the mere fact that Singapore is the natural forum for Mr Darsan's claim and the BVI action is vexatious or oppressive would not be sufficient.

[51] The Singapore Court of Appeal recognised that since an anti-suit injunction indirectly affects the foreign court, the jurisdiction is one which must be exercised with caution and considerations of comity do weigh into the court's determination of whether the injunction should be granted. In fact, comity is the very reason for the distinction between the analyses applicable to applications for an anti-suit injunction and a stay of proceedings. While the relevance of comity is undisputed, the precise scope of the principle is less clear.

[52] The Court of Appeal observed that two different approaches may be discerned in examining the relevance of comity for the purposes of an anti-suit injunction: (a) the "stricter" approach which requires that the court should have regard to comity and should only grant an anti-suit injunction in exceptional circumstances either (i) to protect its own jurisdiction; or (ii) to prevent evasion of its public policies; or (b) the "laxer" and conventional approach which would grant an anti-suit injunction if the domestic court is determined to be the natural forum and if the foreign proceedings are found to be vexatious or oppressive.

[53] After an extensive review of the cases, the Court of Appeal found that most cases adopted an approach that fell in between the stricter approach and the conventional approach, i.e. the grant of an anti-suit injunction is not merely confined to situations where there is a need for the domestic court to protect its own jurisdiction or prevent evasion of public policies (pursuant to the stricter approach). At the same time, it recognised that an anti-suit injunction cannot always be granted so long as the pursuit of foreign proceedings is vexatious or oppressive (pursuant to the conventional approach). Specifically,

there is a common recognition that where the domestic court has a sufficiently close connection with the dispute (such as where it is the natural forum) and the pursuit of the foreign proceedings is found to be unconscionable, the grant of the injunction is less likely to infringe principles of comity.

[54] In support of the “stricter” approach, Mr Darsan referred to a number of cases for the proposition that it is generally for the court in which proceedings are brought to determine whether it is the natural forum for the dispute. It was argued that where a foreign court has declined to stay its proceedings, the local court should not grant an anti-suit injunction save in the most exceptional of circumstance. Specifically, reliance was placed on the *dicta* by Hoffmann J in *Deutsche Bank AG and another v Highland Crusader Offshore Partners LP and others*²⁵ (“*Deutsche Bank*”) (at [50]) to the effect that:

(4) If the English court considers England to be the natural forum and can see no legitimate personal or juridical advantage in the claimant in the foreign proceedings being allowed to pursue them, it does not automatically follow that an anti-suit injunction should be granted. For that would be to overlook the important restraining influence of considerations of comity. (5) An anti-suit injunction always requires caution because by definition it involves interference with the process or potential process of a foreign court. ... [T]he principle of comity requires the court to recognise that, in deciding questions of weight to be attached to different factors, different judges operating under different legal systems with different legal policies may legitimately arrive at different answers, without occasioning a breach of customary international law or manifest injustice, and that in such circumstances it is not for an English court to arrogate to itself the decision how a foreign court should determine the matter. The stronger the connection of the foreign court with the parties and the subject matter of the dispute, the stronger the argument against intervention.

[55] While the Court of Appeal agreed with the principle that it is generally for the court in which proceedings are brought to determine whether it is the natural forum for the dispute, that principle does not apply with equal force where a defendant has deliberately carved out a specific issue from a pending suit and commenced proceedings in a

25 [2010] 1 WLR 1023.

foreign jurisdiction in respect of this issue. In such circumstances, it cannot be said that the foreign court is necessarily in a better position to determine if it is the natural forum for the dispute, having regard to the overall dispute between the parties. This point was in fact noted in *Barclays Bank plc v Homan and others*²⁶ (“*Barclays Bank*”) where the English Court of Appeal explained that the principle stated by Hoffmann J that it is the foreign judge who is usually the best person to decide whether to accept jurisdiction in his court *only applies* in circumstances where the foreign proceedings are *not vexatious or oppressive* (at 703):

Mr Merriman for Barclays Bank argues that in his judgment Hoffmann J was at fault in the following respects. (I) In the passages I have quoted, the learned judge said that the ‘normal assumption’ was that it was for the foreign judge to decide whether to accept jurisdiction in his court rather than for an English judge to decide that he should not. *But when Hoffmann J said this, he had already made it clear that in an exceptional case where the foreign proceedings were vexatious or oppressive, an injunction could properly be granted.* Thus his reference to the normal assumption can only be read as a reference to the principle to which I have already referred, ie that *where the foreign proceedings are not vexatious and oppressive, it is prima facie for the foreign court to decide whether or not it is the appropriate forum for the decision of the suit before it.* In this respect, I agree with Hoffmann J. (Emphasis added.)

[56] The Singapore Court of Appeal ultimately reconciled the cases which were relied on in support of the “stricter” approach. The refusal of the anti-suit injunction in the *Barclays Bank* and *Deutsche Bank* cases was explained on the basis that the respective courts in those cases found that they were not the clearly more appropriate forum for the dispute. Thus, the pursuit of the foreign proceedings was not deemed to be vexatious or oppressive.

[57] In allowing the appeal to grant the anti-suit injunction, the Court of Appeal found that an intervening decision by a foreign court not to stay its proceedings which was rendered while an appeal against a lower court’s refusal to grant the anti-suit injunction was pending, should not on its own change the outcome of the appeal. Comity should not make such a critical difference in such circumstances. To allow comity to operate in such a manner would mean that the outcome of

26 [1993] BCLC 680.

the appeal would be dependent on the scheduling of the cases in the two courts, i.e. whether the appeal against the refusal of the anti-suit injunction, or the application to stay the foreign action is heard first. The overarching consideration in an anti-suit injunction application is whether the ends of justice require that the injunction be granted and for this reason, the determination should not be dependent on the scheduling of cases.

[58] The Court of Appeal noted that the considerations of vexation and comity are interrelated. The domestic court may find the respondent in an anti-suit injunction application to have acted in a vexatious or oppressive manner for reasons which are not necessarily inconsistent with or contradictory to the findings of the foreign court (such as in the present case, where the respondent's conduct was vexatious and oppressive only when considered in the context of the pre-existing litigation in Singapore). In such cases, the domestic court is not arrogating to itself the decision for both jurisdictions in issuing the injunction, and there is correspondingly no undermining of international comity.

Conclusion

[59] These many and varied developments on the application of conflict rules in different areas of the law are both a symptom and a sign of the increasing internationalisation of legal practice. These developments are an important contribution to the growth and evolution of a firm base of sound and consistent precedents, which is critical to the court's expanding role in adjudicating disputes with multi-jurisdictional dimensions.

[60] In this connection, it is perhaps apt to observe that the rules on resolving conflicts will ultimately merely allow the courts to do just that – resolve conflict of laws. Moving forward, the focus must move beyond merely *resolving* conflicts, and towards the gradual *reduction* of conflicts through multilateral and regional efforts at promoting convergence and the harmonisation of laws and legal systems. This is, to some extent, already happening. In particular, and closer to home, good progress has been made both in ASEAN and in the wider Asia-Pacific region, through projects such as the Asian Business Law Institute's development of a set of "Asian Principles for the Recognition and Enforcement of Foreign Judgments", a development which aspires to the tradition of the seminal English

text on the conflict of laws, *Dicey, Morris & Collins on the Conflict of Laws*.²⁷ Another initiative which deserves special mention is the Judicial Insolvency Network (“JIN”) – a network of insolvency judges from around the world who have come together in common recognition of the important contributions that courts can make towards addressing the challenges of cross-border insolvency. Through the platform which the JIN provides, these judges are able to convene regularly, engage in sustained conversation, and undertake a number of projects, all in furtherance of the network’s valuable aims of facilitating court-to-court communication and cooperation, developing best practices, and providing judicial thought leadership. Such projects, and others like it, augur well for the development of a rules-based legal order capable of handling the increasing number and complexity of cross-border disputes which we must expect. Therefore, while this survey of the jurisprudence serves as a backward glance at what has most recently been accomplished in the field of private international law, it should also come as a reminder that, in many ways, that journey has only just begun.

27 See the foreword written by Justice Andrew Phang Boon Leong in *Recognition and Enforcement of Foreign Judgments in Asia*, edited by Associate Professor Adeline Chong, <<https://abli.asia/LinkClick.aspx?fileticket=I0rTeJ0yljw%3d&portalid=0>> (accessed on July 19, 2019).

Recent Developments in Singapore Contract Law

by

Justice Andrew Phang*

Introduction

[1] Contract law is a foundational topic in the law of obligations.¹ A sound understanding of it is essential to legal practice. It is also a fascinating subject. Its importance in the practical sphere belies its complex theoretical underpinnings. It is no coincidence, in my view, that there are a number of legal scholars who have focused on both contract law as well as legal philosophy.² Contract law is therefore by no means an easy topic at all. I can personally testify from my own experience as a former legal academic teaching it for decades that it is an incredibly difficult subject to teach to first year law students. Yet, there is little choice in the matter since it is – as just mentioned – of such foundational significance.

[2] The law of contract in Singapore itself is derived from the English law. This is, of course, not surprising as Singapore was a former British colony. The sources of Singapore law in general³ and its contract law

* Judge of Appeal, Supreme Court of Singapore. Versions of this paper were delivered at the Asia-Pacific Judicial Colloquium 2019 organised by the Supreme Court of Singapore and held between May 27, 2019 and May 30, 2019 in Singapore as well as at the 5th Joint Judicial Conference (involving the Judiciaries of Malaysia, Brunei and Singapore) organised by the Supreme Court of Singapore and held on September 13, 2019 in Singapore. I am grateful to the participants from both these events for their very helpful comments and suggestions. I am also grateful to Professor Goh Yihan, Dean of the Singapore Management University School of Law, for his very helpful comments and suggestions. However, all errors remain mine alone. Further, all views expressed in this essay are personal only and do not reflect in any way the views of the Supreme Court of Singapore.

- 1 The other seminal branch of the law of obligations is the law of torts, although many legal scholars would also argue in favour of including a developing branch of the law which is of rather more modern vintage, *viz*, the law relating to unjust enrichment (formerly more popularly known as the law of restitution).
- 2 For example, Professor Lon Fuller and Professor Charles Fried, both from Harvard Law School.
- 3 See e.g. Andrew Phang Boon Leong, *From Foundation to Legacy – The Second Charter of Justice* (Singapore Academy of Law, 2006).

in particular are dealt with in more detail elsewhere.⁴ Suffice it to state that when the present author was a law student many decades ago, English law was virtually sacrosanct. Not surprisingly, Singapore contract law then was but a poor carbon copy of the corresponding English law.⁵ However, in more recent years, Singapore law has gradually cut its legal apron strings,⁶ and this is evident not only in the development of its law in general⁷ but also in its law of contract in particular as well.⁸

[3] As I have emphasised elsewhere, the approach adopted in the Singapore context is one where the courts ought (especially in novel or developing areas of contract law) to search across all common law jurisdictions for the *principles* that are most appropriate to the jurisdiction concerned from the perspectives of both logic *and* local conditions.⁹ Put simply, courts engage in *the search for principle*.¹⁰ Looked at in this light, comparative analysis is of the first importance,¹¹ and this is, in my view, common to the development of Commonwealth contract law generally. This also ensures that *there ought not to be*

4 See e.g. Andrew Phang Boon Leong and Goh Yihan, "Sources and Theory" in Andrew Phang Boon Leong (gen ed), *The Law of Contract in Singapore* (Academy Publishing, 2012), Ch 2.

5 See generally Andrew Phang Boon Leong, *The Development of Singapore Law* (Butterworths, 1990), Chs 2 and 3, especially pp 52–84 and 96–118, respectively – although it was also opined (at p 115) that "contrary to popular belief or opinion, there [was] ample scope and material for the development of a jurisprudence of local contract law that more truly reflects local needs and circumstances".

6 Cf R H Hickling, "Breaking Apron Strings" (1987) 8 Sing LR 78.

7 See generally Goh Yihan and Paul Tan (gen eds), *Singapore Law – 50 Years in the Making* (Academy Publishing, 2015).

8 For an excellent overview, see Peh Aik Hin, "Contract Law: A Rationalisation Process towards Coherence and Fairness" in Goh and Tan, *ibid*, Ch 10. And for a general treatise on Singapore contract law, see *The Law of Contract in Singapore*, n 4, above.

9 See Andrew Phang, "Recent Developments in Singapore Contract Law – The Search for Principle" (2011) 28 JCL 1.

10 Borrowing (albeit in a somewhat different context) the title of Lord Goff of Chieveley's justly famous Maccabaeian Lecture in Jurisprudence: see Robert Goff, "The Search for Principle" (1983) 69 *Proceedings of the British Academy* 169 (reprinted in William Swadling and Gareth Jones (gen eds), *The Search for Principle – Essays in Honour of Lord Goff of Chieveley* (Oxford University Press, 1999), pp 313–329).

11 See Andrew Phang, "The Law of Remedies – The Importance of Comparative and Integrated Analysis" (2016) 28 SAclJ 746 at 751–765 and (in relation to the specific context of remedies) at 748–751.

*autochthonous or indigenous development (here, of the domestic law of contract) merely for its own sake (for this would be mere parochialism), and that due regard ought to be paid to developments in other jurisdictions.*¹²

[4] Over the many years since independence (on August 9, 1965), the approach briefly outlined in the preceding paragraph has in fact resulted not only in the development of Singapore contract law but has also led to *divergences* from the corresponding *English* law. However, as also emphasised in that same paragraph, such divergences as existed were not effected merely for their own sake. In the present essay I will briefly describe some significant recent developments in the Singapore law of contract and also attempt to explain why divergences from the English law were considered necessary in some of the relevant decisions. Indeed, as we shall see, on occasion, the so-called “divergence” was from the *change* in the corresponding English law – in which the Singapore court concerned either endorsed the *existing* English law¹³ *or* (on much rarer occasions) decided to *set out an entirely new set of legal principles with no precedent in any other Commonwealth common law jurisdiction.*¹⁴

[5] Although the focus of the present essay will be on decisions on Singapore contract law within the past five years or (depending on the specific circumstances) slightly earlier, I hope that the reader will not mind if I refer to a few decisions outside that particular period¹⁵

12 And see the Singapore High Court decision of *CHS CPO GmbH (in bankruptcy) v Vikas Goel* [2005] 3 SLR(R) 202 at [87].

13 For example, in relation to the law concerning remoteness of damage (which is, in fact, discussed in more detail later in this essay).

14 In particular, the law relating to discharge by breach of contract (also discussed in more detail later in this essay).

15 One particular decision is also worthy of consideration but falls, in my view, too far outside this period. It is the Singapore Court of Appeal decision of *Chwee Kin Keong v DigilandMall.com Pte Ltd* [2005] 1 SLR(R) 502 (“*Chwee Kin Keong*”), which decision endorsed the doctrine of common mistake at common law *and* in equity (and *contrary* to the approach in the English Court of Appeal decision of *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2003] QB 679 and that presently represents English law, which *rejected* the doctrine of common mistake in *equity* (as laid down in the previous English Court of Appeal decision of *Solle v Butcher* [1950] 1 KB 671)). It should be noted, though, that, strictly speaking, *Chwee Kin Keong* concerned the doctrine of *unilateral* (as opposed to common) mistake. However, it is respectfully submitted that the *general reasoning* contained in *Chwee Kin Keong* applies *with equal force* to the doctrine of *common* mistake. For learned commentary on *Chwee Kin Keong*, see Lee Pey Woan, “Unilateral Mistake in Common Law and Equity – *Solle v Butcher* Reinstated” (2006) 22 JCL

not only because of their importance to Singapore law itself but also because they might also furnish another view in areas of the law of contract that are either in a state of flux¹⁶ or around which the apex courts of different jurisdictions adopt different approaches.¹⁷ It should also be noted that, owing to constraints of space, I could not deal with every area of development.¹⁸ With this in mind, I will be dealing with developments in the following areas of contract law – contractual interpretation, implied terms, discharge by breach of contract, contractual illegality, unconscionability, remoteness of damage and possible new categories of contractual damages.

Contractual interpretation¹⁹

[6] The discussion in this part of the essay will be brief. This is due, in the main, to the fact that the truly seminal developments in the area of contractual interpretation²⁰ are not as recent as to come strictly within the purview of the present essay. It is, however, true that there were subsequent cases which elaborated as well as refined the law in this area.²¹ A summary of the law may be found in the

81; Andrew Phang, “Contract Formation and Mistake in Cyberspace – The Singapore Experience” (2005) 17 SAclJ 361; and, by the same author, “Contract Formation and Mistake in Cyberspace” (2005) 21 JCL 197; as well as Yeo Tiong Min, “Unilateral Mistake in Contract: Five Degrees of Fusion of Common Law and Equity” [2004] Sing JLS 227; and Kwek Mean Luck, “Law, Fairness and Economics – Unilateral Mistake in *Digilandmall*” (2005) 17 SAclJ 411.

16 Again, the law relating to discharge by breach of contract.

17 Principally where, as we shall see, the Singapore Court of Appeal has declined to follow either House of Lords or UK Supreme Court decisions.

18 See generally *The Law of Contract in Singapore*, n 4 above, as well as the chapters on contract law in the various issues of the *Annual Review of Singapore Cases*.

19 See generally Goh Yihan, *Interpretation of Contracts in Singapore* (Sweet & Maxwell Asia, 2018); Sir Kim Lewison, *The Interpretation of Contracts*, 6th edn (Sweet & Maxwell, 2015) (adapted for Australia in Sir Kim Lewison and David Hughes, *The Interpretation of Contracts in Australia* (Sweet & Maxwell, 2011)); Gerard McMeel, *The Construction of Contracts – Interpretation, Implication, and Rectification*, 3rd edn (Oxford University Press, 2017); and J W Carter, *The Construction of Commercial Contracts* (Hart Publishing, 2013).

20 See the Singapore Court of Appeal decision of *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029.

21 See e.g. the Singapore Court of Appeal decisions of *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193; *Xia Zhengyan v Geng Changqing* [2015] 3 SLR 732; *YES F&B Group Pte Ltd v Soup Restaurant Singapore Pte Ltd* [2015] 5 SLR 1187; *Lucky Realty Co Pte Ltd v HSBC Trustee (Singapore) Ltd* [2016] 1 SLR 1069; *Yap Son On v Ding Pei Zhen* [2017] 1 SLR 219; and *Lim Sze Eng v Lin Choo Mee* [2019] 1 SLR 414.

recent Singapore Court of Appeal decision of *Lim Sze Eng v Lin Choo Mee*,²² as follows:²³

60 ... In *CIFG Special Assets Capital I Ltd (formerly known as Diamond Kendall Ltd) v Ong Puay Koon and others and another appeal* [2018] 1 SLR 170 (“*CIFG*”), this Court pithily summarised the general principles in relation to contractual interpretation in the following manner (at [19], approved more recently in *PT Bayan Resources TBK and another v BCBC Singapore Pte Ltd and another* [2018] SGCA(I) 6 at [120]):

- “(a) The starting point is that one looks to the text that the parties have used (see *Lucky Realty Co Pte Ltd v HSBC Trustee (Singapore) Ltd* [2016] 1 SLR 1069 at [2]).
- (b) At the same time, it is permissible to have regard to the relevant context as long as the relevant contextual points are clear, obvious and known to both parties (see *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at [125], [128] and [129]).
- (c) The reason that the court has regard to the relevant context is that it places the court in the ‘best possible position to ascertain the parties’ objective intentions by interpreting the expressions used by [them] in their proper context’ (see *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [72]).
- (d) In general, the meaning ascribed to the terms of the contract must be one which the expressions used by the parties can reasonably bear (see, eg, *Yap Son On v Ding Pei Zhen* [2017] 1 SLR 219 at [31]).”

61 And in *Yap Son On v Ding Pei Zhen* [2017] 1 SLR 219 (“*Yap Son On*”), this Court made the following observations on the contextual approach to contractual interpretation (at [30]):

“A comprehensive summary of the law on contractual interpretation in Singapore may be found in our recent decision in *Y.E.S. F&B Group Pte Ltd v Soup Restaurant Singapore Pte Ltd* [2015] 5 SLR 1187 ... at [30]–[42]. In gist, the purpose of interpretation is to give effect to the objectively ascertained expressed intentions of the contracting parties as it emerges from the contextual meaning

22 [2019] 1 SLR 414.

23 *Ibid.*, at [60]–[62] (emphasis in the original text).

of the relevant contractual language. Embedded within this statement are certain key principles: (a) first, in general ***both the text and context must be considered*** (at [2]); (b) second, it is the *objectively ascertained intentions of the parties* that is relevant, not their subjective intentions (at [33]); and (c) third, the object of interpretation is the verbal expressions used by the parties and so, *the text of their agreement is of first importance* (at [32]). ...” (emphasis in original in italics; emphasis added in bold italics)

62 The key point to note from the foregoing extracts for the purpose of the present analysis is that although the text of the contract will undoubtedly be the first port of call for the court when interpreting a contract, the court should always proceed to examine the relevant *context* even if the relevant text appears, at first glance, to be plain and unambiguous. This point is perceptively put by Prof Goh Yihan in his very recently published seminal treatise on contractual interpretation in Singapore, *Interpretation of Contracts in Singapore* (Sweet & Maxwell Asia, 2018), in the following manner (at paras 2.042 and 2.043):

“2.042 More broadly, *the Court of Appeal has also emphasised the interaction between both text and context in every case, even as the text ought always to be the first port of call for the court. Thus, what might at first glance appear to be plain and unambiguous text may not in fact be so, once the court has examined the relevant context. Indeed, where the text is ambiguous, the relevant context will become very important in ascertaining the parties’ objective intention. In the end, as the Court of Appeal put it aptly in Y.E.S. [F&B Group Pte Ltd v Soup Restaurant Singapore Pte Ltd (formerly known as Soup Restaurant (Causeway Point) Pte Ltd) [2015] 5 SLR 1187 (“Y.E.S.”)], there is ‘no magic formula or legal silver bullet’ and that ‘[c]ontractual interpretation is (often at least) hard work, centring on a meticulous and nuanced (yet practically-oriented) analysis of the relevant text and context’.*

2.043 In essence, the text of the contract remains an important restraint on the ultimate meaning derived by the court. Thus, as Coomaraswamy J suggested in *HSBC Trustee*, the courts cannot stray too far from the penumbral meaning of the words used by the parties. However, as the Court of Appeal explained in *Y.E.S. ...*, *this does not mean that, where the parties have used unambiguous language, the court must apply those words without utilising the relevant context to assist in the process of contractual interpretation. The context*

can still be used to derive the plain meaning of the text. This is entirely in line with the Court of Appeal's sentiment that the text and context interact with one another in the interpretative exercise. It also gives effect to an often-missed point that the determination of words as 'unambiguous' is itself an interpretative exercise, that takes place against the relevant context, be it the internal context of the document, or the relevant background information, however broad." (emphasis added)

[7] Indeed, Professor Goh's recent book, *Interpretation of Contracts in Singapore*,²⁴ is not only the leading work on contractual interpretation in Singapore but also analyses all the relevant local as well as overseas decisions and therefore is highly recommended to all who are interested in this very important area of contract law.

Implied terms²⁵

[8] Turning, first, to the topic of implied terms, up to approximately a decade ago, the law relating to implied terms (in particular the category we now know as "terms implied in fact") was fairly well-established inasmuch as courts were guided by two tests, *viz*, the "business efficacy"²⁶ and "officious bystander" tests,²⁷ respectively. However, in the Privy Council decision of *Attorney General of Belize v Belize Telecom Ltd*,²⁸ Lord Hoffmann, who delivered the judgment of

24 See n 19 above; and quoted from in the *Lim Sze Eng* decision (*ibid*). It might also be usefully noted that any divergences in this particular area of the law are due, to a significant extent, to the impact of the relevant provisions of the Evidence Act (Cap 97, 1997 Rev Ed) – which divergences are also dealt with in the work just cited.

25 See generally Richard Austen-Baker, *Implied Terms in English Contract Law*, 2nd edn (Elgar Commercial Law and Practice, 2017) as well as Andrew Phang, "The Challenge of Principled Gap-Filling: A Study of Implied Terms in a Comparative Context [2014] JBL 263. I draw liberally from the latter article as well as from my joint article with Professor Goh Yihan (see Andrew Phang and Goh Yihan, "Contract Law in Commonwealth Countries: Uniformity or Divergence?" (2019) 31 SAclJ 170) in the context of this part of the essay.

26 See *per* Bowen LJ in the English Court of Appeal decision of *The Moorcock* (1889) 14 PD 64.

27 See *per* MacKinnon LJ in the English Court of Appeal decision of *Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 KB 206 (affirmed, [1940] AC 701).

28 [2009] 1 WLR 1988 (on appeal from the Court of Appeal of Belize). Reference may also be made to a recent piece by Lord Hoffmann, "Language and Lawyers" (2018) 134 LQR 553. Indeed, the literature itself on *Belize* is copious: see e.g. Kelvin Low and Kelly Loi, "The Many Tests for Terms Implied in Fact" (2009)

the Board, was of the view that “[t]he proposition that the implication of a term is *an exercise in the construction of the instrument as a whole* is ... a matter of logic”.²⁹ The learned Law Lord then *reformulated* the test for “terms implied in fact”, as follows:³⁰

It follows that in every case in which it is said that some provision ought to be implied in an instrument, *the question for the court is whether such a provision would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean.* It will be noticed from Lord Pearson’s speech [in *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board* [1973] 1 WLR 601 at 609] that this question can be reformulated in various ways which a court may find helpful in providing an answer – the implied term must “go without saying”, it must be “necessary to give business efficacy to the contract” and so on – but these are not in the Board’s opinion to be treated as different or additional tests. *There is only one question: is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?*

[9] More significantly, perhaps, Lord Hoffmann was of the view that the “business efficacy” and “officious bystander” tests merely represented different ways in which the courts have expressed the key question italicised in the quotation in the preceding paragraph; indeed, the learned Law Lord warned of the “dangers in treating these alternative formulations of the question as if they had a life of their own”.³¹ The result is that both these traditional tests are no longer the main focus. The central focus or test is premised, instead, on *the reasonable person*.

[10] *However*, there are, with respect, a number of difficulties with the *Belize* test. These were, in fact, considered in some detail in the

125 LQR 561; Paul S Davies, “Recent developments in the law of implied terms” [2010] LMCLQ 140; J McCaughan, “Implied Terms: the Journey of the Man on the Clapham Omnibus” [2011] CLJ 607; J W Carter, “The implication of contractual terms: problems with *Belize Telecom*” (2013) 27(3) CLQ 3; Richard Hooley, “Implied Terms After *Belize Telecom*” [2014] CLJ 315; Phang, n 25 above; David McLauchlan, “Construction and implication: in defence of *Belize Telecom*” [2014] LMCLQ 203; and J W Carter and Wayne Courtney, “*Belize Telecom*: a reply to Professor McLauchlan” [2015] LMCLQ 245. An excellent summary of *Belize* and subsequent developments is to be found in Austen-Baker, n 25 above, paras 7.54–7.69.

29 [2009] 1 WLR 1988 at [19] (emphasis added).

30 *Ibid*, at [21] (emphasis added).

31 *Ibid*, at [22].

recent Singapore Court of Appeal decision of *Foo Jong Peng v Phua Kiah Mai* (“*Foo Jong Peng*”),³² which *rejected* the *Belize* test in so far as that test suggests that the traditional “business efficacy” and “officious bystander” tests are not central to the implication of terms “in fact”. In that case, the appellants concerned were committee members of the management committee of a Chinese clan association. The first appellant was the vice-president of that association and had convened a meeting to remove the respondents from their offices as president and honorary secretary general of the association, respectively. Resolutions were passed at the said meeting to remove the respondents from their offices. The rules of the said association were silent on the power of the management committee to remove office bearers. The respondents filed an application to the Singapore High Court seeking declarations, *inter alia*, that the management committee had no power to remove them from their offices and that the meeting convened was void and invalid. The High Court declined to imply a term permitting the management committee to remove management committee members before the expiry of their fixed two-year term of office and the appellants appealed against that decision. The Singapore Court of Appeal held, *inter alia*, that, applying the “business efficacy” and “officious bystander” tests, a term conferring power on the management committee to remove office bearers could not be implied. In the court’s view, it was not necessary for the effective management of the association’s affairs (based on the “business efficacy” test) nor was this power of removal so obvious that (based on the “officious bystander” test) the members of the association would have considered that it would go without saying that the management committee itself should be free to remove an office bearer.³³ Of more significance (for our present purposes) are the court’s observations with respect to the *Belize* test. In particular, the court observed as follows:³⁴

30 There has, in fact, been a dearth of local authority considering the *Belize* test. Whilst the recent Singapore High Court decision of

32 [2012] 4 SLR 1267; noted both comprehensively and perceptively by Goh Yihan, “Terms Implied in Fact Clarified in Singapore” [2013] JBL 237. See also, by the same author, “Contractual Interpretation in Singapore – Continued Refinement after *Zurich Insurance*” (2012) 24 SAclJ 275 at 279–282; and “The Relationship between Interpretation, Implication and Rectification in Singapore” (2012) 30 Sing L Rev 97 at 101–105 and 110–118.

33 [2012] 4 SLR 1267 at [46] and [47].

34 *Ibid*, at [30]–[35] (emphasis in the original text).

Sembcorp Marine Ltd v PPL Holdings Pte Ltd [2012] 3 SLR 801 referred to the *Belize* test, we refrain from commenting on it as we understand that appeals are pending before this court.³⁵ There was also an observation, by way of *obiter dicta*, by this court in *MFM Restaurants Pte Ltd v Fish & Co Restaurants Pte Ltd* [2011] 1 SLR 150 (“*MFM*”), where it was stated as follows (at [98]; see also at [100], where there is a further reference in the context of terms “implied in law”):

“It is interesting to note, at this juncture, that the broad underlying thread of *interpretation* which Lord Hoffmann utilises in advocating his approach centring on assumption of responsibility by the defendant (a point perceptively made by *Wee* [Paul C K Wee, ‘Contractual interpretation and remoteness’ [2010] LMCLQ 150] ... has *also* been utilised by the learned law lord in the area of implied terms as well (in particular, to terms implied *in fact*) – hence, the analogy drawn by Lord Hoffmann between both these aforementioned areas. However, and with the greatest of respect, the uncertainty generated in the latter area would, in our view, apply equally to the former area. In the recent Privy Council decision (on appeal from the Court of Appeal of Belize) of *Attorney General of Belize v Belize Telecom Limited* [2009] 1 WLR 1988, for example, Lord Hoffmann, delivering the judgment of the Board, adopted an extremely broad approach towards the implication of terms in fact, effectively *effacing* the distinction between the time-honoured ‘business efficacy’ and ‘officious bystander’ tests (for a general account of these two tests (as well as their possible relationship), see the Singapore High Court decision of *Forefront Medical Technology (Pte) Ltd v Modern-Pak Pte Ltd* [2006] 1 SLR(R) 927 at [29]–[40]). This results, however, in a lack of concrete rules (and consequent normative guidance) as well as uncertainty in the practical sphere (a point which is also emphasised by *Wee* at 162-166; reference may also be made to Elizabeth Macdonald, ‘Casting Aside “Officious Bystanders” and “Business Efficacy”?’ (2009) 26 JCL 97). One should not, in fact, be surprised at such a result as the lack of guidance as well as uncertainty is likely to be the result when the *umbrella* concept of *interpretation*, which is pitched at a *necessarily high level of abstraction*, is utilised (in substance, if not form) as the legal basis for *different and disparate areas of law* (cf also the collected essays in Brian Coote, *Contract*

³⁵ See now *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193, discussed below.

as *Assumption – Essays on a Theme* (Hart Publishing, 2010) (Rick Bigwood ed); in so far as *The Achilleas* itself is concerned, see the very recent comment by Brian Coote, ‘Contract as Assumption and Remoteness of Damage’ (2010) 26 JCL 211 (‘Coote’). The lack of guidance stems from the absence of a sufficiently specific set of *concrete* rules and principles whilst the resultant uncertainty is the natural consequence when legal rules and principles lacking specific and concrete guidance are sought to be applied to the various sets of facts (which are themselves necessarily myriad in nature) (in this regard, see also generally this court’s observations in *Mühlbauer AG v Manufacturing Integration Technology Ltd* [2010] 2 SLR 724 (‘Mühlbauer’) (at [40]–[43]) about the danger of over-generalisation and over-abstraction in making legal arguments). Put simply, whilst it is desirable from a conceptual perspective to have umbrella doctrines that make for *theoretical* ‘neatness’, there is a limit to which one can have ‘one-size-fits-all’ *doctrines* that will not ultimately become legal procrustean beds (see also *Wee* at 166 and 175–176). Indeed, the necessity for *specific* rules and principles has always been the hallmark of the development of the common law. Such specificity has, in fact, been (perhaps paradoxically) one of the key strengths of the common law itself, which is why Prof S F C Milsom perceptively observed that the common law system developed in a strikingly systematic fashion, notwithstanding the apparent absence of a clear blueprint as such (see generally S F C Milsom, ‘Reason in the Development of the Common Law’ (1965) 81 LQR 496; see also *Mühlbauer* (at [42]) where it is observed that there is an *interactive* process between the *universal* and the *particular* or the *general* and the *specific* in law and decision-making.” (emphasis in original)

31 As we shall see, the observations in *MFM*, although rendered by way of *obiter dicta*, are significant inasmuch as they embody what is, with respect, the fundamental difficulty with the *Belize* test. And it is that whilst the process of implication (of terms) is, when viewed in a more general sense, also a process of interpretation, the process of implication itself is, in the final analysis, just one specific conception of the broader concept of “interpretation”. In particular, the process of implication is *separate and distinct* from the more general process relating to the interpretation of documents. Indeed, the process of implication of terms proceeds, *ex hypothesi*, on the *absence* of an *express* term of the contract. Hence, the implication of a term, whether in fact or in law (for the distinction between these two categories of implied

terms, see generally *Forefront* ([2006] 1 SLR(R) 927) at [41]–[44]; reference may also be made to the decision of this court in *Jet Holding Ltd v Cooper Cameron (Singapore) Pte Ltd* [2006] 3 SLR(R) 769 at [90]–[91], involves tests as well as techniques that are not only specific but also different from those which operate in relation to the interpretation of documents in general and the (*express*) terms contained therein in particular (see also the observation of Lord Steyn in the House of Lords decision of *Equitable Life Assurance Society v Hyman* [2002] 1 AC 408 at 458 as well as the perceptive observations by Prof Gerard McMeel in *The Construction of Contracts – Interpretation, Implication, and Rectification* (Oxford University Press, 2nd Ed, 2011), para 10.04). The (general) concept of “*interpretation*” has much in common with the *implication* of terms *inasmuch as both entail an objective approach*. However, it is, in our view, incorrect to *conflate* the tests as well as techniques which accompany both the aforementioned processes. Before proceeding to elaborate further, it would be appropriate at this juncture – consistently with the views just expressed – to note the very pertinent observations by a learned author, as follows (see Paul S Davies, “Recent developments in the law of implied terms” [2010] LMCLQ 140 (“*Davies*”) at 144):

“Lord Hoffmann’s speech in *Belize* may be seen to assimilate further implication within interpretation. Indeed, this was Lord Hoffmann’s stated aim, since ‘the implication of the term is not an addition to the instrument. It only spells out what the instrument means’. Yet this is questionable as a matter of logic: if the contract is silent on a point, by implying a term the court is supplementing, or replacing, this silence. It is submitted that it is stretching the boundaries of interpretation too far to suggest that implication is not an addition to the instrument, or that it simply gives effect to what the instrument means. An implied term may give effect to what the instrument should, ideally, have expressly provided for, but not what the instrument means in the form in which it was agreed by the parties.

There is no utility in artificially forcing the doctrine of implication within the confines of interpretation. Indeed, it may actually be dangerous. This is exemplified by the fact that it no longer matters if the parties would not have responded to the officious bystander with a cursory, ‘Oh, of course!’ Why should a term be imposed upon a party if it would not have instantly agreed to such a term upon being asked by a bystander? ... *Belize* suggests

that the subjective intentions of the parties are now irrelevant, and that the only matter of importance is what the reasonable observer would understand the contract to mean.”

32 Returning to *Belize ...*, as is evident from Lord Hoffmann’s approach in that case ..., the central focus or test is premised on – to use more general terminology – the concept of *the reasonable person*. As a learned author put it, “the approach to be derived from *Belize* seems to entail, in the context of contractual implied terms, the replacement of the officious bystander by another character from legal folklore, formerly referred to as the man on the Clapham omnibus” (see John McCaughran, “Implied Terms: The Journey of the Man on the Clapham Omnibus” [2011] CLJ 607 (“*McCaughran*”) at 614). It is important to note that this particular concept of the reasonable person is to be viewed as a *single (and, hence, objective) standard inasmuch as it is the court which stands in the shoes of “the reasonable person”* in determining what the contractual instrument, read as a whole against the relevant background, would *reasonably be understood* to mean. Indeed, despite his more general misgivings on the concept of the reasonable person when it is in effect used in a subjective manner, the invocation of this particular (objective) concept of the reasonable person in the context of implied terms is one which appears to have been mooted by the learned law lord at least as far back as 1995 in the 24th Lord Upjohn Lecture which was delivered on 12 May 1995 at the Inns of Court School of Law (see Lord Hoffmann, “Anthropomorphic Justice: The Reasonable Man and His Friends” (1995) 29 *The Law Teacher* 127 (“*Anthropomorphic Justice*”) (especially at 138-140); see also, by the same author, “The Intolerable Wrestle with Words and Meanings” (1997) 114 *South African LJ* 656 at 662 and, more recently, “A conversation with Lord Hoffmann” [2010] *Law and Financial Markets Review* 242 at 243). Significantly, though, the following (and oft-cited) observations by Lord Radcliffe in the House of Lords decision of *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696 (at 728), which were relied upon by Lord Hoffmann in *Anthropomorphic Justice* in support of the “reasonable man” approach in the context of the implication of terms, were made in the context of the doctrine of *frustration* (a point which the learned law lord himself noted (see *Anthropomorphic Justice* at 127–128) and which, very importantly in our view, is a doctrine that applies by operation of *law* and therefore does *not* concern the search for the presumed intention of the contracting parties (which is the case where the *implication* of terms is concerned)):

“By this time it might seem that the parties themselves have become so far disembodied spirits that their actual persons should be allowed to rest in peace. In their place there rises the figure of the fair and reasonable man. And the spokesman of the fair and reasonable man, who represents after all no more than the anthropomorphic conception of justice, is and must be the court itself.”

33 As already alluded to above, inasmuch as the concept of the reasonable person implies *an objective approach*, that concept must surely be an integral part of the process of the implication of terms. However, the adoption of an objective approach does not, in and of itself, tell us *how* a particular term ought – or ought not – to be implied (*ex hypothesi*, on an *objective* basis). Put simply, *a particular test (or tests) of implication are imperative*. In so far as “terms implied *in fact*” are concerned, these would, in our view, take the form of the “business efficacy” and “officious bystander” tests. These tests constitute (in the manner set out above at [28]) specific as well as concrete guidance for the courts in a situation where the contracting parties have not, *ex hypothesi*, made express provision for the situation concerned in the first place by providing default background guidelines on when the parties may be presumed to have – or not have – a particular unexpressed intention. More importantly, underlying *both* the “business efficacy” and the “officious bystander” tests is a criterion that is *not necessarily* present when applying the broader concept of interpretation, *viz* (with no pun intended), that of *necessity*. In this regard, the following observations by Lord Clarke MR in the English Court of Appeal decision of *Mediterranean Salvage and Towage Ltd v Seamar Trading and Commerce Inc; The Reborn* [2010] 1 All ER (Comm) 1 (“*Mediterranean Salvage and Towage*”) (at [15]) are particularly significant (reference may also be made to the English Court of Appeal decision of *Eastleigh BC v Town Quay Developments Ltd* [2010] 2 P & CR 2 at [32] (*per* Arden LJ) as well as Lord Gribiner QC, “The Iterative Process of Contractual Interpretation” (2012) 28 LQR 41 at 58–61):

“[A]s I read Lord Hoffmann’s analysis [in *Belize*], although he is emphasising that the process of implication is part of the process of construction of the contract, he is not in any way resiling from the often stated proposition that it must be necessary to imply the proposed term.”

It should be noted that the threshold of *necessity* is of little guidance in isolation, and the “business efficacy” and “officious bystander”

tests give practical meaning to this criterion. In contrast, a direct practical relationship with the presumed intentions of the contracting parties is absent from the threshold of “reasonable meaning” as a standalone concept.

34 On a related (and no less important) note, the search under the rubric of implied terms is a search for *the presumed intention of the contracting parties*. In other words, *the court ought not to – and, indeed, cannot – simply substitute its view as to that intention*. Put simply, the intention may be presumed, but the court cannot be presumptuous. We accept that a sceptic might well argue that such a search by the court is a fiction. However, even if we accept that argument, not all *legal* fictions are necessarily fictitious in the pejorative sense that the turn of phrase is utilised by a layperson. Indeed, we would go further: We are of the view that there is no legal fiction involved inasmuch as the court concerned does indeed sift through the objective evidence before it in order to ascertain what the presumed intention of the contracting parties is. In doing this, the court is constantly cognisant of the cardinal (and guiding) principle that it will *not* re-write the contract for the contracting parties. It is true that the very nature of an *implied* term necessitates some investigation of sorts on the part of the court. *However, it bears reiterating that the court does not substitute its own view of what the contracting parties should have intended had the gap in their contract been brought to their attention at the time they entered into the contract.*

35 Indeed, there are legal boundaries or parameters which the court will not transgress. One of these is an obvious one: Where there is already an *express* term covering the situation at hand, the court will *not imply* a term which *contradicts* that particular *express* term (see, for example, Pearlie Koh & Andrew Phang Boon Leong, “Express and Implied Terms” in ch 6 of *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012), para 06.054). Another relates to a principle already emphasised above, *viz*, the criterion of *necessity*. The very nature of this criterion means that the court will imply terms “in fact” *sparingly*. In order to arrive at its decision whether or not to imply a term “in fact”, it will utilise the two tests mentioned above (*viz*, the “business efficacy” and “officious bystander” tests) which, by their very nature, are directly related to ascertaining how *the contracting parties* would (or would not) have filled the gap which ought not to have existed had it been covered by an *express* term in the first place. Again, one must, in our

view, resist the approach of the sceptic merely because *the court* is involved in this exercise. To put it bluntly, this *is* the court's task, *regardless* of the views of the sceptic. More importantly, the court strives, from its *external* vantage point, to ascertain (through the *objective evidence* available) the *internal* intention of the contracting parties *had they been apprised of the situation concerned*. This is why the search is for the *presumed* – as opposed to the actual and subjective – intention of the contracting parties. The concern of the sceptic is, with respect, a misplaced one. No one would seriously controvert the sceptic's concerns if all that he or she is saying is that the process is an imperfect one. After all, it *was* indeed the imperfection of the contracting parties in *leaving a gap* in their contract in the first place that created the *necessity* for implying the term. Utilising the criterion of necessity as embodied within the two tests referred to above, the court attempts its level best to ascertain the presumed intention of the contracting parties in order to ascertain whether or not it will imply the term concerned. Indeed, on a more general level, the law of contract is *not* – owing to a variety of both theoretical as well as practical reasons – concerned with the *actual subjective* intentions of contracting parties *per se* but, rather, is (as already alluded to above) concerned with ascertaining such intentions via *objective evidence* (and on the concept of objectivity, see generally the analysis (as well as the literature cited therein) in Andrew Phang Boon Leong & Goh Yihan, "Offer and Acceptance" in ch 3 of *The Law of Contract in Singapore*, paras 03.006–03.020). What is clear, however, is that adopting the approach of the sceptic is to regress down a slippery slope into legal oblivion and disempowerment. In this regard, it would not, perhaps, be inappropriate to refer to some observations from a lecture delivered at the University of Hong Kong in 2009 which were also referred to in *MFM* ([30] *supra* at [138]) (see Andrew Phang, "Doctrine and Fairness in the Law of Contract" in *The Common Law Lecture Series 2008–2009* (Jessica Young & Rebecca Lee gen eds) (The University of Hong Kong, 2010) pp 17–100 at pp 18–24) ...

[11] The court then summarised the status of the *Belize* test in *Singapore*, as follows:³⁶

In summary, although the process of the implication of terms does involve the concept of interpretation, it entails a *specific form or*

36 [2012] 4 SLR 1267 at [36] (emphasis in the original text).

conception of interpretation which is separate and distinct from the more general process of interpretation (in particular, interpretation of the express terms of a particular document). Indeed, the process of the implication of terms necessarily involves a situation where it is precisely because the express term(s) are missing that the court is compelled to ascertain the presumed intention of the parties via the “business efficacy” and the “officious bystander” tests (both of which are premised on the concept of necessity). In this context, terms will not be implied easily or lightly. Neither does the court imply terms based on its idea of what it thinks ought to be the contractual relationship between the contracting parties. The court is concerned only with the presumed intention of the contracting parties because it can ascertain the subjective intention of the contracting parties only through the objective evidence which is available before it in the case concerned. In our view, therefore, although the Belize test is helpful in reminding us of the importance of the general concept of interpretation (and its accompanying emphasis on the need for objective evidence), we would respectfully reject that test in so far as it suggests that the traditional “business efficacy” and “officious bystander” tests are not central to the implication of terms. On the contrary, both these tests (premised as they are on the concept of necessity) are an integral as well as indispensable part of the law relating to implied terms in Singapore ...

[12] The relevant part of the reasoning of the court in *Foo Jong Peng* in relation to the *Belize* test has been cited *in extenso* in this essay simply because it embodies not only the very detailed reasoning of the court but also because it cites the relevant case law as well as secondary literature (also in some detail). By way of a comparative coda, after proceeding to examine in some detail the relevant English case law handed down after *Belize*³⁷ as well as the relevant academic literature, the court in *Foo Jong Peng* arrived at the following conclusion:³⁸

In summary, therefore, *neither the English case law nor the academic literature furnishes clear support for the Belize test. The entire picture is mixed at best and ambiguous at worst, and constitutes further support for the approach adopted by this court* (set out above at [36]).

37 *Ibid.*, at [37]–[42].

38 *Ibid.*, at [43] (emphasis added in italics and bold italics). See also Goh Yihan, “Terms Implied in Fact Clarified in Singapore” [2013] JBL 237 at 240–243.

[13] The approach set out in *Foo Jong Peng* was subsequently affirmed by the Singapore Court of Appeal in *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* (“*Sembcorp Marine*”).³⁹ In this case, the court confirmed the distinction that was earlier drawn in *Foo Jong Peng* between interpretation on the one hand and implication on the other.⁴⁰ In this regard, it also helpfully clarified the relevant terminology, drawing a (further) distinction between construction on the one hand and interpretation on the other; in so far as Lord Hoffmann intended the *Belize* test to cover only the former (as opposed to the latter), there would be no conflict of views, so to speak. The court in *Sembcorp Marine* observed thus:⁴¹

78 In *Foo Jong Peng*, we recognised (at [31] and [36]) that it is possible to fit the implication of terms within the concept of interpretation “in a more general sense”, which is what we have referred to above as construction of the document as a whole. This may be contrasted with “the interpretation of the express terms of a particular document”:

“31 As we shall see, the observations in *MFM*, although rendered by way of *obiter dicta*, are significant inasmuch as they embody what is, with respect, the fundamental difficulty with the *Belize* test. And it is that *whilst the process of implication (of terms) is, when viewed in a more general sense, also a process of interpretation, the process of implication itself is, in the final analysis, just one specific conception of the broader concept of “interpretation”*. In particular, the process of implication is separate and distinct from the more general process relating to the interpretation of documents. ... Hence, the implication of a term, whether in fact or in law ... involves tests as well as techniques that are not only specific, but also different from those which operate in relation to the interpretation of documents in general and the (express) terms contained therein in particular ... The (general) concept of “interpretation” has much in common with the implication of terms inasmuch as both entail an objective approach. *However, it is, in our view, incorrect to conflate the tests as well as techniques which accompany both the aforementioned processes.*

...

39 [2013] 4 SLR 193.

40 *Ibid.*, at [77]–[82].

41 *Ibid.*, at [78]–[79] (emphasis in the original text).

36 In summary, although the process of the implication of terms does involve the concept of interpretation, it entails a *specific form or conception of interpretation which is separate and distinct from the more general process of interpretation* (in particular, interpretation of the express terms of a particular document). . . .” (emphasis in original omitted; emphasis added in italics and bold italics)

79 In our judgment, it is possible to bridge the gap with *Belize* on this point, if one concludes that Lord Hoffmann was saying that the implication of terms is to be seen as part of the overall process of *construing the document as a whole*, and no more. In this regard, it is pertinent that the relevant passages in *Belize* do not use the word “interpretation”, but rather, “construction”. Moreover, they also speak of the construction of the instrument or document as a whole rather than of specific express terms: see especially *Belize* at [16]–[19], [21], [25] and [27].

[14] It is, however, respectfully submitted that if Lord Hoffmann’s judgment in the *Belize* case is analysed closely and read in its context, it would appear that the learned Law Lord had – in so far as the above observations just quoted are concerned – been utilising the concept of “construction” as meaning “interpretation”. Indeed, as the court in *Sembcorp Marine* also observed as follows:⁴²

But this does not help us with the other parts of *Belize*. In so far as Lord Hoffmann in *Belize* proposed a standard of reasonableness for the implication of terms, we had respectfully registered our disagreement in *Foo Jong Peng* (at [36]), and we reaffirm that disagreement here. The standard for the implication of terms remains one of necessity, not reasonableness. Reasonableness is a necessary but insufficient condition for the implication of a term: *Reigate v Union Manufacturing Company (Ramsbottom), Limited and Elton Dyeing Company, Limited* [1918] 1 KB 592 (“*Reigate*”) at 605.

More importantly (and more generally), perhaps, the court in *Sembcorp Marine* set out the following framework which is now the governing approach in the Singapore context towards the implication of “terms implied in fact”:⁴³

42 Ibid, at [82].

43 Ibid, at [101].

It follows from these points that the implication of terms is to be considered using a three-step process:

- (a) The first step is to ascertain how the gap in the contract arises. Implication will be considered only if the court discerns that the gap arose because the parties did not contemplate the gap.
- (b) At the second step, the court considers whether it is necessary in the business or commercial sense to imply a term in order to give the contract efficacy.
- (c) Finally, the court considers the specific term to be implied. This must be one which the parties, having regard to the need for business efficacy, would have responded "Oh, of course!" had the proposed term been put to them at time of the contract. If it is not possible to find such a clear response, then, the gap persists and the consequences of that gap ensue.

[15] It should be noted that the UK Supreme Court, in *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd* ("*Marks and Spencer*"),⁴⁴ subsequently affirmed the approach adopted in both *Foo Jong Peng* and *Sembcorp Marine*. Indeed, the court in *Marks and Spencer* seemingly disagreed with Lord Hoffmann's view in *Belize*. Lord Neuberger, with whom Lord Sumption and Lord Hodge agreed, all but said that Lord Hoffmann's attempt to recast implication as interpretation is wrong,⁴⁵ and was a development that his Lordship labelled "a characteristically inspired discussion rather than authoritative guidance on the law of implied terms".⁴⁶ There are at least two reasons to regard Lord Neuberger as having rejected the *Belize* test of implication. First (and as already alluded to at the outset of the present paragraph), Lord Neuberger endorsed two Singapore Court of Appeal decisions – itself a rare occasion since the English courts seldom refer to foreign cases – both of which

44 [2016] AC 742. See also Yihan Goh, "Lost but Found Again: The Traditional Tests for Implied Terms in Fact: *Marks & Spencer Plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd*" [2016] JBL 231; Janet O'Sullivan, "Silence is Golden: Implied Terms in the Supreme Court" [2016] CLJ 199; Anthony Kennedy, "Unnecessary Complications" [2016] LMCLQ 190; and Edwin Peel, "Terms Implied in Fact" (2016) 132 LQR 531.

45 [2016] AC 742.

46 *Ibid.*, at [31].

rejected the *Belize* test, viz, *Foo Jong Peng* and *Sembcorp Marine*. In particular, in the latter case, the Singapore Court of Appeal not only “reaffirmed [its] disagreement” with the *Belize* test, but also held that reasonableness is a necessary but insufficient condition for the implication of terms.⁴⁷ By referring to these Singapore decisions that rejected *Belize*, Lord Neuberger must be taken to have disagreed with the *Belize* test. Second, Lord Neuberger expressly disagreed with Lord Hoffmann that implication should be seen as a process of interpretation.⁴⁸ His Lordship drew a further distinction between interpretation and implication, questioning whether it is ever helpful to conflate the two rather different processes⁴⁹ given that “it would seem logically to follow that, until the express terms of a contract have been construed, it is ... not normally sensibly possible to decide whether a further term should be implied”.⁵⁰ While Lord Carnwath⁵¹ and Lord Clarke⁵² did not go as far as to say that *Belize* was wrongly decided, both of their Lordships thought that *Belize* did not depart from the traditional tests of implication. The result, therefore, is that whichever view one agreed with, all their Lordships in *Marks and Spencer* endorsed the *traditional* tests for implication, rather than Lord Hoffmann’s recasting of implication as a facet of interpretation. Given this, the way forward under English law must surely be to abandon the fixation about what Lord Hoffmann meant in *Belize* and develop the traditional tests to fit with the practicalities of implication.

[16] In so far as the *relationship* between the “business efficacy” test and the “officious bystander” test is concerned, the Singapore Court of Appeal in *Sembcorp Marine Ltd v PPL Holdings Pte Ltd*,⁵³ confirmed the approach adopted in the Singapore High Court decision in *Forefront Medical Technology (Pte) Ltd v Modern-Pak Pte Ltd*,⁵⁴ and observed as follows:⁵⁵

47 [2013] 4 SLR 193 at [82].

48 [2016] AC 742 at [25]. Lord Clarke also shared in Lord Neuberger’s view on this point: see *ibid*, at [76].

49 *Ibid*, at [26] and [29].

50 *Ibid*, at [28].

51 *Ibid*.

52 *Ibid*.

53 [2013] 4 SLR 193.

54 [2006] 1 SLR(R) 927.

55 *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [90]–[92] (emphasis in the original text).

90 Nor do the judicial authorities sing a common tune, as Phang J (as he then was) illustrated in *Forefront Medical Technology (Pte) Ltd v Modern-Pak Pte Ltd* [2006] 1 SLR(R) 927 (“*Forefront Medical*”) at [34]–[39]. In so far as the law in Singapore is concerned, we affirm the “complementarity” characterisation of the business efficacy and officious bystander tests in *Forefront Medical* at [35]–[38], for the reasons provided by Phang J. As Phang J observed at [35] of *Forefront Medical*, Scrutton LJ in *Reigate* clearly had in mind business efficacy as the *basis* for the implication of a term (*Reigate* at 605):

“A term can only be implied if it is *necessary in the business sense to give efficacy to the contract; that is*, if it is such a term that it can confidently be said that if at the time the contract was being negotiated some one had said of the parties, ‘What will happen in such a case’, they would both have replied, ‘Of course, so and so will happen; we did not trouble to say that; it is too clear’.” (emphasis added in italics and bold italics)

Not only was business efficacy at the forefront of Scrutton LJ’s mind, it is also telling from the use of the words “that is” that Scrutton LJ’s articulation of the officious bystander yardstick was intended to serve as an elaboration of the business efficacy test. We find the following excerpt from Jacob Petrus Vorster, “The Bases for the Implication of Contractual Terms” (1988) *Journal of South African Law* 161 illuminating (at p 171):

“... The absence of business efficacy is at best an indication that the parties may have intended to agree on some unexpressed term. More than one term may conceivably render a contract which contains a *lacuna*, efficacious. *Whereas the business efficacy test may indicate the existence of a lacuna, it cannot necessarily be used to define the term with which the parties intended to fill the gap.*” (original emphasis omitted; emphasis added in italics and bold italics)

91 In our judgment, this excerpt precisely isolates the core of the officious bystander test: it is the device that enables the court to define that term which can be said to reflect the parties’ presumed intention *vis-à-vis* the gap in the contract. While the business efficacy test is helpful to identify the existence of a *lacuna*, that is to say that for the sake of the efficacy of the contract something more needs to be added into the contract, it does not assist in identifying what that

“something more” is with any degree of precision. That is where the officious bystander test serves an instrumental function.

92 The business efficacy test nonetheless reminds the court that the implementation of the officious bystander test must be conducted within the normative framework of business efficacy as its overarching theme. In this regard, we adopt the cogent explanation of Phang JA and Asst Prof Goh in *Contract Law in Singapore* (Wolters Kluwer Law and Business, 2012) at para 1063:

“... [I]f the ‘officious bystander’ test is the ‘practical mode’ by which the ‘business efficacy’ test is implemented, then it seems that the ‘business efficacy’ test is the rationale behind the ‘officious bystander’ test. An application of the ‘officious bystander’ test needs to be informed by the necessity for business efficacy. In fact, the ‘officious bystander’ test itself *refers back* to the ‘business efficacy’ test because it does not matter what the officious bystander thinks about the implication of the term. The role of the officious bystander is simply to suggest a term, and the true test is whether the parties *themselves* would suppress that suggestion with a common ‘Oh, of course!’. ***Whether the parties would so suppress the officious bystander can only be decided with a normative reference point***, and it is suggested that the ‘business efficacy’ test here *guides* the parties’ response to the officious bystander. ***Thus, only if a court thinks that the parties would, out of necessity for business efficacy, suppress the officious bystander’s suggestion with those famous words, would the court imply the term concerned. ...***” (emphasis in original in italics; emphasis added in bold italics)

Discharge by breach of contract⁵⁶

[17] Turning next to the topic of discharge by breach, this particular topic is probably the most confused (and confusing) area of the common law of contract from both conceptual as well as practical points of view. Not surprisingly, the law appears to be in a state of

56 For this part of the essay, I draw liberally from Phang, n 9 above, as well as strands from my joint essay with Professor Goh Yihan, “Encounters with History, Theory and Doctrine: Some Reflections on Discharge by Breach of Contract” in Simone Degeling, James Edelman and James Goudkamp (gen eds), *Contract in Commercial Law* (Thomson Reuters, 2016), Ch 12.

flux in many Commonwealth jurisdictions.⁵⁷ As we shall see, the Singapore courts have developed a uniquely local set of jurisprudence and principles that seeks to cut the legal Gordian Knot in relation to the central conundrum that has cast a long legal shadow across this particular area of the common law of contract. I will merely set out briefly the present position in the Singapore context.⁵⁸

[18] Simply put, the central conundrum just mentioned lies in reconciling the various tests which the courts employ in ascertaining whether or not the innocent party can elect to treat itself as discharged from the contract as a result of a breach by the other party of one or more of the terms of the contract concerned. There are, in essence, two basic tests in this regard.

[19] The first is what has popularly been termed as the “condition-warranty approach”.⁵⁹ This approach was elaborated upon in the oft-cited English Court of Appeal decision of *Bentsen v Taylor, Sons & Co*⁶⁰ thus:⁶¹

There is no way of deciding that question except *by looking at the contract in the light of the surrounding circumstances*, and then making up one’s mind whether the intention of the parties, as gathered from the instrument itself, will best be carried out by treating the promise as a warrant sounding only in damages, or as a condition precedent by the failure to perform which the other party is relieved of his liability.

[20] The second is the “*Hongkong Fir* approach”,⁶² which was elaborated upon in *Hongkong Fir* itself, as follows:⁶³

57 See e.g. Andrew Phang, “Doctrine and Fairness in the Law of Contract” in Jessica Young and Rebecca Lee (gen eds), *The Common Law Lecture Series 2008–2009* (Faculty of Law, The University of Hong Kong, 2010), pp 17–100 at pp 41–61 (and the decisions from the various jurisdictions cited therein, including Australia, Canada and Hong Kong).

58 For a more comprehensive analysis, see *ibid*, pp 51–52.

59 And see *per* Bowen LJ (as he then was) in the English Court of Appeal decision of *Bentsen v Taylor, Sons & Co* [1893] 2 QB 274 at 281.

60 *Ibid*.

61 *Ibid*, at 281 (emphasis added).

62 The “*Hongkong Fir* approach” draws its terminology from the leading English Court of Appeal decision of *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26.

63 *Ibid*, at 66 (emphasis added).

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

[21] From a conceptual perspective, both tests are quite *different*. The “condition-warranty approach” focuses on the *nature of the term* breached whereas the “Hongkong Fir approach” focuses on the *actual consequences* of the breach. However, it should be noted that these two tests are not necessarily inconsistent with each other, although they *might be, depending on the particular factual matrix concerned*. For example, in the Singapore Court of Appeal decision of *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd (“RDC Concrete”)*,⁶⁴ it was noted as follows:⁶⁵

102 Notwithstanding the potential difficulties alluded to above ..., it should be noted that the approaches in Situations 3(a) and 3(b)⁶⁶ (comprising the condition-warranty approach and the *Hongkong Fir* approach, respectively) are not necessarily incompatible with each other. Indeed, there could be fact situations where the application of either approach would make *no difference*. Take, for example, a situation where there is a breach of a *condition* which *simultaneously* results in *the deprivation vis-à-vis the innocent party of substantially the whole benefit* that it was intended that the innocent party should obtain from the contract. Take another example at the opposite end of the factual continuum – where there is a breach of a *warranty* which *simultaneously* results in *very trivial consequences only*.

103 *However*, there could be situations where the application of either approach could produce *different* (indeed, *diametrically opposed*) results. Take, for example, a situation where there is a breach of *condition* (which would entitle the innocent party to terminate the contract under the condition-warranty approach) *but* which *simultaneously* results in *very trivial consequences only* (which would *not* entitle the innocent party to terminate the contract under the

64 [2007] 4 SLR(R) 413.

65 *Ibid*, at [102]–[103] (emphasis in the original text).

66 See the table at para [25] below.

Hongkong Fir approach). In contrast, take another situation where there is a breach of *warranty* (which would *not* entitle the innocent party to terminate the contract under the condition-warranty approach) *but* which *simultaneously* results in *the deprivation vis-à-vis the innocent party of substantially the whole benefit* that it was intended that the innocent party should obtain from the contract (which *would* entitle the innocent party to terminate the contract under the *Hongkong Fir* approach).

[22] Hence, it is not of merely *theoretical* significance to attempt to formulate an approach which would, as far as is possible, integrate these two tests. Such an attempt was in fact undertaken in *RDC Concrete*. However, before proceeding to consider this attempt, it should be noted that there are *historical reasons* that resulted in the two *conceptually different* approaches as embodied in the two tests. To elaborate (albeit by way of the briefest of summaries), in a joint essay,⁶⁷ my co-author and I had suggested that what was in substance what we now know as the *Hongkong Fir* approach was the original approach adopted by the courts in an era when the focus was on the effects or the nature and consequences of the breach (which was due, in part at least, to the focus of the courts on the substantive fairness of transactions, as opposed to the more modern (and objective) will theory of contracts, which focusses on the intentions of the contracting parties). Indeed, in the 1876 decision of *Bettini v Gye*, Blackburn J seems to have suggested that the default rule, in the absence of the parties' express stipulation as to the status of a term, is for the court:⁶⁸

... [T]o look to the whole contract, ... see whether the particular stipulation goes to the root of the matter, so that a failure to perform it would render the performance of the rest of the contract by the plaintiff a thing different in substance from what the defendant has stipulated for; or whether it merely partially affects it and may be compensated for in damages.

[23] By the time the UK Sale of Goods Act was enacted in 1893, the relevant case law had in fact developed in a manner which centred on an examination of the importance the contracting parties placed on the terms concerned. It appeared to embody the (quite different)

67 See generally Phang and Goh, n 56 above, pp 263–267.

68 (1876) 1 QBD 183 at 188.

condition-warranty approach and it was this particular approach that was incorporated into the Sale of Goods Act – thus marginalising the *Hongkong Fir* approach until it was resurrected once again by Lord Diplock in the *Hongkong Fir* case.⁶⁹

[24] If the brief historical account just set out is correct, it would explain why the condition-warranty and *Hongkong Fir* approaches were different tests until they were integrated in the *Hongkong Fir* case itself.

[25] Returning to the issue of the *integration* of the aforementioned two tests, in the very nature of the tests themselves, a perfect integration is impossible, especially where the factual matrix is such that the application of the respective tests would give rise to different results. In this last-mentioned situation, normative guidance is required as to which test ought to be applied first and what the legal effect would be on the test that is (if at all) to be applied next. In this regard, the court in *RDC Concrete* discussed the various tests as well as how they are to be applied,⁷⁰ summarising the legal position in tabular/diagrammatic form, as follows:⁷¹

**SITUATIONS ENTITLING AN INNOCENT PARTY TO
TERMINATE THE CONTRACT AT COMMON LAW**

SITUATION	CIRCUMSTANCES IN WHICH TERMINATION IS LEGALLY JUSTIFIED	RELATIONSHIP TO OTHER SITUATIONS
I EXPRESS REFERENCE TO THE RIGHT TO TERMINATE AND WHAT WILL ENTITLE THE INNOCENT PARTY TO TERMINATE THE CONTRACT		
(1)	The contractual term breached clearly states that, in the event of certain event or events occurring, the innocent party is entitled to terminate the contract.	None – it operates <i>independently of all other</i> situations. In other words – Situations (2), (3)(a) and (3)(b) (i.e. all the situations in II, below) are <i>not</i> relevant.

69 [1962] 2 QB 26.

70 See generally [2007] 4 SLR(R) 413 at [90]–[113].

71 *Ibid*, at [113].

SITUATION	CIRCUMSTANCES IN WHICH TERMINATION IS LEGALLY JUSTIFIED	RELATIONSHIP TO OTHER SITUATIONS
II No Express Reference to the Right to Terminate and What Will Entitle the Innocent Party to Terminate the Contract		
(2)	<p>Party in breach <i>renounces</i> the contract by clearly conveying to the innocent party that it <i>will not perform its contractual obligations at all</i>.</p> <p><i>Quaere</i> whether the innocent party can terminate the contract if the party in breach <i>deliberately</i> chooses to perform its part of the contract in a manner that amounts to a <i>substantial breach</i>.</p>	<p>None – it operates <i>independently</i> of all other situations. In other words – Situation (1) is <i>not</i> relevant.</p> <p>Situations (3)(a) and (3)(b) are <i>not</i> relevant.</p>
(3)(a)	<p>“Condition-Warranty Approach” – Party in breach has breached a <i>condition</i> of the contract (as opposed to a <i>warranty</i>).</p>	<p>Should be applied <i>before</i> the “<i>Hongkong Fir Approach</i>” in Situation (3)(b).</p> <p>Situation (1) is <i>not</i> relevant.</p> <p>Situation (2) is <i>not</i> relevant.</p>
(3)(b)	<p>“Hongkong Fir Approach” –</p> <p>Party in breach which has committed a breach, the <i>consequences</i> of which <i>will deprive the innocent party of substantially the whole benefit which it was intended that the innocent party should obtain from the contract</i>.</p>	<p>Should be applied only <i>after</i> the “<i>Condition-Warranty Approach</i>” in Situation (3)(a) <i>and</i> if the term breached is <i>not</i> found to be a <i>condition</i>.</p> <p>Situation (1) is <i>not</i> relevant.</p> <p>Situation (2) is <i>not</i> relevant.</p>

[26] The Singapore Court of Appeal subsequently provided, in *Man Financial (S) Pte Ltd v Wong Bark Chuan David* (“*Man Financial*”),⁷² a similar summary in *non-tabular*/diagrammatic form, as follows:⁷³

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

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

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

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

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

158 Because of the different perspectives adopted in Situation 3(a) and Situation 3(b), respectively (as briefly noted above), which

72 [2008] 1 SLR(R) 663.

73 *Ibid*, at [153]–[158] (emphasis in the original text).

differences might, depending on the precise factual matrix, yield different results when applied to the fact situation, this court in *RDC Concrete* concluded that, as between both the aforementioned situations, the approach in Situation 3(a) should be *applied first*, as follows (*id* at [112]):

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

[27] The court in *Man Financial* considered further a number of (non-exhaustive)⁷⁴ factors that could be applied in ascertaining whether or not a term was a “condition” pursuant to the “condition-warranty approach”.⁷⁵ However, the court emphasised that:⁷⁶

160 It is important to note at the outset that there is no magical formula (comprising a certain fixed number of factors or criteria) that would enable a court to ascertain whether or not a given contractual term is a condition. This is not unexpected, given the very nature of the inquiry itself (which would include a countless number of permutations and variations, depending on the respective factual matrices and, more importantly, the intentions of the respective contracting parties themselves). However, as is inherent within the very nature of common law development, certain factors that might (depending, as just mentioned, on the precise factual matrix concerned) *assist* the court in this regard have been developed.

161 *At bottom*, the focus is on *ascertaining the intention of the contracting parties themselves by construing the actual contract itself (including the contractual term concerned) in the light of the surrounding circumstances as a whole* (see the classic exposition on this point by Bowen LJ (as he then was) in the oft-cited English Court of Appeal decision of *Bentson v Taylor, Sons & Co (No 2)* [1893] 2 QB 274 at 281).

74 *Ibid*, at [174].

75 These factors included the following (see generally *ibid*, at [162]–[173]): where a *statute* classifies a specific contractual term as a “condition”; where the contractual term itself expressly states that it is a “condition”; the availability of a prior precedent; and the importance placed on certainty and predictability in the context of mercantile transactions.

76 *Ibid*, at [160]–[161] (emphasis in the original text).

[28] As I alluded to earlier, there is *no perfect* method of *integrating* the two tests. Indeed, that the approach suggested above in *RDC Concrete* still required refinement was demonstrated in the subsequent Singapore Court of Appeal decision of *Sports Connection Pte Ltd v Deuter Sports GmbH* (“*Sports Connection*”).⁷⁷ Owing to constraints of space, it will suffice for the present to set out a summary of the legal position, in which the court in *Sports Connection* added a *very limited exception* to the principles laid down in *RDC Concrete*, observing as follows:⁷⁸

We would therefore reaffirm the approach laid down in *RDC Concrete* for the reasons set out above, subject to the *extremely limited exception* that, where the term itself states *expressly (as well as clearly and unambiguously)* that *any* breach of it, *regardless* of the seriousness of the consequences that follow from that breach, will *never* entitle the innocent party to terminate the contract, then *the court will give effect to this particular type of term (viz, a warranty expressly intended by the parties)*.

[29] The legal position in Singapore in relation to the issue as to when an innocent party may consider itself entitled to terminate the contract in the event of a breach of contract committed by the other party has thus been sought to be rationalised in the manner I have described above. That there is *no perfect* legal solution stems, it is suggested, from the very nature of the various tests as well as the historical manner in which they developed.⁷⁹ To the extent that the law in other Commonwealth jurisdictions is in a state of *flux*,⁸⁰ the legal position in Singapore is a *uniquely local development* which, if I may be so bold as to venture to add, is not only not necessarily a bad thing but also constitutes a possible legal path through the very thick and thorny thicket that has hitherto been generated by, *inter alia*, the various tests in this particular sphere of contract law.

77 [2009] 3 SLR(R) 883.

78 *Ibid*, at [57] (emphasis in the original text). In addition to the decisions already referred to, reference may be made to the (also) Singapore Court of Appeal decision of *Alliance Concrete Singapore Pte Ltd v Comfort Resources Pte Ltd* [2009] 4 SLR(R) 602.

79 *Viz*, the “condition-warranty approach” and the “*Hongkong Fir* approach”, respectively.

80 See Phang, n 57 above.

Contractual illegality⁸¹

Introduction

[30] Turning to the topic of illegality and public policy, this topic is, as I have put it elsewhere, “confused (and confusing)”.⁸² A key difficulty facing the courts has been the fact that no one legal structure (whether doctrinal or theoretical) can *wholly* eradicate the intractable problems that bedevil this particular area of the common law of contract. In particular, where illegality and public policy are concerned, there is a *further overlay* that results in a more complicated legal scenario; put simply, *in situations where the illegality or contravention of public policy is such as to result in actual (or potential) harm to the (wider) public interest, this justifies the court concerned in overriding the parties’ individual contractual rights.* At the risk of oversimplification, in such situations, *the community’s welfare trumps the contracting parties’ individual rights.* At the risk of *further* oversimplification, when the doctrine of illegality and public policy operates, it would appear that *utilitarian considerations trump individual rights.* The legal approach adopted by the court concerned thus becomes of *critical importance.*

[31] Before proceeding further, it might be useful to note that this particular topic is traditionally classified into two broad areas, *viz*, *statutory* illegality and illegality and public policy at *common law*, respectively. This point is of particular importance because the UK Supreme Court in *Patel v Mirza* was setting out the applicable legal principles *only* in relation to *the common law*, whereas, as we shall see, the Singapore Court of Appeal (which adopted a very different approach in both *Ting Siew May v Boon Lay Choo*⁸³ and (most recently)

81 For this part of the essay, I draw liberally from my joint article with Professor Goh (n 25 above). See also generally Andrew Phang, “The intractable problems of illegality and public policy in the law of contract – a comparative perspective” in Rob Merkin and James Devenney (gen eds), *Essays in Memory of Jill Poole – Coherence, Modernisation and Integration in Contract, Commercial and Corporate Laws* (Informa Law, 2018), Ch 12.

82 See e.g. Andrew Phang, “Of Illegality and Presumptions – Australian Departures and Possible Approaches” (1996) 11 JCL 53 at 53; and, by the same author, “Illegality and Public Policy” in *The Law of Contract in Singapore*, n 4 above, Ch 13, para 13.001.

83 [2014] 3 SLR 609. See also Sandra Annette Booyesen, “Contractual Illegality and Flexibility – a Rose by Any Other Name” (2015) 32 JCL 170; and Zhong Xing Tan, “The anatomy of contractual illegality” (2015) 44 Common Law World Rev 99.

*Ochroid Trading Ltd v Chua Siok Lui (trading as VIE Import & Export)*⁸⁴ was concerned with *both* statutory illegality *as well as* illegality and public policy at common law.

Patel v Mirza

[32] In *Patel v Mirza*,⁸⁵ the plaintiff, Mr Patel, transferred sums totalling £620,000 to the defendant, Mr Mirza, for the purpose of betting on the price of certain shares, using insider information which Mr Mirza expected to obtain from his contacts regarding an anticipated government announcement which would affect the price of the said shares. However, Mr Mirza's expectation of a government announcement proved to be mistaken and, hence, the intended betting did not take place. Nevertheless, Mr Mirza failed to repay the money which Mr Patel had transferred to him, despite promises to do so. Mr Patel therefore brought the present claim against Mr Mirza to recover these sums on the grounds of contract *and* unjust enrichment.

[33] The trial judge held that Mr Patel could not recover the sums which he had transferred to Mr Mirza because he had to rely upon his

84 [2018] 1 SLR 363.

85 [2017] AC 467. This decision is an obviously seminal one and, not surprisingly, has been the subject of much academic commentary: see e.g. (and in this very journal) Justice Datuk Harmindar Singh Dhaliwal, "The Illegality Defence after *Patel v Mirza*" [2018] JMJ 29; as well as James Goudkamp, "The End of An Era? Illegality in Private Law in the Supreme Court" (2017) 133 LQR 14; James C Fisher, "The Latest Word on Illegality" [2016] LMCLQ 483; Nicholas Strauss, "The Diminishing Power of the Defendant: Illegality After *Patel v Mirza*" [2016] RLR 145; Emer Murphy, "The *ex turpi causa* defence in claims against professionals" (2016) 32 *Professional Negligence* 241; Andrew Burrows, "A New Dawn for the Law of Illegality" (June 2, 2017), <<https://ssrn.com/abstract=2979425>> (accessed on June 5, 2017); see now Sarah Green and Alan Bogg (gen eds), *Illegality After Patel v Mirza* (Hart Publishing, 2018), Ch 2; Lord Grabiner, "*Patel v Mirza* [2016] UKSC 42 – Illegality and Restitution Explained by the Supreme Court", The Second Distinguished Law Lecture, Queen's College, Cambridge (October 19, 2016) <<https://www.law.cam.ac.uk/press/events/2016/10/queens-distinguished-lecture-law-patel-v-mirza-illegality-and-restitution>> (accessed on December 10, 2018); M P Furmston, "Recent Developments in Illegal Contracts" in Merkin and Devenney, n 81 above, Ch 11); and Graham Virgo, "The Illegality Revolution" in Sarah Worthington, Andrew Robertson and Graham Virgo (gen eds), *Revolution and Evolution in Private Law* (Hart Publishing, 2018), Ch 14. Indeed, Professor Goudkamp went so far as to observe that "*Patel v Mirza* ... is a pivotal moment in English private law" (see Goudkamp, *ibid* at 14). See also the very recent collection of essays in *Illegality After Patel v Mirza*, *ibid*.

own illegality to establish his claim. Although Mr Patel might have been able to effect recovery through the *locus poenitentiae* doctrine, this was not possible on the facts because Mr Patel's attempted withdrawal had *not* been voluntary.

[34] On appeal, the English Court of Appeal reversed the decision of the trial judge and found in favour of Mr Patel. Both Rimer and Vos LJ were of the view that, notwithstanding the fact that Mr Patel's attempted withdrawal had not been voluntary, Mr Patel could still recover the sums that he paid to Mr Mirza because the arrangement between them had *not* been *executed* yet. On the other hand, Gloster LJ arrived at the *same* conclusion as Rimer and Vos LJ, but on *different reasoning*. In her view, Mr Patel ought to succeed in his claim because, balancing various factors, such recovery was legally justified.

[35] On further appeal to the UK Supreme Court, both the majority and minority agreed on the actual result (permitting Mr Patel to recover the funds which he had transferred to Mr Mirza), but arrived at it through *quite different reasoning*. Constraints of space preclude a detailed discussion. I have, in fact, dealt with *Patel v Mirza* in a comparative context elsewhere, and the reader is referred to that essay for more detailed analysis.⁸⁶ It will suffice for present purposes to note that the majority⁸⁷ applied a "range of factors approach" whilst the minority applied a rule-based approach. The former approach confers *discretion* on the court to decide whether or not to permit recovery *notwithstanding* an illegal contract. The latter approach does *not* permit recovery pursuant to the illegal contract, but may permit recovery under established exceptions.

The Singapore position

[36] The Singapore position is quite different. The latest (and very recent) decision is that of the Singapore Court of Appeal in *Ochroid Trading Ltd v Chua Siok Lui (trading as VIE Import & Export) ("Ochroid Trading")*.⁸⁸ This particular decision in fact affirmed the principles

86 See Phang, n 81 above.

87 Although Lord Neuberger of Abbotsbury is considered to be in the majority, I would respectfully suggest that his views straddle *both* the majority *and* the minority views. However, reasons of space once again preclude a detailed discussion and the reader is referred to the essay in Phang, n 81 above, pp 208–212.

88 [2018] 1 SLR 363. See also Alexander Loke, "Disagreement over the Illegality Defence" (2018) 35 JCL 169.

laid down in the court's earlier decision in *Ting Siew May v Boon Lay Choo* ("*Ting Siew May*").⁸⁹ The court in *Ochroid Trading* summarised the law relating to illegality and public policy as follows:⁹⁰

64 The court will first ascertain whether *the contract is prohibited* either pursuant to a *statute* (expressly or impliedly) and/or *an established head of common law public policy*. This is the *first* stage of the inquiry and, if the contract is indeed thus prohibited, there can be *no recovery pursuant to the (illegal) contract*. This is subject to the *caveat* that, in the general common law category of contracts which are not unlawful *per se* but entered into with the object of committing an illegal act (and *only in this category*), the proportionality principle laid down in *Ting Siew May* ought to be applied to determine if the contract is enforceable.

65 *However*, that may not be the end to the matter as a party who has transferred benefits pursuant to the illegal contract *might* be able to recover those benefits on a *restitutionary* basis (*as opposed to recovery of full contractual damages*). This is the *second* stage of the inquiry. We saw that there were at least *three* possible legal avenues for such recovery – all of which have been summarised above (at [43]–[60]).

66 The present legal position in Singapore is thus relatively clear – at least in so far as *the legal approach* is concerned. Admittedly, the process of *application* of the relevant legal principles may be problematic but that is an inevitable part of adjudication and is common to all areas of the law. Having said that, and as alluded to above, there are issues which still need to be clarified, particularly the principles governing *an independent claim in unjust enrichment* for the recovery of benefits conferred under an illegal contract as well as the *limits* of such a claim.

[37] As can be seen, the court in *Ochroid Trading* did *not* follow the approach of the majority in *Patel v Mirza*. It held that the "range of factors" test adopted by the majority in *Patel v Mirza* was *not* part of Singapore law, and the law on the question of whether the contract concerned was prohibited – which arose at the first stage of the inquiry – remained unchanged.⁹¹ In arriving at this holding, the court

89 [2014] 3 SLR 609.

90 [2018] 1 SLR 363 at [64]–[66] (emphasis in the original text).

91 *Ibid*, at [64], reproduced immediately above.

was of the view that the approach of the majority in *Patel v Mirza* would introduce further uncertainty into the analytical process by superimposing an additional inquiry based on the “range of factors” test across the board to all situations of common law illegality. Such an approach was undesirable as it created an unprincipled distinction between the principles which applied to statutory illegality and those which governed common law illegality (the court in *Patel v Mirza* having laid down the “range of factors” test for situations of common law illegality *only*). The “range of factors” test was also unnecessary to achieve remedial justice in the Singapore context given the flexibility of the principles laid down in *Ting Siew May*, which would also allow restitutionary recovery at the second stage⁹² of the inquiry.⁹³

[38] In fact, the court in *Ochroid Trading* had to consider a similar issue to that which faced the UK Supreme Court in *Patel v Mirza* – whether, assuming that (and this was the first issue) the agreements concerned were illegal moneylending contracts that were unenforceable under the Singapore Moneylenders Act (“the MLA”),⁹⁴ the plaintiffs could nevertheless succeed pursuant to their alternative claim in unjust enrichment for the restitutionary recovery of the principal sums that they had lent (this engaged the *second stage* of the inquiry under present Singapore law).⁹⁵ This alternative claim in unjust enrichment concerned the issue of what impact, if any, the illegality of a contract had on an independent claim in unjust enrichment to recover the benefits conferred thereunder, and the position in Singapore on the doctrine of illegality and public policy in the context of unlawful contracts (particularly when viewed in the light of the recent decision in *Patel v Mirza*).

[39] The court held that restitutionary recovery of benefits conferred under an illegal contract would, in principle, also be available where the ordinary requirements of an independent claim in unjust enrichment were satisfied, subject to the defence of illegality and public policy in unjust enrichment. Such a claim would not be barred simply because the plaintiff needed to “rely on” his illegality in a formal or procedural manner as the reliance principle, properly understood,

92 See *ibid*, at [65], reproduced above.

93 *Ibid*, at [125].

94 Cap 188, 1985 Rev Ed.

95 See [2018] 1 SLR 363 at [65].

was engaged only if the plaintiff sought to enforce or profit from the illegal and prohibited contract. A restitutionary claim would not offend the principle underlying the illegality doctrine, even if it could be said that the plaintiff needed to “rely” on his illegal conduct (in a loose and indirect sense), as the claim would not allow the plaintiff to profit from the illegal contract but would simply put the parties in the position they would have been if they had never entered into the illegal transaction.⁹⁶ The defence of illegality and public policy in unjust enrichment, however, *would* bar recovery in unjust enrichment, and that was premised on *the principle of stultification* (taking reference from a seminal article by Professor Peter Birks),⁹⁷ which principle requires the court to determine whether allowing the claim would *undermine the fundamental policy* that rendered the underlying contract void and unenforceable in the first place.⁹⁸ In each case, the court must carefully examine the relevant considerations and the policy, be it statutory or the common law, which rendered the contract illegal before considering if that same policy would be undermined or stultified if the claim in unjust enrichment was allowed.

[40] In so far as the present case was concerned, the alternative claim in unjust enrichment could not succeed because to permit recovery of even the principal sums would undermine and stultify the fundamental social and public policy against unlicensed moneylending which undergirded the MLA. An examination of the legislative policy underpinning the MLA indicated that unlicensed moneylenders should be precluded from recovering any compensation whatsoever for their illegal loans. Permitting restitution of the principal sums lent would make a nonsense of this policy and render ineffectual the prohibition against illegal moneylending in the MLA, which reflected the strong need to deter such conduct due to its status as a serious social menace in Singapore.⁹⁹

96 Ibid, at [128], [129] and [139].

97 See Peter Birks, “Recovering Value Transferred Under an Illegal Contract” (2000) 1 *Theoretical Inquiries in Law* 155.

98 See [2018] 1 SLR 363 at [143], [145]–[148], [158] and [159]. And on observations on other independent causes of action and the scope of the concept of stultification, see *ibid*, at [161]–[168].

99 *Ibid*, at [219].

A brief observation

[41] The current English and Singapore positions represent *clearly divergent (and, indeed, contrasting) models* relating to this particularly thorny topic in the common law of contract,¹⁰⁰ and they reflect an interesting choice as to the possible points of departure for reform in other Commonwealth jurisdictions. However, they do not seem to represent radically different *substantive* perspectives on “public policy” as such but, rather *different legal techniques* that would, in most cases at least, result in the same outcome. That having been said, there is also a sense in which the English and Singapore positions diverge with regard to substantive “public policy” as well. This is particularly the case in relation to the defence of illegality to the independent cause of action in unjust enrichment. In this regard, the Singapore court has endorsed and applied in *Ochroid Trading* the concept of stultification – drawing from academic literature. This represents that rarest of occasions when *academic scholarship* has had a *direct impact on the development of the law by the courts themselves*.

Unconscionability¹⁰¹

Introduction

[42] I now consider the doctrine of unconscionability. This doctrine – particularly under English law – was (and still is to a large extent) an *extremely narrow* one. It is confined to what any reasonable person would consider to be *an extremely egregious case where one party takes unconscionable advantage of another who is in an obviously disadvantageous situation*. As alluded to above, these constitute cases of what the courts have termed “*improvident transactions*”.¹⁰² It is understandable

100 See also Sir Geoffrey Vos, “Preserving the Integrity of the Common Law”, Lecture to the Chancery Bar Association on April 16, 2018, paras 17–23 (and dealing with the contrasting positions taken by *Patel v Mirza* on the one hand and *Ochroid Trading* on the other) (see <<http://www.chba.org.uk/for-members/library/annual-lectures/preserving-the-integrity-of-the-common-law>> (accessed on May 22, 2018)).

101 I draw liberally from my joint article with Professor Goh, n 25 above.

102 Oft-cited cases include *Fry v Lane* (1888) 40 Ch D 312; and *Cresswell v Potter* [1978] 1 WLR 255. The earliest cases were classified under the even more specific rubric of “expectant heirs” (see e.g. Nelson Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, 2nd edn (Sweet & Maxwell, 2012), paras 15-019–15-029).

why the courts adopted – initially at least – such a conservative and narrow approach towards the doctrine. An expansive doctrine of unconscionability might have led to the excessive exercise of judicial discretion in a *substantive* sense where the aim of achieving fairness in the *individual* case at hand might have led to *uncertainty (and even possible arbitrariness)* in the law.

[43] Although the general tenor of the *English* law relating to the doctrine of unconscionability continues to remain fairly conservative, there have been isolated observations in the case law that suggest a possibly fuller development.¹⁰³ However, the position in Australia is *quite different*. There are clear signs of a *broader development* of the doctrine of unconscionability. The leading decision is the High Court of Australia decision of *Commercial Bank of Australia Ltd v Amadio* (“*Amadio*”).¹⁰⁴ In that decision, Deane J observed as follows:¹⁰⁵

The jurisdiction [to relieve against unconscionable dealing] is long established as extending to circumstances in which (i) a party to a transaction was under a special disability in dealing with the other party with the consequence that there was an absence of any reasonable degree of equality between them, and (ii) that disability was sufficiently evident to the stronger party to make it *prima facie* unfair or ‘unconscientious’ that he procure, or accept, the weaker party’s assent to the impugned transaction in the circumstances in which he procured or accepted it. Where such circumstances are shown to have existed, an onus is cast upon the stronger party to show that the transaction was fair, just and reasonable

103 See e.g. the English Court of Appeal decision of *Credit Lyonnais Bank Nederland NV v Burch* [1997] 4 All ER 144 at 153; the English High Court decision of *Multiservice Bookbinding Ltd v Marden* [1979] 1 Ch 84 at 110; the English High Court decision of *Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd* [1983] 1 WLR 87 at 94–95; the English Court of Appeal decision of *Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd* [1985] 1 WLR 173 at 182–3 (affirming the last-mentioned decision); and the Privy Council decision of *Boustany v Pigott* (1993) 69 P & CR 298 (on appeal from the Court of Appeal of the Eastern Caribbean Supreme Court (Antigua and Barbuda), especially at 303.

104 (1983) 151 CLR 447. For a recent decision of the same court considering *Amadio*, see *Kakavas v Crown Melbourne Limited* (2013) 250 CLR 392. See also Enonchong, n 102 above, paras 20–16–20–20.

105 (1983) 151 CLR 447 at 474.

The Singapore position

[44] In contrast, Singapore courts have clearly endorsed the narrower English position embodied in cases such as *Cresswell v Potter*.¹⁰⁶ There has in fact been at least one decision where *Amadio* was cited but there was no substantive discussion or development as such. The Singapore High Court decision of *Fong Whye Koon v Chan Ah Thong*¹⁰⁷ suggested a broader approach towards the doctrine of unconscionability, but it did not contain a clear endorsement of such an approach. In *Rajabali Jumabhoy v Ameerli R Jumabhoy*,¹⁰⁸ also a decision of the Singapore High Court, Judith Prakash J (as she then was) expressed difficulty with accepting the broader Australian position as she thought it to be too wide.¹⁰⁹ And in the recent Singapore High Court decision of *EC Investment Holding Pte Ltd v Ridout Residence Pte Ltd*,¹¹⁰ it was stated that unconscionability as a vitiating factor in contract does not form any part of Singapore law, and that its introduction ought to be a matter for Parliament to decide since it would herald too much uncertainty in the law.¹¹¹ More recently, however, in the Singapore High Court decision of *BOK v BOL*,¹¹² which concerned a Deed of Trust executed in a familial situation, the High Court, after examining the relevant cases, concluded that the Singapore cases have favoured the narrower approach, and rejected the broader approach. The High Court confirmed that an inequality in bargaining power could not, by itself, vitiate a contract as this would undermine the certainty that is much needed in commercial transactions. However, the court, after analysing the *Cresswell* formulation, held that there were possible

106 [1978] 1 WLR 255 (see also n 103 above). And see e.g. the Singapore High Court decisions of *EC Investment Holding Pte Ltd v Ridout Residence Pte Ltd* [2011] 2 SLR 232 at [63] (affirmed in the Singapore Court of Appeal decision of *EC Investment Holding Pte Ltd v Ridout Residence Pte Ltd* [2012] 1 SLR 32, but where the issue of unconscionability was not raised); *Lim Geok Hian v Lim Guan Chin* [1993] 3 SLR(R) 183; and *Pek Nam Kee v Peh Lam Kong* [1994] 2 SLR(R) 750.

107 [1996] 1 SLR(R) 801.

108 [1997] 2 SLR(R) 296; affirmed by the Singapore Court of Appeal decision of *Rajabali Jumabhoy v Ameerli R Jumabhoy* [1998] 2 SLR(R) 434 (but without any discussion of this particular issue).

109 [1997] 2 SLR(R) 296 at [198].

110 [2011] 2 SLR 232 (also referred to above, n 106); affirmed by the Singapore Court of Appeal decision of *EC Investment Holding Pte Ltd v Ridout Residence Pte Ltd* [2012] 1 SLR 32 (but where the issue of unconscionability was not raised).

111 [2011] 2 SLR 232 at [66].

112 [2017] SGHC 316.

grounds to establish unconscionability as Megarry J had referred to other “circumstances of oppression or abuse of confidence which will invoke the aid of equity”.¹¹³ The court explained the requirements as follows:¹¹⁴

First, there must be weakness on one side. Such weakness could arise from poverty, ignorance or other circumstances, like acute grief in this case. Lack of independent advice would almost always deepen the weakness. Second, there must be exploitation, extortion or advantage taken of that weakness. A transaction at an undervalue would be a necessary component of this requirement ...

Once these two elements are established, it will be for the defendant to show that the transaction was ... “fair, just and reasonable” ... If he is unable to do so, then the transaction is liable to be set aside on the ground of unconscionability.

[45] The Court of Appeal has now in *BOM v BOK*¹¹⁵ laid down the approach to be taken in Singapore, in so far as the doctrine of unconscionability is concerned. For completeness, it might be noted that the same court had, in *Chua Chian Ya v Music & Movements (S) Pte Ltd (“Chua Chian Ya”)*,¹¹⁶ observed thus in relation to the doctrine of unconscionability:¹¹⁷

17 Broadly speaking, covenants in restraint of trade are *prima facie* unenforceable unless the contractual provisions are shown to be reasonable, taking into account the interests of both the parties concerned and the public. Specifically, the application of this doctrine to employment contracts is well established (see generally the decision of this court in *Man Financial (S) Pte Ltd v Wong Bark Chuan David* [2008] 1 SLR 663, where the doctrine was examined). This doctrine was applied to contracts between songwriters and music publishers in the seminal House of Lords decision of *A Schroeder Music Publishing Co Ltd v Macaulay* [1974] 1 WLR 1308 (“*Schroeder Music Publishing*”), a case which Chua relied upon heavily. However, it should be noted, at the outset, that that particular case involved an extremely one-sided contract. Indeed, the case involved such an extreme fact situation

113 [1978] 1 WLR 255 at 257.

114 [2017] SGHC 316 at [120] and [122].

115 [2019] 1 SLR 349.

116 [2010] 1 SLR 607.

117 *Ibid*, at [17] and [24].

that it is often referred to by advocates of a broader (and distinct) doctrine of unconscionability, not least because of Lord Diplock's speech therein (even though such a doctrine has yet to take root in the Commonwealth in general and in Singapore in particular (see, for example, the High Court decision of *Wellmix Organics (International) Pte Ltd v Lau Yu Man* [2006] 2 SLR 117 at [72] and the decision of this court in *Sandar Aung v Parkway Hospitals Singapore Pte Ltd* [2007] 2 SLR 891 at [39]; although *cf* the Australian position as embodied in, for example, the leading High Court of Australia decision of *The Commercial Bank of Australia Limited v Amadio* (1983) 151 CLR 447)).

...

24 We would respectfully endorse the approach taken by Parker J in [*Panayiotou v Sony Music Entertainment (UK) Limited* [1994] EMLR 229] as briefly outlined above. It is important, however, to emphasise that this does *not* entail the adoption of a broader doctrine of unconscionability – the legal status of which is still in a state of flux in the Commonwealth in general and in Singapore in particular (see above at [17]). In any event, it is unnecessary for the purposes of the present appeal to deal with the question of whether there is (or ought to be) a broader doctrine of unconscionability (although we note that there is local case law endorsing a narrower equitable jurisdiction proscribing specific (and improvident) bargains (see, for example, the High Court decisions of *Lim Geok Hian v Lim Guan Chin* [1994] 1 SLR 203 and *Pek Nam Kee v Peh Lam Kong* [1996] 1 SLR 75; and *cf* the (also) High Court decision of *Fong Whye Koon v Chan Ah Thong* [1996] 2 SLR 706, which demonstrates that the line between a broader doctrine of unconscionability and this (narrower) equitable jurisdiction might be blurred)). This is because the situation in *Panayiotou* was, in fact, precisely the situation which obtains in this appeal. Chua's case did not involve the broader doctrine of unconscionability, but focused instead on the court's common law jurisdiction to declare a contract unenforceable as a restraint of trade. Although Chua sought to invoke *Schroeder Music Publishing* ([17] *supra*) in aid of her case, she relied on that particular precedent from the perspective of the doctrine of restraint of trade only.

[46] It is significant that the Court of Appeal had emphasised in *Chua Chian Ya* that it was not adopting a broader doctrine of unconscionability, and especially since the applicability of such a broader doctrine had not arisen for decision in that case. In the very recent decision of *BOM v BOK*, the court has now ruled determinatively that the broader

doctrine of unconscionability does not form part of Singapore law. This is because the broader doctrine afforded the court too much scope to decide on a subjective basis and came dangerously close to the ill-founded principle of inequality of bargaining power as introduced in *Lloyd's Bank v Bundy*.¹¹⁸ Instead, the narrow doctrine, as exemplified

118 [1975] QB 326. But see the following article which was published after this essay had been written: Rick Bigwood, "Knocking Down the Straw Man: Reflections on *BOM v BOK* and the Court of Appeal's "Middle-Ground" Narrow Doctrine of Unconscionability for Singapore" [2019] Sing JLS 29. The author criticises the Court of Appeal decision of *BOM v BOK*, *inter alia*, for mischaracterising *Amadio* as embodying a broad doctrine of unconscionability and for using rhetoric in situating its concept of the narrow doctrine of unconscionability within the context of practical application instead of theoretical conceptualisation. With respect, the author has not elaborated on the fact that the formulations in *Amadio* do contain the potential for engendering uncertainty (save for his attempt in a lengthy footnote (p 52, n 138) in response to an anonymous referee making the same point and in which he admits that he had "no response" to the referee "except to say that the interpretation of another legal system's doctrinal formulation is to a significant and unavoidable extent perspectival, and [he] has not personally found the 'special disadvantage' criterion [in *Amadio*] to be intolerably 'open-ended' in its formulation (though granted this is probably shaped somewhat by [his] knowledge of how the criterion has actually been applied by the local courts)" and that he "[a]grees with the referee that language performs an important signalling function in law, although [he remains] unsure, based simply on the linguistic formulations of the respective 'infirmity' and 'special disadvantage' criteria [in *BOM v BOK* and *Amadio*, respectively], what exactly is the conceptual and practical distance between them in the wake of [*BOM v BOK*]"). The author also glosses over the attempt to distinguish the narrow doctrine of unconscionability as stated at [144] of *BOM v BOK* from the broad doctrine in *Amadio* through *practical application that is accompanied by a focus that entails such application being made through the lens of cases exemplifying the narrow doctrine (such as Fry and Cresswell)*. Indeed, the author's claims that such an approach is "rhetorical" (at p 46) and (at p 38, n 59) that the aforementioned distinction "may be a little too subtle, at least for [him]" misses the dynamic interaction in that approach that is itself normative in nature. Perhaps a key to understanding the author's approach is to be found in his belief that there is no real substance to the concept of uncertainty (see at p 46 as well as his book, *Exploitative Contracts* (Oxford University Press, 2003), pp 245–246) – an approach that is itself certainly not uncontroversial. Even if the author's argument is taken at its highest (and there is no difference, in substance, between *BOM v BOK* and *Amadio*), that can be no bad thing (although the formulations in both cases are indeed different). For a somewhat more positive approach towards *BOM v BOK*, see Vincent Ooi and Walter Yong, "A Reformulated Test for Unconscionability" (2019) 135 LQR 400; as well as Debby Lim and Jonathan Muk, "Consciously Uncoupling: Court of Appeal Becomes Conscious to Unconscionability in *BOM v BOK*", *Law Gazette*, March 2019, available online at <<https://lawgazette.com.sg/feature/consciously-uncoupling-unconscionability/>> (accessed on May 28,

by cases such as *Fry v Lane* and *Cresswell v Potter*, applies in Singapore. This narrow doctrine requires the plaintiff to satisfy three elements:

2019). It should also be noted that *BOM v BOK* was also considered by Nettle and Gordon JJ in a joint judgment in the High Court of Australia decision of *Australian Securities and Investments Commission v Lindsay Kobelt* [2019] HCA 18. This case related to *statutory* unconscionability pursuant to s 12CB of the Australian Securities and Investments Commission Act 2001 (Cth) and where, as the learned judges noted (at [144]), the unwritten law had “a significant part of play in ascribing meaning to the term ‘unconscionable’ under s 12CB(1)”. Both Nettle and Gordon JJ (together with Edelman J, who delivered a separate judgment) were in the minority in so far as the final decision on the facts of the case was concerned; in relation to *BOM v BOK*, they observed thus (at [153]):

The doctrine of unconscionability was recently criticised by the Court of Appeal of Singapore for its vagueness and generality [in *BOM v BOK* at [121]–[125]]. The Court applied a distinction [in *BOM v BOK* at [140]–[142]] between “broad” and “narrow” unconscionability in an effort to address this issue. The utility of such distinctions, however, is questionable. Certainly, in any given case, a conclusion as to what is, or is not, against conscience may be contestable: so much is inevitable given that the standard is based on a broad expression of values and norms [citing *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199 at [304]]. However, efforts to address the “indeterminacy” [citing *Commonwealth of Australia v Kojic* (2016) 249 FCR 421 at [58]] of the doctrine by way of further distillations, categorisations or definitions may risk “disappointment, ... a sense of futility, and ... the likelihood of error” [citing *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199 at [304]]. This is because evaluating whether conduct is unconscionable “is not a process of deductive reasoning predicated upon the presence or absence of fixed elements or fixed rules” [citing *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199 at [304]]. Instead, at least in the Australian statutory context, what is involved is an evaluation of business behaviour (conduct in trade or commerce) in light of the values and norms recognised by the statute [citing *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199 at [304]]. The problem of indeterminacy is addressed by close attention to the statute and the values derived from it, as well as from the unwritten law [citing *Commonwealth of Australia v Kojic* (2016) 249 FCR 421 at [58]].

It should be noted that this was the only reference to *BOM v BOK* in this case and that the observations just quoted tend to suggest a “broad” doctrine of unconscionability. More importantly, perhaps, they miss, with respect, a point already made above and which bears reiterating, *viz*, the attempt to distinguish the narrow doctrine of unconscionability as stated at [144] of *BOM v BOK* from the broad doctrine in *Amadio* through *practical application that is accompanied by a focus that entails such application being made through the lens of cases exemplifying the narrow doctrine (such as Fry and Cresswell)*. Indeed, a close reading of that part of the judgment of Nettle and Gordon JJ dealing with the *application* of the law to the facts of that case demonstrates precisely the approach that was stated at [144] of *BOM v BOK*.

first, the plaintiff had to be poor and ignorant; second, the transaction had to have been at a considerable undervalue; third, the plaintiff must not have had the benefit of independent advice. Upon the satisfaction of these factors, it was for the defendant to prove that the transaction was fair, just and reasonable, failing which the transaction could be set aside on the basis of unconscionability.

[47] Although the Court of Appeal held that the narrow doctrine of unconscionability applies in Singapore, it also emphasised that it is slightly different from its origins in *Fry v Lane* and *Cresswell v Potter*. To invoke the doctrine, the plaintiff had to show that he was suffering from an infirmity that the other party had exploited in procuring the transaction. In addition to considering if the plaintiff was poor and ignorant, the court would also include situations where the plaintiff was suffering from other forms of infirmities, whether physical, mental and/or emotional in nature. However, not every infirmity would *ipso facto* be sufficient to invoke the narrow doctrine of unconscionability. It must have been of sufficient gravity as to have acutely affected the plaintiff's ability to conserve his interests, and must also have been, or ought to have been, evident to the other party procuring the transaction. Taking a step back, the court also emphasised that this criterion of an infirmity must not be overly broad, lest it amounted to the application of the broader doctrine. Ultimately, the approach in Singapore should be applied through the lens of cases exemplifying the narrow doctrine rather than those embodying the broad doctrine. Such an approach distinguished the narrow doctrine subtly but significantly from the broad doctrine, and represented a middle ground based on practical application rather than theoretical conceptualisation. Upon the satisfaction of an infirmity, the burden was on the defendant to demonstrate that the transaction was fair, just and reasonable. Further, it was not mandatory that the transaction was at a considerable undervalue or that the vendor lacked independent advice. But they would be important factors that the court would take into account.

[48] There was one remaining issue upon which the court in *BOM v BOK* made some observations. This related to the issue of whether or not, given the numerous linkages amongst the doctrines of duress, undue influence and unconscionability, there is (as I suggested when I was in legal academia prior to joining the Bench) no reason in logic or principle why it is not possible "to subsume all three doctrines [i.e. economic duress, undue influence and unconscionability] under

one broad heading of unconscionable conduct”.¹¹⁹ However, in *BOM v BOK*, the Court of Appeal opined that, without principled as well as practical legal criteria that would enable an umbrella doctrine of unconscionability to function in a coherent as well as practical manner, such a novel and radical shift towards an umbrella doctrine (whilst theoretically elegant) should not be undertaken. Further, the broad doctrine of unconscionability that constituted the premise as well as basis for such an umbrella doctrine was not (as noted above) the law in Singapore and might, in any event, have been historically flawed (inasmuch as it had been developed from a (narrow) doctrine of unconscionability that was, in effect, what we now know as “Class 1” undue influence, although the court in *BOM v BOK* was not prepared to definitively reject the narrow doctrine of unconscionability).¹²⁰

Remoteness of damage

Introduction

[49] I turn next to the important topic of remoteness of damage. The law in both England and Singapore in relation to remoteness of damage under the common law of contract was, for over 150 years, premised on the seminal statement of principle by Alderson B in the celebrated English decision of *Hadley v Baxendale*.¹²¹ Indeed, that statement of principle was endorsed by the Singapore Court of Appeal itself as late as 2008 in *Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd* (“*Robertson Quay*”).¹²² However, a mere four months after the decision in *Robertson Quay* was handed down, the House of Lords decision in *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)*¹²³ was handed down. In *The Achilleas* itself, Lord Hoffmann introduced an apparently *new* legal criterion to the existing law relating to remoteness of damage in contract law – whether or not the defendant concerned

119 See Andrew Phang, “Undue Influence – Methodology, Sources and Linkages” [1995] JBL 552 at 570.

120 I should note that I wrote the judgment on behalf of the *coram* in *BOM v BOK*, although I did point out (at [167]) that nothing I had written in an extrajudicial capacity (in this instance as an academic (see *ibid*)) was influential by dint of its provenance alone, save to the extent that it contained persuasive arguments that might assist the court. Though *cf* Michael Douglas, “Judges’ Scholarly Writing as A Source of Common Law” [2019] No 3 *UNSW Law Journal Forum* 1.

121 (1854) 9 Exch 341.

122 [2008] 2 SLR(R) 623.

123 [2009] 1 AC 61.

had *assumed responsibility* for the loss which had occurred as a result of its breach.¹²⁴ However, after considering the relevant arguments both for as well as against such an approach in some detail, the Singapore Court of Appeal, in *MFM Restaurants Pte Ltd v Fish & Co Restaurants Pte Ltd* (“*MFM Restaurants*”),¹²⁵ rejected this approach and endorsed the seminal principle laid down in *Hadley* instead. This approach was confirmed by the same court in *Out of the Box Pte Ltd v Wanin Industries Pte Ltd* (“*Out of the Box*”).¹²⁶ Indeed, this last-mentioned decision not only falls within the more recent period covered by the present essay but also elaborates upon the Singapore position in more detail. It should also be noted that both the aforementioned decisions deal with an extremely important area of contract law and this further justifies the consideration (if only somewhat briefly) of the relevant legal developments (particularly since the more recent English approach has *not* been followed).

The Singapore position

[50] Owing to constraints of space, it will not be possible to describe in detail the reasoning of the court in both *MFM Restaurants* as well as *Out of the Box*. A brief summary will, instead, suffice for the purposes of the present essay (with the reader being encouraged to read both judgments themselves for a more detailed understanding of those decisions).

[51] First, the court in *MFM Restaurants* pointed to various difficulties with the decision in *The Achilleas* itself. In particular, the court observed that it is unclear whether the approach advocated by Lord Hoffmann in *The Achilleas* constituted the *ratio decidendi* of the case in the first

124 And see the important essay – to like effect – by Adam Kramer, “An Agreement-Centred Approach to Remoteness and Contract Damages” in Nili Cohen and Ewan McKendrick (gen eds), *Comparative Remedies for Breach of Contract* (Hart Publishing, 2005), Ch 12, p 249. Reference may also be made to a case note by the same author on *The Achilleas* itself: see “The New Test of Remoteness in Contract” (2009) 125 LQR 408 which, not surprisingly perhaps, endorses the approach adopted by Lord Hoffmann. However, as was pointed out in *MFM Restaurants* itself, this does not represent mainstream academic opinion on this particular approach (see [2011] 1 SLR 150 at [117]).

125 [2011] 1 SLR 150. And see the comment by Goh Yihan, “Explaining Contractual Remoteness in Singapore” [2011] JBL 282. See, further, Senthil Sabapathy, “*The Achilleas*: Struggling to Stay Afloat” [2013] Sing JLS 384.

126 [2013] 2 SLR 363.

place. It also pointed to “very fundamental theoretical or conceptual difficulties with the approach advocated by Lord Hoffmann”,¹²⁷ observing as follows:¹²⁸

92 ... As a learned author perceptively observes (see [Paul C K Wee, “Contractual interpretation and remoteness” [2010] *LMCLQ* 150] at 158):

“The view preferred here is that the agreement-centred approach as accepted in *The Achilleas* is best understood not as an approach to remoteness, but as embodying an approach to interpretation. Remoteness is traditionally regarded as a doctrine which limits and cuts back *prima facie* liability. However, under the agreement-centred approach, *prima facie* liability is never cut back. If limits on the scope of contractual duties can be distilled through the ordinary process of interpretation, as Lord Hoffmann contends ..., then the claimant is always ‘to be placed in the same situation, with respect to damages, as if the contract had been performed’, where the meaning of ‘the contract’ is properly construed. There are no limits on the fulfilment of the claimant’s (properly construed) expectation interest. Consequently, under the agreement-centred approach, there is no independent role for remoteness.”

93 Put simply, the approach advocated by Lord Hoffmann is not only conceptually distinct from – but also appears to exclude the operation of – the very doctrine of remoteness of damage in contract law itself. In this regard, the observation made in the preceding paragraph is a perceptive one, although, as we will point out below ..., it might in fact be possible to achieve a balance between both approaches inasmuch as the concept of assumption of responsibility by the defendant (which is the basis of Lord Hoffmann’s approach) might be considered as *having already been embodied or incorporated within the existing doctrine of remoteness of damage in contract law (which, of course, comprises, in essence, the two limbs in Hadley)*.

[52] The court pointed, further, to the *practical difficulties* in applying the approach advocated by Lord Hoffmann in *The Achilleas*. The court

127 [2011] 1 SLR 150 at [92] (emphasis in the original text).

128 *Ibid*, at [92]–[93] (emphasis in the original text).

referred, *inter alia*, to the following observations to that effect in a leading textbook on the law relating to damages:¹²⁹

What Lord Hoffmann and Lord Hope propose is full of difficulty, uncertainty and impracticality. How are we to tell what subjectively the contracting parties were thinking about assumption of responsibility? When contracting, assumption of responsibility was probably not in their minds at all, for it is well known that parties entering a contract are thinking of its performance rather than of its breach. Apart from this uncertainty there is the impracticality of allowing defendants to raise the issue, as they will surely do, in case after case as an extra argument, thereby taking up the time of the courts unnecessarily and making the arriving at settlements more difficult.

[53] Secondly, the court in *MFM Restaurants* pointed to *the merits of the existing approach* embodied in *Hadley* itself.¹³⁰ Indeed, it was of the view that “*even if ... Lord Hoffmann’s approach in The Achilleas ... [was accepted], both the limbs in Hadley ... would necessarily embody and encompass the necessary criteria for ascertaining (on an objective basis) whether or not there had been an assumption of responsibility or an implied undertaking on the part of the defendant*”.¹³¹ More specifically, the court observed that “*the first limb in Hadley necessarily embodies an implied undertaking or assumption of responsibility on the part of the defendant (albeit on an imputed basis)*”;¹³² it proceeded to observe as follows:¹³³

This *imputation* is justified on the ground that, in so far as *natural or ordinary* loss is concerned, any reasonable person in the shoes of the defendant should (with the (*imputed*) knowledge that such loss would ensue) be *taken to have assumed responsibility for such loss should it breach the contract concerned*. Hence, even if we adopt Lord Hoffmann’s approach in *The Achilleas*, the reasoning just referred

129 *Viz*, Harvey McGregor QC, *McGregor on Damages*, 18th edn (Sweet & Maxwell, 2009), para 6-171: see [2011] 1 SLR 150 at [94]. See also the observations by Andrew Robertson, “The basis of the remoteness rule in contract” (2008) 28 LS 172 at 185; and Steve McAuley, “*Transfield Shipping Inc v Mercator Shipping Inc*” (2010) 38 ABLR 65 at 66, which were referred to by the court as well (see [2011] 1 SLR 150 at [95] and [2011] 1 SLR 150 at [95], respectively).

130 See generally [2011] 1 SLR 150 at [101]–[141].

131 *Ibid*, at [101] (emphasis in the original text).

132 *Ibid*, at [103] (emphasis in the original text).

133 *Ibid*.

to would provide the court with *an objective basis* for finding that the defendant had (in the absence of an express undertaking to the contrary) *assumed responsibility* for the (*natural or ordinary*) loss which has occurred. *Put simply, even if we accept Lord Hoffmann's approach, it is, in fact, already an intrinsic part of the first limb in Hadley.*

[54] Finally, and turning to the *second limb* in *Hadley*, the court in *MFM Restaurants* observed thus:¹³⁴

106 The key issue that arises at this juncture, in our view, centres on the *role* of the *actual* knowledge of the defendant. Is it, as the *second limb* in *Hadley* assumes, *sufficient – in and of itself – to be the basis for an implied obligation on the part of the defendant that it would assume responsibility for the (extraordinary) loss flowing from its breach? Or is actual knowledge merely a factor (and no more) in ascertaining whether or not there was such an obligation (a point which is implicit in Lord Hoffmann's approach in *The Achilles* ...)* ...?

...

107 It will be recalled that the obligation or assumption of responsibility with regard to the *loss* flowing as a result of a *breach of contract* is (in the absence of a relevant *express* term) *necessarily* an *implied* one ... This proposition would, of course, apply to *both limbs* in *Hadley* and is, in fact, also a premise underlying Lord Hoffmann's approach in *The Achilles* as well (although it is significant to note that Lord Hope appeared, also in *The Achilles* (at [36]), to suggest *otherwise*). If so, then it is *the court* which *imputes* such an obligation on the defendant, albeit on an *objective* basis. Looked at in this light, it is our view that *the criterion of knowledge furnishes a sufficiently objective basis on which to premise the existence (or otherwise) of an implied obligation or assumption of responsibility on the defendant*. To leave the situation open to other factors would lead to unnecessary speculation as well as uncertainty. ...

[55] Turning to the principles in *Hadley* proper, the court gave its reasons as to why the principles laid down in *Hadley* constitute a set of universal and external rules of law which are undergirded by sound logic but are also consistent with the very essence of the law of contract itself (which gives effect to the idea of the contract as an *agreement*). In doing so, the court cited from its earlier judgment in

¹³⁴ *Ibid*, at [106]–[107] (emphasis in the original text).

Robertson Quay. In this regard, the reader is referred to the detailed reasoning contained in the judgment itself.¹³⁵

[56] Not surprisingly, perhaps, the court in *MFM Restaurants* concluded thus:¹³⁶

Consistent with the analysis set out above, we take this opportunity to confirm the approach relating to remoteness of damage in the law of contract as set out in the decision of this court in *Robertson Quay* ... (which affirmed the principles laid down in *Hadley*). We also take this opportunity to state that the approach advocated by Lord Hoffmann in *The Achilles* is not the law in Singapore, except to the extent that the learned law lord's reliance on the concept of assumption of responsibility by the defendant is already incorporated or embodied in both limbs in *Hadley* itself.

[57] Turning, next, to *Out of the Box*, as already noted above, the court endorsed the approach adopted in *MFM Restaurants*. More importantly, perhaps, it proceeded to elaborate upon the appropriate approach to be adopted, as follows:¹³⁷

46 While we agree with this, it does not lead inevitably to Lord Hoffmann's conclusion that this is so as a matter of the interpretation of the contract, nor indeed that questions of remoteness are to be resolved in that way. In our judgment, it is important in each case to segregate the question of the interpretation of the contract from the question of remoteness. To take the facts of this case, it simply does not aid the process to characterise the issue in terms of whether, *as a matter of the interpretation of the Contract*, WI [i.e. the defendant in this case] had undertaken an obligation to pay the extensive wasted advertising costs by way of damages in the event it failed to perform its primary obligation to deliver the required quantities of 18 in a suitable quality. Barring cases where the parties have agreed to liquidated damages as the remedy for a breach, the secondary obligation to pay damages upon a breach is a general one and it is a matter of applying the rules on remoteness as have been developed in the cases to ascertain whether the contract breaker should be held liable to pay the particular damages claimed. This, as we have seen, turns on whether the contract breaker had

135 See generally *ibid*, at [108]–[113].

136 *Ibid*, at [140].

137 [2013] 2 SLR 363 at [46]–[47] (emphasis in the original text).

such knowledge of the facts that bore upon that risk as to render it just that he be held liable to pay such damages.

47 A straightforward analytical framework for questions of remoteness of damage would help ascertain in most cases the extent to which the defendant can fairly be held liable for losses that are causally connected to his breach. Such a framework would engender the following inquiries:

- (a) First, what are the specific damages that have been claimed?
- (b) Second, what are the facts that would have had a bearing on whether these damages would have been within the reasonable contemplation of the parties had they considered this at the time of the contract?
- (c) Third, what are the facts that have been pleaded and proved either to have in fact been known or to be taken to have been known by the defendant at the time of the contract?
- (d) Fourth, what are the circumstances in which those facts were brought home to the defendant?
- (e) Finally, in the light of the defendant's knowledge and the circumstances in which that knowledge arose, would the damages in question have been considered by a reasonable person in the situation of the defendant at the time of the contract to be foreseeable as a not unlikely consequence that he should be liable for?

New categories of contractual damages (?)¹³⁸

Introduction

[58] Turning now to possible new categories of contractual damages, it should be noted that, in recent years, the Singapore Court of Appeal has had the opportunity to consider whether two new categories of contractual damages should be recognised. The first relates to *punitive* damages in *contract*. The second relates to what have been popularly termed "*Wrotham Park* damages".¹³⁹ Let me now turn to briefly consider

138 Once again, I draw liberally from my joint article with Professor Goh, n 25 above. In so far as the curious notation (of a question mark) in the heading to this part is concerned, see the main text accompanying nn 140 and 141 below.

139 Based on the leading English High Court decision of *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798.

each in turn. I should add, at this particular juncture, that I have placed a curious notation (a question mark, in fact) in parentheses in the heading to this part of the essay.¹⁴⁰ This is because whilst the Singapore Court of Appeal recognised the category termed “*Wrotham Park damages*”, it did not do so in so far as punitive damages in *contract* was concerned and, hence, the same notation in the (corresponding) sub-heading that follows.¹⁴¹ I will also refer – in the briefest of fashions – to yet another category of contractual damages which has not come up directly for decision by the Singapore courts yet. However, the focus will be on the former two categories of contractual damages.

Punitive damages in contract law (?)

[59] It is axiomatic that contractual damages are – in the main at least – intended to be *compensatory* in nature. It would therefore appear to be the case that *punitive* damages ought *not* to be awarded in a contractual setting. However, this is not the case in Canada. In the Supreme Court of Canada decision of *Whiten v Pilot Insurance Company* (“*Whiten*”),¹⁴² punitive damages were awarded in a contractual setting. However, the Singapore Court of Appeal decision of *PH Hydraulics & Engineering Pte Ltd v Airtrust (Hongkong) Ltd* (“*PH Hydraulics*”)¹⁴³ declined to follow *Whiten*, and held, instead, that there ought to be *a general rule* that punitive damages *cannot* be awarded for breach of contract.

[60] By way of a brief summary, the court in *PH Hydraulics* first considered the arguments *against* the award of such damages. It was of the view that allowing the courts to punish a party who had breached a contract sits uneasily with the concept of a contract as a set of obligations arising from a voluntary and binding agreement.

140 See n 138 above.

141 *Contra* punitive damages in *tort*; see, in particular, the decision of the Singapore Court of Appeal in *ACB v Thomson Medical Pte Ltd* [2017] 1 SLR 918, where the court, in fact, declared that the decision of the House of Lords in *Rookes v Barnard* [1964] AC 1129 (which confined the award of punitive damages to three categories of case) was no longer good law. It was held that punitive damages might be awarded in *tort* where the totality of the defendant’s conduct was so outrageous that it warranted punishment, deterrence and condemnation.

142 (2002) 209 DLR (4th) 257; 2002 SCC 18. Professor McCamus has observed that “[a]lone in the common law world, it seems, Canada has embraced the notion that punitive damages can be awarded for a simple or pure breach of contract” (see John D McCamus, “The Future of the Canadian Common Law of Contract” (2014) 31 JCL 131 at 141 (emphasis added)).

143 [2017] 2 SLR 129.

The courts ought to have but a minimal role in regulating the contracting parties' conduct without regard to their agreement. It would be anomalous or even inappropriate for the court to regulate the contracting parties' conduct by imposing an award of punitive damages on the party in breach by way of what is in effect an external standard. The standard is an external one because, with the award of such damages, the court would be signifying its own outrage at the contract-breaker's conduct and communicating its own view of what proper commercial behaviour should be. Such an external standard might be said to be antithetical to the very nature and function of the law of contract in general and its remedial structure in particular. In contrast, the law of tort affords far more latitude to the courts in regulating conduct between the parties; it imposes standards of normative behaviour between complete strangers.¹⁴⁴ The court was further of the view that the argument based on a "remedial gap" – that it is necessary to have a residual discretion to award punitive damages in contract law because existing remedies are inadequate to punish and deter outrageous behaviour – was neutral at best. If the concepts of punishment and deterrence were inapposite in the context of the common law of contract, there would be no gap in the first place. Such a gap could, in any event, be filled by alternative remedial options, such as "*Wrotham Park* damages", an account of profits for breach of contract, or damages for mental distress. These arguably have punitive or deterrent effects even though they remain primarily compensatory in purpose in that they protect a plaintiff's interest in contractual performance.¹⁴⁵ It also held that another argument against recognising the award of punitive damages for breach of contract was the absence of clear criteria by which to determine when punitive damages should be awarded, and the consequent uncertainty this would lead to. The concept of an "outrageous" breach is particularly elusive in the commercial context where self-serving behaviour is an accepted reality. It would be very difficult to identify specific (as well as workable) criteria for ascertaining when a contracting party's conduct has crossed the line from self or vested interest into the realm of the "outrageous".¹⁴⁶ The court also held that the weight of case law authority was also against the recognition of the award of such

144 Ibid, at [68], [71], [72] and [74].

145 Ibid, at [78]–[84].

146 Ibid, at [85], [86] and [89].

damages although this was not necessarily conclusive of the issue.¹⁴⁷ Finally, *policy considerations* also militated against the award of punitive damages in a purely contractual context. Awarding punitive damages in a purely contractual context might adversely affect the manner in which litigation is conducted inasmuch as it might add to its length, complexity and costs and confer upon plaintiffs an undue advantage in forcing large (or larger) settlements. Further, punitive damages are most commonly awarded in circumstances where there is a heightened risk of recurrent reprehensible conduct, especially where the parties are of unequal bargaining power, such as in insurance, employment and consumer transactions. Such risk would be more appropriately managed by regulation rather than by judicial remedies such as an award of punitive damages.¹⁴⁸

[61] Insofar as the arguments in *favour* of an award of punitive damages for breach of contract were concerned, the court in *PH Hydraulics* was of the view that the argument from uniformity – that it would be inconsistent to recognise punitive damages in tort but exclude punitive damages from contract claims – was unpersuasive because the law of tort is qualitatively different from the law of contract.¹⁴⁹ It was also of the view that the Canadian decision of *Whiten*, the key authority relied upon by the court below to justify the award of punitive damages for breach of contract, ought *not* to be followed. In particular, *Whiten* held that punitive damages could be awarded where the conduct complained of constituted the breach of an independently actionable wrong – the breach of a contractual duty of good faith. But there was no reason in principle why a single breach of contract ought not also justify an award of punitive damages; if it was the egregious nature of the conduct of the party in breach that was being punished, it ought not matter whether that conduct was the result of a single breach or more than a single breach.¹⁵⁰ The court also noted – adopting the *amicus curiae*'s¹⁵¹ view – that *Whiten* has been subject to no small measure of criticism (significantly, from a number of eminent academic experts in the field of Canadian contract law, one of whom was of the view that

147 Ibid, at [101].

148 Ibid, at [102], [104] and [106].

149 Ibid, at [110] and [111].

150 Ibid, at [112], [114] and [115].

151 Associate Professor Lee Pey Woan of the School of Law, Singapore Management University.

Whiten may not be a true authority for the award of punitive damages in a purely contractual context as it involved tortious defamatory conduct as well and there were features of the case not common to ordinary commercial contracts, such as quasi-regulatory interests).¹⁵² The court found the principles in *Whiten* unpersuasive because it was assumed in *Whiten* that there was no difference in principle between awarding punitive damages in tort and doing so in a purely contractual context; the broader issue of principle – why punishment is a legitimate remedial response to a breach of contract – was not really dealt with. The principle of proportionality, which attempts to impose a rational limit on punitive damages awards, did not furnish sufficient guidance and had led in turn to uncertainty.¹⁵³ Further, it was not clear whether *Whiten* recognised the availability of punitive damages for all contract breaches or only certain types of contracts where there was a material power imbalance, or more generally contracts where there was a duty of good faith.¹⁵⁴ In any event, the court in *PH Hydraulics* was of the view that the existence of a duty of good faith would not, on its own, justify an award of punitive damages in the event of its breach, although it might help overcome one of the objections in principle to punitive damages for breach of contract: the undesirability of a court imposing on the parties its own normative standard of contractual performance. However, it did not necessarily follow that punitive damages ought to be awarded; the existence of an express or implied duty of good faith was a neutral factor.¹⁵⁵

[62] The court in *PH Hydraulics* then decided that as the arguments against the award of punitive damages for breach of contract *far outweighed* the arguments in favour of such an award, there ought (as already noted above) to be a general rule that punitive damages could not be awarded for breach of contract.¹⁵⁶

[63] However, it should be noted that the court in *PH Hydraulics* did not rule out completely the possibility of ever awarding punitive damages for breach of contract, observing as follows:¹⁵⁷

152 [2017] 2 SLR 129 at [117] and [118].

153 *Ibid*, at [121]–[123] and [126].

154 *Ibid*, at [127] and [128].

155 *Ibid*, at [134].

156 *Ibid*, at [135].

157 *Ibid*, at [136].

Given, however, that the instances in which a breach of contract can occur are manifold, we would not rule out entirely the possibility that a case may one day come before this court, involving a particularly outrageous type of breach, which necessitates a departure from the general rule. As was said in a case concerning punitive damages for negligence, “‘never say never’ is a sound judicial admonition” (see the Privy Council decision of *A v Bottrill* [2003] 1 AC 449 at [26] *per* Lord Nicholls of Birkenhead). That said, any argument for the award of such damages would need to surmount the many reasons of principle and policy set out in this judgment against doing so. It would therefore take a truly exceptional case to persuade this court that punitive damages should be awarded for breach of contract.

[64] At least one commentator has expressed dissatisfaction with the “legal safety valve” embodied in the quotation just set out above.¹⁵⁸ With respect, this misses the point that the general rule proscribing the award of punitive damages for breach of contract is the default rule and that this exception would operate (by its very nature and the terms in which it is phrased) in but the rarest of situations, if at all. This difference in perspectives is also emblematic of the academic’s natural tendency towards *theoretical* neatness on the one hand and the judge’s need to grapple with the various implications of any rule or principle in the context of *practical* application on the other in what is a fundamentally imperfect as well as complex world.¹⁵⁹ What is clear, however, is the fact that any Commonwealth court which needs to decide whether or not to award punitive damages for breach of contract will need to weigh the various arguments – many of which have been set out above.

Wrotham Park damages

[65] An area of the law of contractual damages that is still in a state of flux concerns the issue as to whether damages of the kind awarded in the leading English High Court decision of *Wrotham Park Estate Co Ltd v Parkside Homes Ltd*¹⁶⁰ ought to be awarded.¹⁶¹ In essence, such

158 See Samuel J Hickey, “Punitive damages for breach of contract: A Singaporean perspective” (2017) 46 *Common Law World Rev* 239.

159 *Cf* Lord Goff, n 10 above.

160 [1974] 1 *WLR* 798.

161 See also the seminal article in this area by Robert J Sharpe and S M Waddams, “Damages for lost opportunity to bargain” (1982) 2 *OJLS* 290.

damages (often termed “*Wrotham Park* damages”¹⁶² after the case just mentioned) are awarded in situations involving a breach of contract where the award of compensation either by way of expectation loss or reliance loss is not possible but where the defendant, by reason of his or her breach of contract, has made a profit by transacting with a third party. Instead, the court concerned awards the plaintiff damages for the lost opportunity to bargain with the defendant (or a third party) for a price for releasing the defendant from its covenant, calculated by way of a reasonable (albeit not the entire) amount of the aforementioned profit made by the defendant. Such a reasonable bargain as just mentioned is necessarily *hypothetical* in nature since, *ex hypothesi*, it never actually took place.

[66] The UK Supreme Court recently handed down its first ever decision on this particular category of damages in *Morris-Garner v One Step (Support) Ltd*.¹⁶³ The judgment is itself a demonstration of the flux in this area within the UK jurisprudence. Lord Reed (with whom Lady Hale, Lord Wilson and Lord Carnwath agreed) disapproved of the terminology “*Wrotham Park* damages” and preferred the term “negotiating damages” instead.¹⁶⁴ His Lordship traced the development of this category of damages, dividing them into two phases – an earlier period where the award of such damages was based on the exercise of the jurisdiction under Lord Cairns’ Act and a later period “in which [such] awards ... were made at common law on a wider and less certain basis”.¹⁶⁵ He viewed the House of Lords decision in *Attorney General v Blake (Jonathan Cape Ltd Third Party)*¹⁶⁶ as a pivot dividing both these phases.

[67] Having analysed the development of this remedy in the case law, Lord Reed finally set out what he viewed to be the principles governing the availability of what he termed “negotiating damages”.¹⁶⁷ His Lordship reasoned that negotiating damages are compatible

162 But *cf* n 164 below. See also n 139.

163 [2018] 2 WLR 1353. See also Caspar Bartscherer, “Two Steps Forward, One Step Back: *One Step (Support) LTD v Morris-Garner and Another*” (2019) 82 MLR 367.

164 The latter terminology had been introduced by Neuberger LJ (as he then was) in the English Court of Appeal decision of *Lunn Poly Ltd v Liverpool & Lancashire Properties Ltd* [2006] EWCA Civ 430.

165 [2018] 2 WLR 1353 at [48] (emphasis added).

166 [2001] 1 AC 268.

167 [2018] 2 WLR 1353 at [91]–[94].

with the compensatory purpose of an award of contractual damages. Such damages are awarded in situations when “the loss for which compensation is due is the economic value of the right which has been breached, considered as an asset”.¹⁶⁸ The imaginary negotiation is “merely a tool” for arriving at the economic value of the right.¹⁶⁹ This value constitutes the measure of the claimant’s loss in circumstances where the claimant has in substance been deprived of a valuable asset. In other words, these are situations where “the defendant has taken something for nothing, for which the claimant was entitled to require payment”.¹⁷⁰ Anticipating the objection that any contractual right may be described as an asset or property, Lord Reed confined the contractual right in contemplation to those kinds the breach of which would result in “an identifiable loss equivalent to the economic value of the right, considered as an asset, even in the absence of any pecuniary losses which are measurable in the ordinary way”.¹⁷¹ This was thought to be true of some contractual rights, but not all. While the UK Supreme Court was reluctant to foreclose the possibility, it intimated that it would be difficult to imagine how a hypothetical release fee would be the correct measure in any other circumstances.

[68] Accordingly, “*Wrotham Park* damages” (or “negotiation damages”) has now been recognised by the UK’s highest court in accordance with the principles stated above, which will undoubtedly constitute a legal point of reference for any court considering whether or not to accept such damages within the legal landscape.

[69] Shortly after the decision of the UK Supreme Court in *Morris-Garner v One Step (Support) Ltd* was handed down, the Singapore Court of Appeal released its decision of *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* (“*Turf Club Auto Emporium*”),¹⁷² which contained a detailed discussion of *Wrotham Park* damages in the Singapore context. In brief, the court largely agreed with the English approach taken by the UK Supreme Court in *Morris-Garner v One Step (Support) Ltd*. As

168 Ibid, at [91].

169 Ibid.

170 Ibid, at [92].

171 Ibid, at [93].

172 [2018] 2 SLR 655. For subsequent (and related) decisions, see *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2019] 1 SLR 214. See also Man Yip and Alvin W-L See, “One Step Away from *Morris-Garner: Wrotham Park* Damages in Singapore” (2019) 135 LQR 36.

a fundamental point, the court recognised *Wrotham Park* damages as a head of damages under Singapore law that are meant to protect the plaintiff's performance interest. The court then held that the normative basis of such damages is compensatory in nature, since they are aimed at compensating the plaintiff for the loss of his performance interest due to the defendant's breach. Indeed, the reference to the defendant's gain was merely a method of quantifying the damages, rather than the basis of the award. Understood this way, *Wrotham Park* damages apply only in a limited category of cases, which is where there is a remedial lacuna arising from the unavailability of orthodox compensatory damages or specific relief, but where there is still a need to provide the plaintiff with a remedy to protect his performance interest, and where the lacuna could be rationally and sensibly filled by reference to the hypothetical bargain measure.

[70] As a practical matter, the Court of Appeal stated that there are three requirements to be satisfied before a court would award *Wrotham Park* damages:¹⁷³

- (a) First, as a threshold matter, orthodox compensatory remedies were unavailable. This would usually arise if the plaintiff had not suffered any financial loss from the defendant's breach, and could not claim for specific performance. However, as the court reminded us, this is a difficult requirement to satisfy. Indeed, the mere difficulty of quantifying compensatory damages cannot be taken to be satisfaction of this requirement.
- (b) Second, there must generally be shown to have been a breach of a negative covenant. This must be a substantive negative covenant, and not simply a positive obligation "dressed up" as a negative covenant.
- (c) Third, it must not have been irrational or totally unrealistic to expect the parties to bargain for the release of the relevant covenant, even if this were only hypothetical in nature. Thus, as an example, the hypothetical measure would not apply if the agreement to release the covenant were illegal.

Apart from these requirements, the court also pointed out that *Wrotham Park* damages should not be confined to merely breach of a

173 And see generally [2018] 2 SLR 655 at [135]–[255].

proprietary right. Neither was there a need to prove that the defendant had committed a deliberate or cynical breach of contract, or that the plaintiff had a legitimate interest in preventing the defendant's profit-making activity in breach of contract. There was further no need to avoid manifest injustice or satisfy similar requirements, as these are built into the three requirements above.

[71] The Court of Appeal's approach differs slightly from the UK Supreme Court's approach in *One Step*. First, in terms of the threshold issue of terminology, unlike the UK approach, the court did not see any real prejudice in continuing with the term "*Wrotham Park* damages" (as opposed to "negotiating damages"). In its view, any difference between the two terms is merely a matter of form and so they can be used interchangeably.

[72] Second, there are also some differences in relation to the legal requirements for *Wrotham Park* damages at common law. The legal requirement for such damages outlined in *One Step* is different from that set out in *Turf Club Auto Emporium*. In *One Step*, the primary limiting criteria for an award of negotiating damages at common law is that the contractual right breached must be considered to be an economically valuable "asset". However, the Court of Appeal did not think that this should be part of Singapore law for several reasons. For one, it is not clear in what *other circumstances* a contractual right can be considered to be an "asset", and whether negotiating damages can be awarded at common law *only* in situations where the contractual right breached related to the control and use of land, intellectual property or confidential information. Indeed, if the effect of this requirement is to limit *Wrotham Park* damages to such circumstances only, it would unduly narrow the scope of such damages and revive the narrow proprietary conception of the doctrine (which has been rejected). More substantively, it is not clear why it should be any more permissible to expropriate personal rights than it is permissible to expropriate property rights. Furthermore, the requirement of an economically valuable asset causes uncertainty since every contractual right could be described as an asset in some sense.

[73] A further difference between the Singapore and UK approaches is the emphasis that the majority in *One Step* placed on the distinction between *Wrotham Park* damages awarded in the exercise of the court's equitable jurisdiction under the Lord Cairn's Act ("LCA"), and those awarded at common law. Lord Reed in *One Step* bifurcated the

two categories of cases, and suggested that they were governed by different principles and perhaps even different rules of assessment. In contrast, the Court of Appeal, while recognising the equitable roots of damages in lieu of an injunction under the LCA, was of the view that this historical lineage did not justify a sharp distinction between *Wrotham Park* damages awarded under the LCA (in our case, under paragraph 14 of the First Schedule to the Supreme Court of Judicature Act (read with section 18(2) thereof)) and the same measure of damages awarded at common law. On the contrary, the legal requirements articulated should apply to both categories of cases.

[74] Despite these differences, the Court of Appeal accepted that there is much harmony between its approach and the UK approach.

AG v Blake damages

[75] This is yet another relatively new category of contractual damages. It is, as its name suggests, based on the House of Lords decision in a case already noted above, *viz*, *Blake*.¹⁷⁴ *Blake* itself is a very unusual case and may, in fact, have limited application. It was certainly necessary for the House of Lords to arrive at the decision it did in order to achieve substantive justice on the facts of that particular case. However, it could be argued that this was not wholly consistent with the *spirit* underlying the *second central thread* referred to earlier in this essay. As mentioned, in *Morris-Garner*, *AG v Blake* was treated as the pivot signalling the wider availability of “negotiating damages” in cases decided under the common law of contract. Lord Reed acknowledged that following *Blake*, in exceptional circumstances, an account of profits can be ordered as a remedy for breach of contract.¹⁷⁵ This proposition was not the subject of appeal in *Morris-Garner*. In his Lordship’s conclusion, Lord Reed stated that “[c]ommon law damages for breach of contract cannot be awarded merely for the purpose of depriving the defendant of profits made as a result of the breach, other than in exceptional circumstances, following *Attorney General v Blake*”.¹⁷⁶

174 *Attorney General v Blake (Jonathan Cape Ltd Third Party)* [2001] 1 AC 268. There is a plethora of literature on this particular decision, including a joint article by the author of the present paper (see Andrew Phang and Pey-Woan Lee, “Rationalising Restitutionary Damages in Contract Law – An Elusive or Illusory Quest?” (2001) 17 JCL 240).

175 [2018] 2 WLR 1353 at [82].

176 *Ibid*, at [95].

[76] *Blake* has yet to be considered by the Singapore courts, although there is *obiter dicta* that does not appear to cast it in favourable light. In the Singapore Court of Appeal decision of *MFM Restaurants Pte Ltd v Fish & Co Restaurants Pte Ltd*,¹⁷⁷ it was observed thus (although the issue did not come up for decision):¹⁷⁸

... *Blake* itself generated – not surprisingly, perhaps – a learned body of legal literature of a magnitude that has been witnessed only occasionally (in this regard, the account by Prof Graham Virgo in his book, *The Principles of the Law of Restitution* (Oxford University Press, 2nd Ed, 2006) (“*Virgo*”) ch 17 furnishes an exceptionally clear and succinct overview of both the relevant case law as well as legal literature). Put very simply, the principles set out in *Blake* permit the court to award damages to the plaintiff (in a situation relating to the breach of a contract) on the basis of the gains or profits made by the defendant even though the plaintiff could not otherwise be awarded any damages based on traditional contractual principles (for example, because there has been no difference in value of the contractual subject matter and, hence, no justification for the award of expectation loss). Such damages would, however, be awarded only in *exceptional* cases. This category of damages has sometimes been termed as “restitutionary damages”, although the House in *Blake* preferred to classify such an award on the basis of an account of profits.

Apart from the various conceptual as well as (as referred to at the end of the preceding paragraph) terminological difficulties, there are (concurrent) practical difficulties as well in so far as the award of damages under the principles set out in *Blake* are concerned. In *Blake*, for example, in the leading judgment of Lord Nicholls of Birkenhead, the statement of principle (at 284–285) does not really furnish concrete guidance as to when the power to award such damages will arise. That the award of such damages is (as already noted in the preceding paragraph) exceptional still leaves the (very practical) issue as to *the criteria* which will enable the court to ascertain whether or not a given fact situation is indeed exceptional. Case law developments since *Blake* (see, for example the English Court

177 [2011] 1 SLR 150.

178 *Ibid*, at [52]–[55] (emphasis in the original text). But *cf*, in the Canadian context, John D McCamus, “The Future of the Canadian Common Law of Contract” (2014) 31 JCL 131 at 145–146.

of Appeal decision of *Experience Hendrix LLC v PPX Enterprises Inc* [2003] 1 All ER (Comm) 830 (noted in Pey-Woan Lee, “Responses to A Breach of Contract” [2003] LMCLQ 301 (“Lee”); Martin Graham, “Restitutionary Damages: The Anvil Struck” (2004) 120 LQR 26 (“Graham”); and David Campbell and Philip Wylie, “Ain’t No Telling (Which Circumstances are Exceptional)” (2003) 62 CLJ 605 (“Campbell and Wylie”)) have also suggested a possible alternative approach that is premised not on a restitutionary basis as such but, rather, on a compensatory one (centring on the much discussed decision by Brightman J in the English High Court decision of *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 (“Wrotham Park”) (see also Robert J Sharpe and S M Waddams, “Damages for lost opportunity to bargain” (1982) 2 OJLS 290); reference may also be made to the recent Privy Council decision (on appeal from the Court of Appeal of Jersey) of *Pell Frischmann Engineering Limited v Bow Valley Iran Limited* [2010] BLR 73 (especially at [46]–[54])). However, it would appear that the precise contours of this particular head of compensatory loss (as well as its relationship with the established head of expectation loss) have yet to be worked out fully (see, for example, *Virgo* (at pp 490–492) as well as *Lee*; *Graham*; and *Campbell and Wylie*). It might well be a difference of degree rather than kind, at least in so far as the former consists in an attempt to quantify compensatory damages by reference to the defendant’s gain (see *Lee* (at 302–303) and, by the same author, “A New Model of Contractual Compensation” [2006] LMCLQ 452 at 453; cf also Samuel Stoljar, “Restitutionary Relief for Breach of Contract” (1989) 2 JCL 1 at 3–4). To the extent, of course, that both heads are coincident, the head of damages will, in substance, be based on orthodox principles of the common law of contract (which centre on expectation loss).

[77] In *Turf Club Auto Emporium*, the Court of Appeal had occasion to comment on such damages. It held that, on a superficial level at least, *AG v Blake* damages are similar to *Wrotham Park* damages in that they both involve the stripping of the gain or profit that had accrued to the defendant as a result of his breach of contract. However, the two are very different normatively. As the court explained, whereas an award of *Wrotham Park* damages involves the stripping of the defendant’s gain or profit based on a *hypothetical or objective measure*, an award of *AG v Blake* damages involves stripping *the actual* gain or profit that had accrued to the defendant.

[78] The Court of Appeal reaffirmed that such damages are an exception remedy, and left for a later occasion to decide if they are truly part of Singapore law. Indeed, the court pointed out that the primary difficulty with recognising *AG v Blake* as part of Singapore law is the uncertainty of the legal criteria to be applied in awarding such damages. Indeed, the criterion of “legitimate interest” is rather general and even vague, and difficult to define. The only possible way of rationalising these damages may perhaps be to say that the law has a *legitimate basis for punishing the defendant and deterring non-performance because the contract involves a public interest which goes beyond the private interests of the parties themselves*. This would be an *exceptional* class of contracts, but the contract between the Government and the intelligence agent in *AG v Blake* provides a classic illustration that this category of cases does exist. However, it bears reiterating that the court was not purporting to conclude this as a part of Singapore law; its views were only tentative and we must await a future case to see if *AG v Blake* damages are part of Singapore law and, if so, how they are to be awarded.

[79] Returning then to the broader point in this section, in my view, it is by no means clear that there will be no divergence in so far as this particular category of damages is concerned. The acid test, so to speak, will come when *Blake* arises for direct consideration once again in a Commonwealth apex court.

Conclusion

[80] Although I have sought to set out as many recent developments in Singapore contract law as possible, constraints of space have precluded a fuller discussion than I would have liked. However, I hope that the present essay would give the reader a flavour of these developments. What is clear is that Singapore law in general and its contract law in particular are no longer poor carbon copies of the corresponding English law. Whilst change merely for its own sake has been eschewed, the Singapore courts have nevertheless sought to draw together the best principles from relevant decisions from all common law jurisdictions and have sought to develop Singapore contract law in a manner that is most appropriate from the perspectives of both logic as well as local conditions.

Family Justice in Divorce Proceedings in Singapore for Spouses and Their Children

by

Professor Leong Wai Kum and Justice Debbie Ong*

Introduction

[1] By the philosophy of the family justice system the adversarial system of litigation is tempered in its fiercest aspects so that both the litigant-spouses and their children emerge without having acrimoniously destroyed their relationships. Divorce should be no worse than a re-organisation of family members' living arrangements and the divorced spouses should still be able to continue to discharge their parental responsibilities with some degree of co-operation.

[2] This article discusses how the family justice system is effectuated within divorce proceedings heard by the Family Justice Courts in Singapore.

[3] The first half of the article discusses the theory of the family justice system and how it became embraced in Singapore.

[4] The second half of the article discusses the approaches and the specific programmes that have been put in place in the Family Justice Courts, in line with the philosophy of the current family justice system.

Towards the family justice system in common law jurisdictions

Pristine adversarial system of litigation

[5] In common law jurisdictions court proceedings follow the "adversarial system of litigation". The theory behind the adversarial system of litigation is that a just outcome of court proceedings is more likely when each litigant pursues her own interest single-mindedly.

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The litigant proceeds as if she is an “adversary” of the other. She never needs to consider the effect of her conduct of the proceedings upon the other. The theory rests upon the belief that the truth emerges when each litigant does what is in her own interests, largely, without regard to the effect of such behaviour on the other party and non-parties to the proceedings.

[6] Divorce litigation within family proceedings, as with any court proceeding, in common law jurisdictions continues to follow this theory of litigation.

[7] If the adversarial system of litigation proceeded in its pristine form within divorce proceedings, each litigant-spouse will pursue her own interests single-mindedly without paying any thought to the effect of her behaviour upon her relationship with the other and also the effect of all this upon their child who is, of course, not a party to the proceedings.

[8] Family lawyers have long recognised, however, that the adversarial system of litigation must be tweaked in family proceedings and divorce litigation in particular in order that the toll on family relationships is not higher than it needs to be.

[9] The self-centred pursuit of each spouse’s own interests in the divorce proceedings will likely leave their relationship completely shattered.

[10] Worse, the effect of the spouses’ shattered relationship upon their children is even more grievous.

[11] After an acrimonious divorce the spouses might find it impossible to discharge their parental responsibilities towards their children with any spirit of co-operation.

[12] The cost of an acrimonious divorce upon the family members and the children, in particular, is higher than it needs to be.

Family practitioners innovated with tweaking the adversarial system of litigation

[13] Family practitioners around the world, beginning with those in the United States, took small steps from the 1970s to soften the roughest edges of the adversarial system of litigation. They began by encouraging their clients to use softer means of resolving the family

dispute such as mediation and negotiation so that litigation was only the last resort.

[14] These small steps have now grown and developed into the universally acknowledged philosophy generally called the “family justice system”.

What is family justice

[15] The family justice system today encompasses the philosophy that the adversarial system of litigation should be tweaked to avoid truly disastrous outcomes in family proceedings in general and divorce litigation in particular.

[16] Spouses who find that their marital relationship has irretrievably broken down can obtain judicial relief by a judgment of divorce and do so in a manner that does not cause each to view the other with acrimony and, more importantly, can allow them to co-operate to the highest degree possible in discharging their parental responsibilities to their children.

[17] Every member of the family gains under the family justice system philosophy of divorce litigation.

[18] The courts too are spared from being the site of deep feelings of acrimony, disappointment and grief. There is probably no court system in the common law world that does not adhere to the family justice system in some form or other. The difference lies in whether there is formal commitment to it, and the extent of the commitment to this “win-win” concept.

[19] While there is no common definition of the family justice system, it is useful enough to note that Mavis Maclean, John Eekelaar and Benoit Bastard suggest:¹

By family justice we mean not only Family Law ... but also the justice system that delivers legal knowledge, advice and support at times of change of status or family stress, together with the mechanisms for dispute resolution, and adjudication where agreement cannot be reached.

1 See *Delivering Family Justice in the 21st Century* (Hart Publishing, 2015), p 1.

Singapore joins other progressive common law jurisdictions in embracing the family justice system

Committee for family justice

[20] In Asia, Singapore may be regarded as a leader in embracing this new philosophy of litigation in family proceedings and divorce proceedings in particular.

[21] Singapore formally committed to the family justice system for all family proceedings originating here when Parliament in Singapore enacted the Family Justice Act 2014.²

[22] The Family Justice Committee³ established in 2013 released its *Recommendations of the Committee for Family Justice on the Framework of the Family Justice System* in July 2014.

[23] The Committee's definition of the family justice system, notably, integrates substantive law with mechanisms to offer a view of the system that is better integrated than the definition suggested for the United Kingdom ("UK") by Mavis Maclean, *et al.*⁴

[24] In *Recommendations of the Committee for Family Justice on the Framework of the Family Justice System* at paragraph 13, the Committee offers:

[The family justice system recommended for Singapore is] a seamless synergy of substantive law, procedural rules, institutions, agencies and the courts all assisting the expeditious and amicable resolution of family problems.

[25] We suggest that it is a superior view of the philosophy of the family justice system that it is a seamless synergy. Substantive law should underpin procedural mechanisms to produce an integrated whole that serves divorce litigation.

[26] The Singapore Government accepted the recommendations in full and Parliament enacted the Family Justice Act 2014.

2 Act 27 of 2014. By coincidence, the UK Government also formally committed to the family justice system when it accepted in total the recommendations of their *Family Justice Review: Final Report* (November 2011) and established its Family Court in 2014.

3 Headed by VK Rajah, then Judge of Appeal of the Supreme Court of Singapore.

4 See n 1 above.

Effect of the Family Justice Act 2014

[27] The Family Justice Act 2014⁵ completed the customised hierarchy of courts hearing family proceedings by establishing the Family Division of the High Court.

[28] The Family Division of the High Court hears appeals from decisions of the Family Court. The Family Court was established in 1995 at the level of State Courts, *viz*, at the subordinate level to the Supreme Court of Singapore. The Family Court hears practically all originating applications in family proceedings,⁶ as only cases involving very large pools of matrimonial assets to be divided originate at the Family Division of the High Court.

[29] Family proceedings, including applications for a judgment of divorce,⁷ originate at the Family Court. Appeals from decisions of the Family Court are as of right and these are heard by the Family Division of the High Court.

[30] Appeals from decisions of the Family Division of the High Court, however, are not as of right and may only proceed with the leave of the court. Thus, although there is still the apex court above the Family Division of the High Court, *viz*, the Court of Appeal of Singapore, these appeals are only permitted for good cause. The Family Division of the High Court may be regarded as the court that is intended to, generally, be the final recourse of the parties in family proceedings.

Family justice in Singapore may be regarded to have begun from 1995

[31] As the Family Justice Act 2014 was enacted in 2014, it may be thought that family justice started in Singapore only from 2014. This fails to appreciate the significance of earlier developments in Singapore.

[32] It is possible, simply from the fact that the Family Court was established as a customised court to hear all family proceedings way back in 1995, for Singapore to claim that she has committed to family justice since 1995.

5 See Family Justice Act 2014, s 4.

6 Apart from the classical family proceedings, the Family Justice Act 2014, s 2 defines “family proceedings” to include succession-related applications as well as applications under health-related statutes.

7 See the Women’s Charter (Cap 353, 2009 Rev Ed) (the main family law statute in Singapore), s 95 that permits the judicial termination of marital relationships.

[33] The Family Court in Singapore was established with the mission of assisting family members to resolve their disputes as harmoniously as possible.

[34] To this end several initiatives were put in place from the beginning and these and others have been innovated over time. Procedures in applying to the court and hearings within the court became streamlined. Parties will find the court more accessible and that hearings before it are less intimidating or provocative.

[35] The Family Court became a laboratory testing out and implementing the provision of counselling and other social services as well as better court processes. Mediation and pre-trial conferences soon became the norm so that parties were able either to reach settlement of their dispute or, at least, narrow down their dispute into more manageable proportion. Alternatives to litigation in resolving the spouses' dispute became the norm so that litigation was only the final resort when these alternatives still could not lead to complete resolution.

[36] The Family Court also innovated in incorporating social sciences including counselling by professionally-trained counsellors to help the spouses understand the issues and choices before them. The court will, whenever useful, direct parties and their children to counselling and educational courses.

[37] Among the more important procedural innovations are the requirements, from May 1, 1997, that the plaintiff and defendant in a divorce application should file either an "agreed" or at least a "proposed" "parenting plan"⁸ and "matrimonial property plan".⁹ Many of the procedural rules and requirements of the Family Justice Courts that appear to be put in place consequent upon the enactment of the Family Justice Act 2014 had originated as innovations over the course of time by the Family Court since its establishment in 1995.

8 This document required the parties to direct their minds and devise the best available plans for the future living arrangements regarding their children. The Family Justice Rules, S 813/2014 ("FJR") continue to require the same in r 45.

9 This document is required of all parties who own an HDB flat as their only or one of their matrimonial assets. Through it parties inform the Housing & Development Board administering their flat as well as obtain all the information, including from the Central Provident Fund ("CPF"), as to how the purchase of the HDB flat was financed. The FJR continue to require the same in r 46.

[38] It may be appreciated that these procedures and practices are exactly what the family justice philosophy encourages. These procedural mechanisms soften the fiercest aspects of the adversarial system. Family proceedings before the Family Court in Singapore since 1995 are less adversarial than what might have been.

Family justice in Singapore rooted in substantive legal demands of spouses and parents and so began from 1961

[39] One of the authors of this paper¹⁰ has suggested, however, that family justice may even be regarded to have begun quite a bit earlier and, more importantly, is synergised with substantive law rather than just being a theory of litigation.

[40] The argument begins from the realisation that, as massive as the Family Justice Practice Directions¹¹ (“FJPD”) and the Family Justice Rules¹² (“FJR”) that direct the conduct of family proceedings before the Family Justice Courts in Singapore are, these pursue two core objectives.

Two core objectives of the family justice system in Singapore

[41] The first core objective of family justice in Singapore is that family proceedings and divorce litigation, in particular, should be disposed of in a “just, expeditious and economical manner”.¹³ Divorce litigation, as with any court proceeding, must, of course be disposed of justly according to the dictates of the law. Within that immovable, however, there is reason in divorce litigation to encourage parties to refrain from dragging out the proceedings as well as not to incur unnecessary expenses in the course of obtaining the result desired. The second part of this article details the various schemes and programmes that the current Family Justice Courts inherited from the Family Court and built upon in pursuit of this objective.

10 See Leong Wai Kum, *Elements of Family Law in Singapore*, 3rd edn (Lexis Nexis, 2018), paras 19.027–19.035.

11 With effect from 2015.

12 S 813/2014 with effect from January 1, 2015.

13 See, e.g. the FJPD, Part III (Judge-led approach in resolving family disputes); and the FJR, r 22 (Power to make orders and give directions for just, expeditious and economical disposal of proceedings).

[42] The second core objective is that the well-being of the children of the parties should be protected throughout the entire divorce proceedings and even after the proceedings have been resolved by the award of the divorce judgment to the spouses. This despite the fact the children are not themselves parties to the divorce proceedings. Schemes and programmes must be put in place to ensure that the parties themselves are always reminded of the effect of their behaviour upon their children. In this regard as well, the current Family Justice Courts in Singapore further developed the schemes and programmes inherited from the Family Court to build upon them in pursuit of this second core objective.

Two core objectives exactly in synchrony with legal demands

[43] Once we deduce the core objectives within the philosophy of the family justice system in Singapore, we are able to appreciate that the substantive bases of these core objectives lay within the original Women's Charter itself.

[44] The Women's Charter was enacted as the State of Singapore's Ordinance 18 of 1961. In its¹⁴ section 46(1) the statute demands:

Upon the solemnization of marriage, the husband and the wife shall be mutually bound to co-operate with each other in safeguarding the interests of the union and in caring and providing for the children.

[45] This provision makes two demands of persons who commit to marrying one another under the Women's Charter.

First legal demand of spouse, as spouse, to always co-operate reasonably with the other

[46] The first legal demand that spouses behave reasonably *vis-à-vis* one another would require a modicum of reasonableness even when the spouses are, literally, adversaries in a divorce litigation.

[47] The first demand is made of the married couple of how to conceive their marital relationship. Section 46 demands that each regard the relationship as "an equal co-operative partnership of their different

14 In Ord 18 of 1961, this provision was numbered s 45 but in substance the current s 46(1) is *in pari materia*.

efforts for their mutual benefit".¹⁵ This conception of the relationship has been embraced by the Court of Appeal in Singapore in *NK v NL*.¹⁶

[48] In the later Court of Appeal decision in *Chan Tin Sun v Fong Quay Sim*, Judge of Appeal Andrew Phang elaborated on this and helpfully related it to the Women's Charter section 46(1) when he observed:¹⁷

As this court recognised in *NK v NL* [2007] 3 SLR(R) 743 (at [20]), the court's power to order the division of matrimonial assets under s 112 of the Women's Charter (Cap 353, 2009 Rev Ed) ("the Act") is founded on the prevailing ideology of marriage as an equal co-operative partnership of efforts for mutual benefit. This characterisation of marriage is supported by s 46(1) of the Act, which states "the husband and the wife shall be mutually bound to co-operate with each other in safeguarding the interests of the union and in caring and providing for the children". Thus in *NK v NL*, we observed (at [20]) that:

"... The contributions of both spouses are equally recognised whether he or she concentrates on the economics or homemaking roles, as both roles must be performed equally well if the marriage is to flourish. When the marriage breaks up, these contributions are translated into economic assets in the distribution according to s 112(2) of the Act."

[49] By this demand, then, a spouse should always act in reasonable consideration of the other with full respect for their equal co-operative marital partnership.

Powerful legal demand despite not being backed by sanction for breach

[50] The legal demand in section 46(1) is not accompanied by any sanction for breach. Instead of being meaningless because it lacks sanction, however, the author suggests that the legal demand is the only form of law that can practicably regulate spousal behaviour at all points of their marriage.

15 There is no equivalent provision in the UK, Australia or New Zealand as Leong Wai Kum (see "Fifty years and more of the Women's Charter of Singapore" [2008] SingJLS 1–24) revealed that the draughtsman of the original Women's Charter 1961 modelled the then s 45(1) upon a provision in the Swiss Civil Code of 1907.

16 [2007] 3 SLR(R) 743.

17 [2015] 2 SLR 195 at [21].

[51] The Court of Appeal decision in *AOO v AON*¹⁸ illustrates how a legal demand without a specific sanction for breach allows the court to choose the optimal response to one or both spouses' breach of the demand.

[52] The facts of the case are laborious. The wife committed adultery. In January 2009 the husband confronted her with photographic evidence of her adultery. He expressed his unequivocal desire to terminate their marriage.

[53] Eight days after confronting his wife, the husband's solicitors passed to her a copy of a deed that purported to evince the spouses' intentions with regard to maintenance, division of matrimonial assets and custody of their teenaged children. By this deed the husband would have sole custody of the children with reasonable access to the wife, their matrimonial home would be transferred to the husband without any refund of the amounts that had been paid out from the wife's CPF account, and the wife would provide for herself and waive her right to seek maintenance. The deed was totally slanted in the husband's favour. The wife signed the deed on February 12, 2009 as did the husband on February 16, 2009.

[54] The husband commenced divorce proceedings the very next day. The proceedings were undefended and proceeded on an uncontested basis leading to an interim judgment of divorce on May 5, 2009 that was granted in the wife's absence as she had not attended any part of the divorce hearing. Despite the Family Court routinely informing the wife, as defendant, of the impending hearings and her right to defend herself in them, the wife took no part, presumably, as she was consumed by her guilt.

[55] The husband's application for ancillary orders were processed after the award of the interim judgment of divorce, as was the common practice of the Family Court. The first pre-trial conference was adjourned on May 28, 2009 due to the wife's absence. Thereafter, despite the wife being notified of their respective dates and timings, three further pre-trial conferences were adjourned due to the wife's absence. The hearing was eventually set for October 7, 2009. The wife did not appear. Not surprisingly, the ancillary orders closely

18 [2011] 4 SLR 1169.

followed the terms of their deed. Judge of Appeal Andrew Phang observed:¹⁹

What is clear from the facts is that, firstly, the wife made no appearances (whether in person or through a legal representative) in the ancillary proceedings despite having been accorded multiple opportunities to do so and, secondly, the ancillary order [made by the Family Court] tracked the provisions of the deed.

[56] Finally, five months after the award of the ancillary order and four months after the award of the final judgment of divorce, on March 8, 2010, the wife filed this application. She sought to set aside the interim and final judgment of divorce as well as the ancillary order that closely followed the terms of their deed. At the hearing before the Family Court, she sought only to set aside the ancillary order.

[57] On the wife's appeal to the Court of Appeal, the court demonstrated sensitivity and sympathy for the wife.

[58] The court allowed her appeal and set the ancillary order aside. In effect, the wife will now, so many months after failing to protect her own interests, still be able to defend her interests with respect to her entitlement of a just and equitable division of their matrimonial assets, her maintenance and the best living arrangements possible for their children. Two vital steps in the Court of Appeal's reasoning towards the ultimate result were:

- i. The ancillary order was made closely following the terms of the deed but it was a "consent order", only, in the most technical sense. The court offered the view that a "consent order", substantively understood, comes about only upon the participation of both parties in the hearings.
- ii. The court also accepted the view of the District Judge of first instance regarding the husband's conduct leading to the spouses' execution of their deed.

[59] As the Judge of Appeal observed:²⁰

Although the wife had not appeared before the court as required on a number of occasions, we bear in mind the fact that she was not

¹⁹ Ibid, at [4].

²⁰ Ibid, at [26].

legally represented then. More importantly, as the District Judge pertinently pointed out, the husband “sought to have the terms of the [deed] agreed upon immediately after confronting [the wife with photographic evidence of her adultery]” and that the husband “clearly acted on her sense of guilt”. Indeed, in her brief reasons for her decision, the District Judge again reiterated that “[i]t seems to me that the [husband] was capitalizing on the [wife’s] sense of guilt”. This is clearly borne out by the relevant facts as well as context as [we] set out ...

[60] The Court of Appeal was sympathetic to the wife’s apparent disinterest in the court proceedings and agreed with the lower court judge that the husband may have capitalised on her sense of guilt when confronted with clear evidence of her having committed adultery. Such judicial attitude shows well that the legal demand is made of each spouse whatever may be the state of their marital relationship. Here, the wife herself failed this legal demand by committing adultery. Nevertheless, in the view of the courts, the husband was not thereby relieved from the legal demand.

[61] The legal demand made of both spouses, whatever the condition of their marital relationship, is a powerful tool in the hands of a wise judge.

[62] Whether the couple is happily married or engaged in family proceedings, each spouse must behave with some respect for the other.

[63] It follows from the demand in section 46(1) that spouses are encouraged to be “less adversarial” as “opposing parties” in family proceedings. The legal demand means that a modicum of consideration is expected of each spouse towards the other in the conduct of their dispute in court. This provides the substantive basis for many of the procedural requirements within our family justice system, as these are discussed below.

Second legal demand of spouse as parent

[64] The second demand is made of parents in their parenting of their child. Section 46(1) of the Women’s Charter demands that the parents co-operate with one another as best as they are able to and always act in pursuit of the well-being of their child. This demand is made of married parents but is easily interpreted to extend as well to divorcing and, indeed, divorced parents.

[65] During the course of family proceedings and after its conclusion, therefore, the parents as parties to the proceedings must act to protect the well-being of their child. As each parent pursues his and her personal interests, the law demands that each also co-operates with the other to continue to achieve the well-being of their child. Their marriage may end but their parenthood is interminable.

[66] Parental responsibility as a substantive demand of the law in Singapore²¹ operates effectively to ensure that the well-being of the child is not ignored or overtly manipulated as the parents are absorbed in their divorce proceedings.

Powerful tool and used appropriately by courts

[67] The legal demand empowers the courts to respond effectively to curb any wrongdoing so that the well-being of the child continues to be preserved. The courts have regularly used the provision to remind parents of their continued responsibility towards their child through the deterioration of their own marital relationship and beyond.

[68] A fine example is *AZZ v BAA*.²² The High Court, which was faced with two rather belligerent parents who required court orders relating to their two children's custody, care and control and access by the non-resident parent, reiterated the principles. The wife was a private banker and the husband an investment banker who left his job to deploy his skills in trading and investing his own funds. Their divorce proceedings were "long and tortuous, attended at every step by a dismaying level of acrimony". Upon their divorce, the husband and another woman had three other children. Vinodh Coomaraswamy J began his judgment regarding the orders sought of the two children from the marriage (aged 12 and 10 years) thus:

I have kept in mind two key principles. Both of these are axiomatic but are nevertheless worth restating:

21 There is no true equivalent in the UK, Australia or New Zealand. The idea of "parental responsibility" for example, is used in the UK Children Act 1989 more like a status conferred by law on favoured parents. See Leong Wai Kum, "Moral messaging in Law towards harmonious living" in Anne Scully-Hill, Sala Sihombing and Katherine Lynch (eds), *Reforming Hong Kong's Child & Family Justice System* (HK: Chinese University of HK, 2015), pp 371–373.

22 [2016] SGHC 44.

- (a) The first is the welfare principle. In deciding arrangements for children, I must have regard to the welfare of the children as my first and paramount consideration ...: s 3 of the Guardianship of Infants Act (Cap 122, 1985 Rev Ed) and s 125(2) of the Women's Charter.
- (b) The second is the principle of joint and enduring parental responsibility. ... One aspect of this principle is embodied – at least for children born in wedlock – in s 46(1) of the Women's Charter. That section establishes that, from the date on which a marriage is solemnized, the husband and wife are mutually bound to cooperate with each other in caring and providing for their children. Although s 46 frames this aspect as a responsibility which each spouse has to the other, they must equally have that responsibility as parents to their child and to society at large.

[69] Of custody, the judge ordered joint custody for the mother and the father. Of daily care and control, the judge ordered that the mother who clearly was more involved in the children's daily activities should have this. In return the husband was ordered to have liberal access. The judge's decisions were greatly aided by his insightful use of both the legal demand of parental responsibility (that is even more important for the court to uphold where the parents are divorced) and the direction to resolve legal issues by the ubiquitous standard of the welfare of the child as the court's first and paramount consideration.

Family justice philosophy in Singapore firmly rooted in substantive legal demands

[70] It may, therefore, be appreciated that the commitment to the family justice system's philosophy of how family proceedings ought to be conducted and resolved in Singapore can readily be traced to the statutory demand that her family law had put in place from 1961. This is worth noting.

[71] By being grounded in substantive legal demands of the spouses and parents which demands have been part of our law since 1961, the current family justice philosophy in Singapore has several advantages over the system in other jurisdictions that is no more than the collection of procedural rules and practices.

Advantages of being rooted in substantive legal demands

[72] In Singapore the family justice system is truly a synthesis of theory, substantive law and procedural rules. Such synthesis can only assist the better appreciation of the procedural rules and mechanisms. Any ambiguity can be resolved by referencing the substantive legal demand that gave rise to the procedural rule or practice. Theory, law and procedure all work hand-in-hand and in perfect synchrony.

[73] This further means that the philosophy has long become embedded in our collective psyche. The family law in Singapore started off in 1961 with the then inventive demands of persons who commit to one another in marriage. These demands have proven their worth and today finds expression in the family justice system philosophy that is embraced by many common law jurisdictions.

[74] It is timely that we made the formal commitment in 2014 to fully flesh out what our substantive law has demanded for so long. Indeed, possessing an organic quality places the family justice system in Singapore in a uniquely strong position.

[75] The core objectives of the “new” family justice system are discussed in greater detail below in relation to the approach, requirements and empowerments in divorce litigation as handled by the Family Justice Courts. It comes as no surprise that most of these processes are not completely new.

[76] The rest of this article details the approaches and services that the Family Justice Courts in Singapore offer to divorcing spouses as well as to divorced former spouses.

The Family Justice Courts: Approaches, services and programmes

[77] The Family Justice Courts (“FJC”) exhorts parties towards a harmonious resolution of all family disputes. In relation to divorce proceedings in particular, the FJC pursues this through processes, facilities and services that enable parties to find *a way forward* in all stages of their divorce journey. This approach supports parties in discharging both demands by the law in section 46 of the Women’s Charter, *viz* that each spouse should continue to show as much reasonable consideration as possible to the other and that each spouse, as parent, should continue to discharge their parental responsibility to their child. The termination of their marital relationship becomes

simply the way by which the former spouses recast their own personal futures while continuing to protect the well-being of their child.

The just, expeditious and economical disposal of divorce proceedings

[78] To enable a way forward for the family, the parties need support for their own healing and they need assistance to reconstruct their own lives. The Chief Justice has exhorted family judges to consider that the “judicial task can be likened to that of a doctor with a focus on diagnosing the problem, having the appropriate bedside manner to engender trust and convey empathy, and the wisdom to choose the right course of treatment so as to bring a measure of healing.”²³ Such “therapeutic” justice needs a multi-disciplinary environment.

[79] A multi-disciplinary environment brings both legal and therapeutic services together to assist divorcing families. An inter-agency Committee to Review and Enhance the Reforms in the Family Justice System (the “RERF Committee”) was recently established. The committee is co-chaired by the Presiding Judge of the FJC and the Permanent Secretaries of the Ministry of Law and the Ministry of Social and Family Development. The RERF Committee’s work builds on the recent reforms to the family justice system. It aims to develop further measures to strengthen the judge-led approach and procedures, to enhance multi-disciplinary approaches to conflict resolution and ultimately to reduce acrimony in the divorce journey.

Continued co-operative parenting

[80] “Parental responsibility” is understood in Singapore to require parties who are parents to act co-operatively to protect the well-being of their children throughout the length of their marriage and even during their divorce journey, as well as after the divorce proceedings have successfully concluded in the termination of their marital relationship. The discharge of parental responsibility after marital breakdown requires the deep commitment, hard work and personal sacrifices of both parents in reducing conflict and minimising their acrimony between themselves. Research has highlighted the

23 Opening Keynote Speech by Chief Justice Sundaresh Menon at the opening of the Family Justice Courts, October 1, 2014, para 24.

adverse effects of parental conflict on children of separated families.²⁴ Litigation, in even a legal system that endeavours to be less adversarial, can enmesh children in parental conflict for a prolonged period of time. Family judges have encountered all too often parents battling over their children and causing them to suffer “conflicts of loyalty” and other types of harm. Litigation should be the last resort for the resolution of family disputes and, when they are unavoidable, there is much that divorce procedure can require towards the harmonious resolution of the litigation.

[81] The following schemes and programmes endeavour to support parties and their children throughout the journey from the beginning through to the conclusion of divorce proceedings.

Pre-writ: before a writ of divorce is filed

Upstream measures

[82] The divorce journey is stressful to the entire family. While there are ongoing efforts to simplify court rules and processes, “simple” processes do not necessarily equate with an “easy” journey. The divorce process is never easy for anyone.

[83] The FJC has worked with other support agencies to enhance services to help parties resolve their issues “upstream” so that disputes may be resolved before the parties’ positions become entrenched. Such work includes the implementation of the “Primary Justice Project”²⁵

24 See material cited in *AZB v AZC* [2016] SGHCF 1 at [3]: Christy M Buchanan and Kelly L Heiges, “When Conflict Continues After the Marriage Ends: Effects of Postdivorce Conflict on Children” in John H Gryncz and Frank D Fincham (eds), *Interparental Conflict and Child Development: Theory, Research and Applications* (Cambridge University Press, 2001), Ch 13, pp 337–362; Christina Sadowski and Jennifer E McIntosh, “On laughter and loss: Children’s views of shared time, parenting and security post-separation” (2015) *Childhood* 1 (Children’s views of shared time, parenting and security post-separation); and Robert D Hess and Kathleen A Camara, “Post-Divorce Family Relationships as Mediating Factors in the Consequences of Divorce for Children” (1979) 35(4) *Journal of Social Issues* 79.

25 The Primary Justice Project is a scheme in which litigants pay a fixed fee for basic legal services that assists towards settlement, as an intermediate step between self-help and the commencement of legal proceedings in court.

at the Community Justice Centre, “Collaborative Family Practice”²⁶ and the development of the family lawyer’s capacity and skills in family mediation.²⁷

[84] Parties who have reached the place where divorce proceedings may be imminent can be supported in obtaining good legal assistance. An effective family lawyer can assist parties towards reducing trauma and pain, and support sound judgment in reaching outcomes that are good for the children and the parties.

Mandatory Parenting Programme

[85] The FJC works closely with the MSF in respect of pre-writ and post-order interventions. For example, a party with children below 21 years old must attend the Mandatory Parenting Programme (“MPP”) before he or she can file a writ of divorce. This programme helps parties understand the importance of co-parenting and the practical issues arising from a divorce which would have an impact on their children. Conducted by the Divorce Support Specialist Agencies (“DSSA”) appointed by the MSF, this programme was introduced when the Women’s Charter was amended in 2016.²⁸

Parenting Plan and Matrimonial Property Plan

[86] The FJR also requires the parties to a divorce to file either an “Agreed Parenting Plan” (where parties can agree on how they are to continue to discharge their co-operative parenting responsibilities after

26 Collaborative Family Practice is a voluntary dispute resolution process whereby couples who have decided to end their marriage can avoid the lengthy and often costly process of a contested divorce through negotiation facilitated by accredited lawyers. It is aimed at helping the couple to work successfully to achieve a positive outcome for both parties, whilst trying to avoid the social, emotional and economic strain a traditional divorce can have.

27 It was announced in the Family Justice Courts Workplan 2019 speech on “Every Outcome, a Way Forward”, delivered by Justice Debbie Ong (at paras 40–41): “... a Family Lawyer Certification Scheme will be conceptualised and implemented to enable all who practise family law to be equipped with the basic Specialist Skillsets. The training will include the use of the newest processes, updating lawyers in the latest practices. This scheme will be propelled by incentivising lawyers to be equipped. A Family Specialist Accreditation Scheme will also be conceptualised and launched to recognise top-tier Family Law Practitioners who are experts in handling more complicated family proceedings involving divorce and children, including cases with complex cross-border issues.”

28 A new s 94A was inserted in the Women’s Charter.

they are divorced and living apart from each other) or a “Proposed Parenting Plan”²⁹ (where parties are unable to agree on all terms). Where any Housing and Development Board (“HDB”) flat belongs to either or both parties, the “Matrimonial Property Plan” must also be filed.³⁰ The underlying aim of these requirements is to nudge the parties, *even before* commencing divorce proceedings, to give thought to important matters such as continuing their co-operative parenting of their children and how to provide a stable home after the divorce. It is hoped that these paths encourage both parties to reach an amicable agreement on these core issues that directly impact the well-being of the children.

Commencing divorce proceedings

Simplified divorce track

[87] If the parties, with or without the support of legal or other services, are able to agree on all matters including seeking a divorce on an uncontested basis, they may file the divorce writ under the “Simplified Divorce Track”.

[88] The “Simplified Divorce Track” was introduced through the FJR in January 2015 for parties who are able to agree on all matters before the filing of the divorce writ. Cases filed on this track involve uncontested divorces and agreement on all Ancillary Matters (“AMs”) on Custody, Maintenance and the Division of Assets. The simplified track enables the fixing of an uncontested hearing upon the filing of the writ, so that the court may, if satisfied of all requirements, grant the divorce as well as consent orders on the AMs without the need for the parties’ attendance in court.

[89] Divorces filed on the simplified track have been increasing in the past few years, from 24% in 2015 to 37% in 2016, to 49% in 2017, and reaching 55% in 2018.³¹ As the simplified track is a recent process, it might well be that there were more cases in 2015 or 2016 that reached agreement before filing, but as the simplified track was then only just introduced, some may not have been filed on that track. Still, it gives

29 See n 8.

30 See n 9.

31 Keynote Address delivered by Justice Debbie Ong at the Law Society’s Family Conference 2019.

an encouraging snapshot that a growing number of couples are able to reach harmonious resolutions *before* the filing of the divorce writ. One underlying objective of the simplified track is to encourage parties, especially those with minor children, to think through as early as possible, how they can work out co-parenting arrangements on their own without litigating and increasing hostility by any adversarial stance.

During divorce proceedings

Case conferences

[90] Once divorce proceedings commence on a *non*-simplified track, a “case conference” will be conducted, where the family judge will give directions on how to best manage that particular case. During the case conference, the court may direct the parties to attend mediation and/or counselling to facilitate an amicable settlement on the disputed issues.

[91] The “judge-led” approach enables the family proceedings to be managed by the family judge empowered to control proceedings so that they are less adversarial. This will minimise the adverse impact of the court proceedings on the children.³² Directions given at case conferences include timelines that enable the expeditious disposal of the case so that children are not mired for an unnecessarily protracted period of time in an environment of conflict.

Mediation and counselling

[92] Since the establishment of the FJC as a specialist court, various programmes and initiatives have been introduced to expand the use of alternative dispute resolution to promote the early settlement of cases. Mediation and counselling are mandatory for divorcing parties with children who are under 21 years of age. In other cases, the family judge can direct the parties to attend mediation. Counselling is conducted by FJC “Family Specialists” who are drawn from the social work, counselling and mental health professions.

“Child-Inclusive” approach in family dispute resolution

[93] Family proceedings, and divorce proceedings in particular, also subscribe to the “Child-Inclusive approach”. By this, the views of the

32 FJR, r 22.

children are sought during counselling and mediation. The approach requires an interview with the children followed by a session between the parents and the Family Specialists to discuss the developmental and adjustment needs of the children. Divorcing parents are guided to place the needs of their children at the centre of their attention.

Private mediation and mediation at the Singapore Mediation Centre

[94] Parties in divorce proceedings involving matrimonial assets of sufficiently high value, which the court will divide in just and equitable proportions between them, may be directed to attend private mediation, or mediation at the Singapore Mediation Centre (“SMC”) where such mediation is conducted for at least one full day by an experienced mediator with family law expertise.

Cross-border mediation

[95] There are also efforts to curb the effects of poor parenting including when a parent abducts her own child across the border, whether in a desperate attempt to keep the child away from the other spouse or making a unilateral decision to permanently relocate without any reasonable consultation with the other parent. Cases filed under the International Child Abduction Act³³ are time-sensitive. The court uses a time frame of approximately six weeks to make the necessary orders, given the urgency to ensure the child’s prompt return to the state of his/her habitual residence to restore the status quo and minimise the impact caused by the removal. The FJC continues to develop its partnerships with foreign mediation providers to set up a cross-border mediation scheme. For example, an arrangement has been put in place for the court to refer suitable cases to private mediation centres such as the *Internationales Mediationszentrum Fuer Familienkonflikte Und Kindesentfuehrung* (“Mikk”) and the SMC.

Judge-led approach; robust case management and case docketing

[96] Litigation of family disputes ought to be the last resort. Where adjudication is necessary to resolve the disputes, the “judge-led” approach encapsulated in rule 22 of the FJR is used in family proceedings. This approach empowers the family judge to take the lead in identifying the relevant issues and ensuring that the evidence

33 Cap 143C, 2011 Rev Ed.

adduced is relevant to the case. The judge may also, at any time, make orders or give directions as he or she thinks fit for the just, expeditious and economical disposal of the matter. The adversarial nature of divorce proceedings is lessened through the incorporation of suitable features from the inquisitorial system.

[97] For more effective case management and disposition, complex cases are docketed to a single judge. This practice enables the docketed judge to be familiar with the facts of the case (which may involve several separate applications) thereby aiding in its expeditious resolution. Recognising that divorce proceedings have a deep impact on the personal lives of the families, particularly that of the children, case docketing has been found to be enormously useful for cases involving multiple applications, complex issues and contested child issues with high parental conflict.

Counselling and Psychological Services

[98] As therapeutic justice requires a multi-disciplinary approach to resolution, "Family Specialists" are integrated into nearly all aspects of the FJC's work, ranging from divorce, protection from family violence, to the Youth Court proceedings. The team of Family Specialists from the Counselling and Psychological Services ("CAPS") also work within a larger network of community agencies to which it refers families needing longer term therapeutic or social support outside of the courts.

Child evaluation reports

[99] In cases involving disputes over the care and control or access to a child, the court may direct that child evaluation reports be provided by the "Family Specialists". This usually involves the Family Specialists interviewing the child where it is age-appropriate to do so, finding out the wishes of the child, assessing the parenting capacity of the parties and other related issues. A report is made to the judge hearing the case.

Child Representative scheme

[100] The Child Representative ("CR") scheme was introduced on October 1, 2014 with a view to allowing the child to have a voice in the proceedings. CRs are experienced family lawyers who are specially trained for the role. CRs are appointed by the court in some cases involving high conflict disputes over the care and control of or access to the children. The CR collates information from the relevant

persons involved in the child's life, such as school teachers, school and external counsellors, psychologists and psychiatrists. The CR also speaks to the parties, and may discuss care arrangements for the child mutually acceptable to both parties. The CR will prepare written submissions and recommendations to the court, focusing on the child's best interests. The CR ensures that the child's views have been sought and when subsequent orders are made, the CR explains the court's orders and directions to the child as well as the parents.

Post-divorce

Parenting Coordinator scheme

[101] After orders for the AMs are made, parties are still required to continue co-operating with each other for the welfare of the children. A pilot scheme, the Parenting Coordinator ("PC") scheme, aims to help divorcing couples learn to co-parent more effectively after the divorce. A PC, who is appointed by the court, "educates" the parents in co-parenting, mediates conflict, and assists the parents in implementing the court's orders, in particular, access orders. A PC may be a family lawyer, psychologist or counsellor who has received specific training for this role. The PC scheme may be particularly useful in cases where there is a breach of access orders, where carrying out an access order has proved tremendously challenging. This pilot scheme is under review and will be implemented in full in due course.

Referral to Divorce Support Specialist Agencies

[102] There are cases that require continuing support even after a court has concluded the matters with clear orders. These usually involve high-conflict parenting issues. In such cases, the parents and the children may be referred to, or directed to attend at the Divorce Support Specialist Agencies ("DSSAs") for counselling and therapeutic support. This ensures that the needs of the parties and children are cared for by the professionals within the broader family justice system.

[103] DSSAs also provide, amongst other services, the "supervised visitation" and "supervised exchange" programmes to assist families with child access issues. The court may order that supervised access takes place at a DSSA centre under the supervision of a DSSA counsellor. It can also make orders for "supervised *exchange*", where the children are brought from the care of one parent to the DSSA premises so that

the other parent may pick the children up for unsupervised access. This scheme allows parenting orders to be carried out in a safe environment, supervised by a counsellor, with the ultimate aim of helping parents to co-parent more effectively as well as enhance the child's sense of emotional safety.

Conclusion

[104] This article has suggested that while the family justice philosophy is increasingly embraced in common law legal jurisdictions, the philosophy as manifested in Singapore may be uniquely synchronised with her substantive legal demands of spouses, in their behaviour towards one another, and of parents, in their behaviour towards their child. Such synthesis of substantive law with procedural rules is advantageous so that the new procedure is better understood and appreciated by legal practitioners and their clients. This will contribute towards family proceedings, including divorce applications, being resolved harmoniously. The children of the marriage are the ultimate beneficiaries as the more harmoniously divorce proceedings are resolved the higher the possibility of their parents' continued co-operative parenting after they have become divorced.

[105] In this globalised world we ought to keep abreast with developments in comparable legal jurisdictions to ensure that our own laws and procedural rules do not lag behind. As Asian countries look towards developments in the Western world, they should also look with equal interest at developments in their neighbouring Asian countries. It may well be that developments in neighbouring Asian countries are in a form that is superior to those of Western countries. We may have as much to learn from our neighbours as we do from our friends further away.

[106] This is not to suggest that divorce law and procedure is perfect in Singapore. The optimal state of the law and procedure may always be works in progress. The current divorce law in Singapore³⁴ is modelled upon the uneasy compromise of the "fault" and "no fault" bases that was introduced into UK law by the UK Divorce Reform Act 1969. The proposal of divorce by mutual consent was abandoned in favour of following closely the UK Divorce Reform Act 1969. Recently, the UK

34 See the Women's Charter, s 95.

Government announced that the divorce law will be changed to one which will not require fault-based evidence to prove the irretrievable breakdown of marriage.³⁵ Singapore will soon need to consider how her divorce law may be improved. When she engages in this, she ought to consider the current laws applying in her Asian neighbours, in Western countries³⁶ and also look back into the innovative “divorce by mutual consent” that was proposed by the Women’s Charter (Amendment) Bill No 23 of 1979 as an alternative to “divorce by one party proving the irretrievable breakdown of marriage”. While further discussion of this point is beyond the scope of this article, the thesis to look into our own past and to look also at the state of the law in our Asian neighbours is just as compelling.

35 A Bill seeking to reduce family conflict entered Parliament on January 7, 2020: see <<https://www.gov.uk/government/news/new-divorce-law-to-end-the-blame-game>> (accessed on January 8, 2020).

36 See e.g. the Divorce, Dissolution and Separation Bill 404 that is before the House of Commons in the UK Parliament that proposes to allow either a joint application to court or an application by one spouse for divorce.

Developments in Singapore Insolvency Law

by

*Justice Kannan Ramesh and Justice Aedit Abdullah**

[1] The past few years have been a fecund period for insolvency and restructuring law in Singapore. In 2017, the Singapore Companies Act¹ was amended to enhance the statutory restructuring regimes and to implement the UNCITRAL Model Law on Cross-Border Insolvency (“Model Law”). For convenience, we will refer to these amendments collectively as the “2017 Companies Act amendments”. As a result, numerous applications have come before the Singapore courts which have raised important questions on the interpretation of the amended provisions, as well as their implications on the existing body of jurisprudence.

[2] This article will focus on corporate insolvency and restructuring. First, we discuss recent developments in general insolvency and restructuring law, including the courts’ approach to winding up, judicial management, and the costs and funding of such proceedings. Next, we discuss the 2017 Companies Act amendments. In short, these amendments introduced additional measures in aid of schemes of arrangement, judicial management and cross-border insolvency. We will focus in particular on two aspects of schemes of arrangement, namely the new forms of moratoria and the introduction of super priority for rescue financing (which also applies to judicial management). We will then consider the Model Law and other aspects of cross-border insolvency. Finally, we conclude with a brief overview of the new Insolvency, Restructuring and Dissolution Act 2018² (the “Insolvency Act”), an omnibus insolvency statute designed to consolidate the insolvency-related provisions of the Bankruptcy Act³ and the Companies Act.

* Judges, Supreme Court of Singapore. We are grateful for the assistance of our Justices’ Law Clerks, Huang Jiahui and Esther Wong. All views expressed are personal and do not represent those of the Supreme Court of Singapore. All errors and omissions are, of course, ours alone.

1 Cap 50, 2006 Rev Ed.

2 Bill No 32 of 2018.

3 Cap 20, 2009 Rev Ed.

Developments in general insolvency practice

Stay of winding-up proceedings

[3] Similar to the position under Part IV, Division 1 of Malaysia's Companies Act 2016,⁴ section 247 of the Companies Act provides that a company may be wound up by order of the court or by voluntary means. Winding up may be ordered by the court under Part X, Division 2 of the Companies Act pursuant to an application made under section 253. Given the non-consensual nature of a court-ordered winding up, one or more interested parties may wish to apply for a stay of the winding up. This has been a frequent source of disputes which the courts have had to adjudicate upon in recent years.

[4] Applications for a stay of winding-up proceedings before and after the winding-up order has been made are governed by two different provisions under the Companies Act. Section 258(1) governs applications for stays made prior to the grant of a winding-up order. As regards the applicable test, *Strategic Construction Pte Ltd v JH Projects Pte Ltd*⁵ ("*Strategic Construction*") affirmed the test in *Metalform Asia Pte Ltd v Holland Leedon Pte Ltd*⁶ ("*Metalform*"); the court exercises its discretion to stay the proceedings if the applicant can show that there is a genuine cross-claim and that it is greater than the claim of the creditor seeking the winding up, and there are no other special circumstances. In relation to the former two requirements, the applicant must simply show the existence of *triable issues* (i.e. the winding up application must be unlikely to succeed).⁷ On the facts of the case, the triable issues standard applied even though the underlying claim arose under the Building and Construction Industry Security of Payment Act⁸ ("*SOPA*"); the High Court held that the insolvency regime overrides the regime under the SOPA as holding otherwise would unduly favour the construction industry over other creditors.⁹

[5] Where a winding-up order has already been made, section 279(1) of the Companies Act – which is identical to section 492 of Malaysia's Companies Act 2016 – applies instead, and grants the court the power

4 No 777 of 2016.

5 [2018] 4 SLR 1192.

6 [2007] 2 SLR(R) 268; *Strategic Construction* at [25]–[27].

7 *Strategic Construction* at [19]–[20].

8 Cap 30B, 2006 Rev Ed.

9 *Strategic Construction* at [57].

to stay the winding-up order against a company, but only on the application of the liquidator, or any of its creditors or contributories. The High Court in *Interocean Holdings Group (BVI) Ltd v Zi-Techasia (Singapore) Pte Ltd (in liquidation)*¹⁰ (“*Interocean*”) and *Phang Choo Ong v Gilcom Investment Pte Ltd (LRG Investments Pte Ltd and another, non-parties)*¹¹ (“*Phang Choo Ong*”) considered the application of section 279(1) and the effect of a stay. As observed in *Interocean*, a winding-up order, once perfected, cannot be set aside or revoked in the absence of an express statutory power permitting this.¹² The only remedy is to stay the winding up: the stay thus halts the winding-up proceedings and permits the officers of the company to continue to be in control from the date of its pronouncement.¹³

[6] The court’s powers under section 279(1) are entirely discretionary. Three broad principles have been identified in *Phang Choo Ong* as guiding this discretion: an applicant under section 279(1) has to show that the state of affairs that required the company to be wound up no longer exists; the grant of a stay cannot be detrimental to commercial morality and the interests of the public at large; and a stay would be refused if the interests of the creditors, the members and the liquidator are not protected.¹⁴

[7] Nevertheless, the High Court in *Interocean* identified certain issues that remain open for determination under the present legislative framework.

[8] The first pertained to the procedure if the company had to be wound up subsequently: where the initial petition to wind up the company had been perfected by a winding-up order, would it be open to any interested party to have the stay order set aside or varied so that the winding up could proceed, or would a fresh petition have to be made under section 254 for a winding-up order?¹⁵ The High Court in *Interocean* discussed the case of *Re Intermain Properties Ltd (“Intermain”)*.¹⁶ The winding-up order in that case had not been properly

10 [2014] 2 SLR 485.

11 [2016] 3 SLR 1156.

12 *Interocean* at [16].

13 *Ibid*, at [18] and [22]; see also *Phang Choo Ong* at [14].

14 *Phang Choo Ong* at [17]–[20].

15 *Interocean* at [25].

16 (1985) 1 BCC 99555.

served on the company, and the Official Receiver did not feel able to act upon the winding-up order. This left the petitioning creditor in the position of having no effective winding-up order, but unable to present a fresh petition while the existing order stood. Hoffmann J held that the petitioning creditor's only remedy was to apply for a stay of winding-up under section 549 of the Companies Act 1985¹⁷ and to present a fresh petition to be properly served.¹⁸ *Interocean* adopted this position.¹⁹ In England, this difficulty has since been resolved by legislation.²⁰

[9] The second issue identified but not answered in *Interocean* concerned the scenario where directors were to leave office for various reasons, such that nobody was left to take up the reins of the company in the case that winding up was stayed altogether.²¹

[10] The High Court ventured beyond the scope of *Interocean* in the recent case of *Standard Chartered Bank (Singapore) Ltd v Construction Professional Resources Pte Ltd* ("*Construction Professional Resources*").²² Observing that a permanent stay would leave a wound up company "legally dead but physically alive and trading", the High Court held that the court may exercise its inherent power under Order 92 rule 4 of the Rules of Court²³ to set aside the winding-up order where no prejudice was caused.²⁴ Here, no prejudice would be caused if the order was set aside as the debtor company had paid off its debt to the creditor who wound it up and who expressed no objection to a permanent stay of the winding-up order. The application for an indefinite stay was adjourned so as to allow the relevant party (a creditor or liquidator) to file an application for the order to be set aside.²⁵

[11] It remains to be seen how the Singapore courts will continue to develop this area of law, and in doing so whether distinctions will be drawn between, e.g., cases of voluntary and compulsory winding

17 (c 6) (UK).

18 *Intermain* at 99556–99557.

19 *Interocean* at [16].

20 UK Insolvency Rules 1986 (SI 1986 No 1925), r 7.47: see *Re Calmex Ltd* (1988) 4 BCC 761.

21 *Interocean* at [26].

22 [2019] SGHC 168.

23 Cap 322, R 5, 2014 Rev Ed.

24 *Construction Professional* at [9]–[10].

25 *Ibid*, at [11].

up. However, the particular difficulty addressed in *Construction Professional Resources* may no longer be encountered in the future: when the Insolvency Act comes into force, section 186(1)(b) will give the court the express power to terminate both voluntary and compulsory winding-up proceedings.

Stay of winding-up proceedings in favour of arbitration

[12] The Committee to Strengthen Singapore as an International Centre for Debt Restructuring (“Restructuring Committee”) has observed that the use of arbitration in insolvency and restructuring proceedings would be particularly amenable for certain types of disputes.²⁶ Such disputes include pre-insolvency disputes involving cross-border issues, where arbitration prevents re-litigation across various jurisdictions; in complex cases that require specialist knowledge and which are otherwise likely to result in inconsistent court decisions; and disputes involving intercompany claims across multiple jurisdictions or which involve issues that arise across multiple concurrent insolvency proceedings.

[13] In any case, as mandatory recourse to arbitration is increasingly provided for in commercial contracts, a company faced with a winding-up application on the basis of particular alleged debts will frequently want to challenge those debts in arbitration. In recent years, the High Court has, in various cases, considered the applicable test in determining whether to grant a stay of court proceedings in favour of arbitration.

[14] In *BDG v BDH*²⁷ (“*BDG*”), the High Court held that where the dispute between the parties arises out of an arbitration agreement, it suffices for the applicant to demonstrate that there was a *prima facie* dispute over the debt. While the objective of the triable issue or good arguable case standard is to ensure that winding up is not staved off on flimsy or tenuous grounds, the countervailing objective in arbitration cases is to hold the parties to their agreement to arbitrate.²⁸

26 Report of the Committee, April 20, 2016, paras 3.61–3.62. Available at <www.mlaw.gov.sg/content/minlaw/en/news/press-releases/recommendations-released-on-strengthening-singapore-as-an-intern.html> (accessed on May 1, 2019).

27 [2016] 5 SLR 977.

28 *BDG* at [22]–[23].

[15] In *VTB Bank (Public Joint Stock Co) v Anan Group (Singapore) Pte Ltd*²⁹ (“*VTB Bank*”), the High Court endorsed the arguments from first principles in *BDG*³⁰ but held that it was nonetheless bound to apply the triable issues test by virtue of the Singapore Court of Appeal’s decision in *Metalform*.³¹ But in the recent decision of *BWF v BWG* (“*BWF*”),³² the High Court chose not to follow *VTB Bank*. The High Court cited the Singapore courts’ recent renewed emphasis on a common approach towards upholding party autonomy in arbitration, as reflected in the Court of Appeal’s decision in *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd*.³³ It proceeded to distinguish *Metalform* on this issue and followed *BDG* instead, on the basis that the principle of party autonomy is in focus where an arbitration clause is engaged, and that this extends into the insolvency context.³⁴ An appeal against the decision in *VTB Bank* is now pending before the Court of Appeal,³⁵ whose decision on this point will provide welcome clarity to the law.

Funding of litigation

[16] Since debtors in insolvency proceedings are invariably short on money, administrators appointed in such proceedings may face difficulty pursuing claims which may be crucial in settling the debtors’ debts. There is therefore considerable attraction in obtaining third-party litigation funding for insolvency-related claims. However, a long-established common law rule limits the permissibility of maintenance and champerty. Maintenance refers to “the giving of assistance or encouragement to one of the parties to litigation by a person who has neither an interest in the litigation nor any other motive recognised by the law as justifying his interference”, while champerty is the form of maintenance of an action “in consideration of a promise to give a maintainer a share in the proceeds or subject matter of the action”.³⁶ The

29 [2018] SGHC 250.

30 *VTB Bank* at [71]–[72].

31 *Ibid.*, at [61].

32 [2019] SGHC 81.

33 [2018] 2 SLR 1271; *BWF* at [32]–[35].

34 *BWF* at [36]–[38].

35 CA 174/2018. An application by the appellant to introduce fresh evidence for the purposes of the appeal was allowed by the Court of Appeal: [2019] SGCA 41. The substantive appeal is currently scheduled to be heard in the week commencing November 18, 2019.

36 *Re Vanguard Energy Pte Ltd* [2015] 4 SLR 597 at [33], citing *Lim Lie Hoa and another v Ong Jane Rebecca* [1997] 1 SLR(R) 775 at [23].

question, therefore, is whether the third-party funding of insolvency-related claims is permissible in light of these rules.

[17] This issue arose for consideration before the High Court in *Re Vanguard Energy Pte Ltd*³⁷ (“*Vanguard*”). In *Vanguard*, a company under compulsory liquidation wanted to commence litigation in respect of a number of claims. The company eventually entered into an agreement with three of its shareholders, one of which was also a creditor, for them to provide funding for the litigation, in return for an assignment of the fruits of the action up to the sum of funding provided. This funding included a proportion of the company’s solicitor-and-client costs, and all of any party-and-party costs.³⁸ The High Court granted an application for the court’s approval of this funding arrangement.

[18] The court found that an assignment of the fruits of the action fell within the liquidator’s powers of sale over the company’s property and things in action under section 272(2)(c) of the Companies Act.³⁹ As such, the court held that section 272(2)(c) would operate as a statutory exception to the doctrines of maintenance and champerty.⁴⁰ This arrangement did not fall afoul of the statutory order of priorities in the payment of debts under section 328(1) and (3) of the Companies Act, since the funders now owned the fruits of the action and would simply be receiving what they own.⁴¹ On the other hand, a previous iteration of the funding arrangement, in which the company merely promised to pay part of the fruits of the action to the funders, would have fallen afoul of section 328(1) and (3), since it would amount to a priority payment of debts.⁴²

[19] However, the court also concluded that the arrangement in *Vanguard* would not have constituted maintenance or champerty in the first place. From a survey of the case law, the court concluded that the assignment of a cause of action or its fruits would be permissible if:⁴³

37 [2015] 4 SLR 597.

38 See *Vanguard* at [7].

39 *Ibid*, at [24].

40 *Ibid*, at [29].

41 *Ibid*, at [50].

42 *Ibid*, at [51]. There was an exception in s 328(10) of the Companies Act for litigation funding, but this did not apply on the facts in *Vanguard: Vanguard* at [53].

43 *Ibid*, at [43].

- (a) it is incidental to a transfer of property; or
- (b) the assignee has a legitimate interest in the outcome of the litigation; or
- (c) there is no realistic possibility that the administration of justice may suffer as a result of the assignment. In this regard, the following should be considered:
 - (i) whether the assignment conflicts with existing public policy that is directed to protecting the purity of justice or the due administration of justice, and the interests of vulnerable litigants; and
 - (ii) the policy in favour of ensuring access to justice.

[20] Applying these factors, the court held that the funders did have a legitimate interest in the outcome of the litigation, since they stood to benefit as shareholders (and in one case, as a creditor).⁴⁴ The court also found that there was no realistic possibility of detriment to the administration of justice, since the liquidator retained full control over the legal proceedings themselves, subject to the funders' agreement on the choice of solicitors and the settlement or discontinuance of the litigation.⁴⁵ Furthermore, there was evidence that the litigation had reasonable chances of success, which would result in more assets for distribution in the liquidation when the company may otherwise have been unable to afford the litigation. The court added that although the funders in *Vanguard* only stood to recover the amount they actually expended on the litigation under the terms of the funding arrangement, it would not have been fatal to the arrangement if the funders stood to gain an even larger share of the fruits of the action.⁴⁶

[21] Subsequently, a different arrangement for the third-party funding of litigation came before the High Court in *Re Fan Kow Hin*⁴⁷ ("*Fan Kow Hin*"). *Fan Kow Hin* concerned litigation by trustees in bankruptcy seeking to avoid transactions made by the bankrupt on the basis that they were transactions at an undervalue and unfair preferences. The trustees sought to finance this litigation by assigning part of the

44 Ibid, at [48].

45 Ibid, at [46].

46 Ibid, at [47].

47 [2019] 3 SLR 861.

proceeds of the claims to a third party. The High Court approved this arrangement.

[22] There are two key aspects to the High Court's decision to allow this funding arrangement. First, the court applied *Vanguard* and held that the arrangement did not amount to maintenance or champerty.⁴⁸ In so ruling the High Court rejected the argument that when Parliament expressly allowed third-party funding for international arbitration proceedings or related court or mediation proceedings by enacting section 5B of the Civil Law Act,⁴⁹ it impliedly circumscribed third-party funding for other types of proceedings.⁵⁰ The court pointed out that following the amendments to the Civil Law Act, the High Court had nevertheless approved a third-party funding arrangement in *Re Trikonsel Pte Ltd*.⁵¹

[23] Second, the court had to consider the precise means of funding, which involved the assignment of the fruits of avoidance claims. This difficulty arose from the English decision of *In re Oasis Merchandising Services Ltd*⁵² ("*Oasis*"), which held that property of the company acquired after the commencement of the liquidation by the liquidator's statutory powers was not part of the company's property, and therefore could not be assigned by the liquidator.⁵³ Furthermore, the Singapore Court of Appeal had approved *Oasis* in the context of the avoidance provisions as applied to judicial management through section 227T of the Companies Act in *Neo Corp Pte Ltd (in liquidation) v Neocorp Innovations Pte Ltd*⁵⁴ ("*Neo Corp*"). However, the High Court in *Fan Kow Hin* reasoned that section 102(4) of the Bankruptcy Act specifically provided that sums recovered under the avoidance provisions were to be part of the bankrupt's estate.⁵⁵ Furthermore, section 78(1)(a) of the Bankruptcy Act confirmed that all property acquired by the bankrupt before his discharge from bankruptcy is divisible amongst his creditors. *Oasis* could not apply in the present context because of the express provisions of the Bankruptcy Act.

48 *Fan Kow Hin* at [25].

49 Cap 43, 1999 Rev Ed.

50 *Fan Kow Hin* at [31]–[33].

51 High Court Originating Summons No 989 of 2018 (unreported); cited in *Fan Kow Hin* at [35].

52 [1998] Ch 170.

53 See *Fan Kow Hin* at [15].

54 [2006] 2 SLR(R) 717 at [24].

55 *Fan Kow Hin* at [11] and [18].

[24] Given the close reading of the statutory provisions and the authorities adopted by the High Court in *Fan Kow Hin* to reach its conclusion, the analysis of a similar question under a different statutory framework must be considered with care. For example, in the context of a winding up, section 329(1) of the Companies Act provides that the avoidance provisions under sections 98 to 103 of the Bankruptcy Act apply “in like manner”. It may therefore be thought that the analysis of section 102(4) of the Bankruptcy Act in *Fan Kow Hin* would apply here with equal force. This contrasts with section 227T of the Companies Act, which, as the Court of Appeal acknowledged in *Neo Corp*, specifically provides that the avoidance provisions render transactions void only “as against the judicial manager”.⁵⁶ Nevertheless, the High Court in *Fan Kow Hin* held that it could not distinguish *Neo Corp*’s endorsement of *Oasis* in the liquidation context in general.⁵⁷ Consistency between different areas of insolvency may justify revisiting the *Oasis* rule in an appropriate case.

Developments in general restructuring practice

[25] The 2017 Companies Act amendments have enhanced Singapore’s existing corporate debt restructuring regimes of judicial management and scheme of arrangement. At the same time, the courts have endeavoured to strike a balance between achieving a good restructuring outcome and ensuring that creditors’ interests are protected. One example of this is seen in the courts keeping a tighter rein on companies undergoing debt restructuring by scheduling more frequent case management conferences and requiring frequent and comprehensive updates on various issues including cashflow, cashburn and profitability projections, business case assumptions, costs and assets. This section will discuss the new statutory provisions in more detail.

Judicial management

[26] Part VIIIA of the Companies Act encompasses the provisions pertaining to judicial management (sections 227AA to 227X). Similar to the position under section 404 of Malaysia’s Companies Act 2016, a company or its creditors may apply to place the company under judicial management where (a) it is or will be unable to pay its debts; and

⁵⁶ *Neo Corp* at [24].

⁵⁷ *Fan Kow Hin* at [17].

(b) there is a reasonable probability of rehabilitating it or of preserving its business as a going concern, or if its creditors' interests would be better served than by winding up. However, unlike in Malaysia, the court need not be satisfied that the company is or will be unable to pay its debts. The court applies the lower threshold that the company must be *likely* to become unable to pay its debts: section 227B(1) (see paragraph [46] below).

[27] Section 227X(a) of the Companies Act allows the provisions in the Companies Act relating to schemes of arrangement to apply (with substituted language) to companies under judicial management. Under section 210 read with section 227X(a), judicial managers may propose a scheme of arrangement to a company's creditors. The scheme will be binding on the company, the judicial manager, and the creditors or class of creditors if it is approved by a majority in number of creditors representing three-fourths in value of creditors (or class of creditors) present and voting at the creditors' meeting. Unlike in a normal scheme of arrangement, members and shareholders may not vote to approve the scheme.⁵⁸ This is unsurprising given that judicial management is predicated on insolvency where the primary stakeholders become the company's creditors.

[28] The High Court in *Re Swiber Holdings Ltd and another matter*⁵⁹ ("*Swiber*") clarified issues regarding creditor voting rights in creditors' meetings held in relation to judicial management. Under regulation 74 of the Companies Regulations,⁶⁰ a secured creditor is entitled to vote in creditor meetings in relation to judicial management only in respect of the unsecured element of its claim; where it votes in respect of its whole debt, it is deemed to have surrendered its security. In *Swiber*, the issue arose as to whether a creditor whose claim against the debtor company was secured against the property of a third party was also considered a "secured creditor" within the meaning of regulation 74. The High Court answered in the negative. The purpose of regulation 74 was to address the fact that a creditor who held security over the debtor company's assets would have a privileged claim to have the debt due to it satisfied out of the debtor's estate, when the asset would otherwise have been distributed amongst the unsecured

58 Companies Act, s 227(a)(ii).

59 [2018] 5 SLR 1130.

60 Cap 50, Rg 1, 1990 Rev Ed.

creditors. It would be unfair if the secured creditor was also able to vote for the full value of its claim.⁶¹ This concern does not apply as regards creditors holding third-party securities, and such creditors may thus vote for the full value of their claim in creditors' meetings.⁶²

[29] The High Court in *Swiber* also held that regulation 74 of the Companies Regulations did not apply in relation to creditors' meetings called for the approval of a scheme of arrangement pursuant to section 210 read with section 227X(a) of the Companies Act, since regulation 61 of the Companies Regulations provided that the Regulations applied only to meetings called under section 227N(1) and meetings of creditors called by the judicial manager under regulation 60. The creditors' meetings called to approve a scheme fell into neither category, since they were court-ordered, albeit on an application by the judicial manager.⁶³

[30] In the follow up case of *Re Swiber Holdings Ltd*⁶⁴ ("*Swiber (No 2)*"), the High Court considered how votes were to be counted in a creditors' meeting to approve a scheme where a company under judicial management had issued bonds and a trustee had been appointed to hold the investors' beneficial interest in the bond proceeds. For the purposes of a scheme of arrangement under section 210 of the Companies Act, it was settled law that "creditors" included contingent creditors with unproven and unliquidated claims.⁶⁵ Regulation 73 of the Companies Regulations, which precluded contingent creditors from voting in the creditors' meetings defined in regulation 61, did not apply,⁶⁶ for the same reasons in *Swiber* as canvassed above.

[31] On the facts, the contingent creditors were the noteholders as defined in the trust deed under which the debtor company had issued the notes. Under the trust deed, the noteholders could elect for direct rights against the debtor company upon the trustee's issuance of a default notice. It was therefore these noteholders who were contingent creditors in relation to the notes, and who were entitled to vote in that

61 *Swiber* at [22] and [24].

62 *Ibid.*, at [36] and [44].

63 *Ibid.*, at [41] and [42]; Companies Regulations, reg 61.

64 [2018] 5 SLR 1358.

65 *Swiber (No 2)* at [29]; *SAAG Oilfield Engineering (S) Pte Ltd (formerly known as Derrick Services Singapore Pte Ltd) v Shaik Abu Bakar bin Abdul Sukol and another and another appeal* [2012] 2 SLR 189 at [29]–[30] and [50].

66 *Ibid.*, at [44].

capacity, if the notes were subject to a scheme and the noteholders classified as scheme creditors.⁶⁷

[32] The High Court in *Swiber (No 2)* further recommended, *obiter*, that votes of contingent creditors be individually counted in future cases involving bonds held under global custodian arrangements. This would avert practical difficulties where the approval threshold pertained to a majority in number of creditors (“the Headcount Test”), provided that the relevant security document provided for direct rights against the debtor to be vested in the relevant party. To otherwise hold that the trustee was the only creditor for a bond held through a global custodian arrangement would mean that a proposed scheme would never pass under the Headcount Test, unless the ultimate bondholders with beneficial interest in the bond proceeds unanimously agree that the scheme should be approved. The trustee’s vote would either be treated as one vote for or one vote against, or a vote neither for nor against.⁶⁸

Schemes of arrangement

[33] As observed by the Court of Appeal in *Pathfinder Strategic Credit LP and another v Empire Capital Resources Pte Ltd and another appeal*⁶⁹ (“*Pathfinder*”), schemes of arrangement have become an increasingly popular tool for debt restructuring: they permit the debtor company to remain in control of the company, and permit a statutory majority of creditors to impose their views over a minority group of dissidents. The 2017 Companies Act amendments have also introduced various important provisions concerning the implementation of schemes, and are discussed below at paragraphs [44] to [63].

[34] The court’s leave is required for a company to convene a scheme meeting pursuant to section 210(1) of the Companies Act. Where leave is granted and the creditors’ meeting is duly convened, a proposed scheme is binding on the company and its creditors if the statutorily-required majority of creditors present and voting approve of the scheme and where the proposed scheme is sanctioned by the court: section 210(3AA) read with section 210(3AB) of the Companies Act.⁷⁰ Although it is the company’s prerogative to table a proposal

67 *Ibid*, at [45]–[47].

68 *Ibid*, at [33], [34] and [45].

69 [2019] SGCA 29 at [27].

70 *Pathfinder* at [30].

and for the creditors to consider and approve it, the courts play an important gatekeeping role in granting leave for the convening of the section 210(1) creditors' meeting and in sanctioning the approved scheme. We will discuss in detail two issues that the Court of Appeal has recently clarified, pertaining to the company's duty of disclosure at the section 210(1) leave stage, and how creditors' meetings are to be conducted.

[35] The company's disclosure obligations at the leave stage were discussed in *Pathfinder*. The Court of Appeal started by considering the test for disclosure at the *sanction* stage which it had articulated in *SK Engineering & Construction Co Ltd v Conchubar Aromatics Ltd and another appeal*⁷¹ ("*Conchubar*"): the applicant-company must demonstrate that it has disclosed, by the time of the creditors' meeting, all material information which would ensure that the creditors are able to "exercise their voting rights meaningfully".⁷² A less onerous standard applies at the leave stage, given that matters are in a greater stage of flux at this relatively early stage in the restructuring process.⁷³ The merits and reasonableness of a proposed scheme are also matters properly decided only at the sanction stage.⁷⁴ But the company must still disclose such information to assist the court to determine the issues it must consider at the leave stage, including the classification of creditors at the meeting, the proposal's realistic prospects of success, any allegation of abuse of process and whether the fair conduct of the creditors' meeting is possible.⁷⁵

[36] In the interests of ensuring that creditors' meetings are fairly conducted, the courts will also scrutinise the classification of creditors at the leave stage.⁷⁶ If the scheme favours or prejudices a group of creditors by treating them differently compared to the most likely scenario if the scheme was not approved – e.g. the liquidation of the company – those creditors should be classed separately.⁷⁷ Similar issues of fairness arise in relation to related creditors, i.e. creditors whose positions are tainted and who for any reason may be "motivated by

71 [2017] 2 SLR 898.

72 *Conchubar* at [88].

73 *Pathfinder* at [48]–[49].

74 *Ibid*, at [58].

75 *Ibid*, at [50]–[53].

76 *Ibid*, at [83].

77 *Ibid*, at [87].

personal or special interests to disregard the interests of the class as such and vote in a self-centred manner”.⁷⁸ The Court of Appeal expressed the view in *Conchubar, obiter*, that the more principled and certain approach would be to discount the votes of related creditors completely,⁷⁹ departing from the partial discounting approach taken in *The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and others v TT International Ltd and another appeal*.⁸⁰

Costs scheduling for insolvency practitioners

[37] In *Kao Chai-Chau Linda v Fong Wai Lyn Carolyn and others*⁸¹ (“*Linda Kao*”), the High Court held that it was profoundly unsatisfactory that the courts’ conventional response in fee disputes was to slash down the quantum of liquidators’ fees without a clear reference point as to what the appropriate quantum ought to be. The High Court invited submissions from counsel and the Insolvency Practitioner’s Association of Singapore (“IPAS”) to implement a system of “costs scheduling” for insolvency practitioners.⁸²

[38] Having decided that the introduction of a system of costs scheduling would address the policy imperatives of cost control and transparency and fairness,⁸³ the High Court set out the following recommendations:

- (a) The general principle is that there should be full disclosure of all relevant information, as tempered by the principle of proportionality. Costs schedules should contain all information necessary for the court to make an informed decision as to whether the fee estimates represent fair, reasonable and proportionate value. Any costs schedule should contain the following matters, covering the entire period of engagement:⁸⁴
 - (i) details of the work that is likely to be undertaken;
 - (ii) the anticipated time that each category of work will take;

78 *Conchubar* at [40].

79 *Ibid*, at [67].

80 [2012] 2 SLR 213 at [170]–[171].

81 [2016] 1 SLR 21.

82 *Linda Kao* at [4] and [6].

83 *Ibid*, at [A.20].

84 *Ibid*, at [A.31]–[A.33].

- (iii) the anticipated size of the team, with brief descriptions of the seniority of each team member and their areas of responsibility;
 - (iv) the proposed basis of remuneration, and reasons why it is thought that this is the most suitable method for the calculation of remuneration in this case;
 - (v) the hourly rate or rates that the insolvency practitioners propose to charge (if time-based costing is employed) and, if available, the rates which have been charged and approved for similar appointments in the past;
 - (vi) a fee estimate for the relevant period of assessment;
 - (vii) a list of anticipated disbursements and the costs that will be incurred in respect of them;
 - (viii) the sum of fees which have already been incurred or billed for work done for the company between the time of appointment and the submission of the costs schedule; and
 - (ix) whether any other professionals (e.g. lawyers) have also been engaged by the company and the proposed division of responsibility between the insolvency practitioner and such other professionals.
- (b) All court-appointed insolvency practitioners whose fees are subject to court approval must submit a costs schedule if their fees are expected to exceed \$200,000. This would include provisional liquidators, liquidators, judicial managers, and receivers and managers.⁸⁵
- (c) Costs schedules are to be submitted to the relevant approving body with jurisdiction over the practitioners' fees within a month of appointment, subject to reasonable applications for extensions of time.⁸⁶

[39] Once the costs schedule has been approved, it is treated as an order *nisi*. The insolvency practitioner is entitled to interim payments

85 Ibid, at [A.35] and [A.41].

86 Ibid, at [A.44] and [A.45].

up to the pre-approved cap and provided that the conditions set out in the costs schedule are adhered to. The total sum to be paid out will be subject to a final review to ensure that there is no over- or under-payment. During this final review, a more intrusive review will generally be warranted only where approval for deviations of 15% or greater is sought or where there are particular matters that call for attention.⁸⁷ Costs schedules may be amended where the sum of remuneration exceeds the pre-approved cap by 15%, but the insolvency practitioner will have to explain the reasons for exceeding the cap; the additional work he intends to undertake; and the persons who will be assigned to the task and their rates.⁸⁸

Disclosure of scheme managers' remuneration

[40] As noted in *Linda Kao*, scheme managers are exempt from the practice of costs scheduling as their fees ought to be disclosed to creditors and the court prior to the sanction of the scheme.⁸⁹ The duty to disclose scheme managers' fee arrangements, and success-based fee remunerations in particular, came to the fore in *The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and others v TT International Ltd and another appeal*⁹⁰ ("*RBS v TT (No 2)*").

[41] In *RBS v TT (No 2)*, TT International Ltd ("*TT*"), the respondent company, had engaged nTan Corporate Advisory Pte Ltd ("*nTan*"), a financial advisor, to assist in its financial restructuring. The letters of engagement provided for the remuneration of nTan, including a value-added fee ("*VAF*"). The VAF was a percentage of the amount of TT's debt that would be waived, written off or extinguished pursuant to the eventual scheme of arrangement that TT hoped to be placed under. In other words, the greater the amount of debt due to creditors that was compromised under the approved scheme, the greater the quantum of remuneration received by nTan. Neither TT nor the scheme manager disclosed the VAF to the scheme creditors prior to their approval of the proposed scheme.

[42] The Court of Appeal emphasised the uncompromising need for transparency in relation to the disclosure of material information when

87 *Ibid*, at [A.48(b)], [A.50] and [A.51].

88 *Ibid*, at [A.57].

89 *Ibid*, at [A.35].

90 [2012] 4 SLR 1182 at [28] and [29].

a financially-distressed company proposes to enter into a scheme of arrangement. The scheme creditors had to have full information in order to determine whether the scheme was commercially viable and preferable to liquidation, and thus deserving of their support.⁹¹ In the circumstances, the VAF constituted a contingent liability that would crystallise when the proposed scheme was implemented. The VAF was material information that should have been disclosed to the scheme creditors, given that it carried enormous financial implications to the scheme creditors.⁹² In failing to make such disclosure, TT breached its duty to disclose material information to the scheme creditors. However, in the circumstances, it was not practical to set the scheme aside, given that it had been implemented for over two years.⁹³

[43] The Court of Appeal warned that in future cases where creditors or the court approved of a scheme of arrangement without the company having disclosed material information of this nature, the scheme would be set aside and the scheme manager might also be deprived of his costs.⁹⁴ The Court of Appeal also made general comments as to the fair and reasonable remuneration of insolvency practitioners. This was a matter of public interest, given that the fees to be paid would come from the scheme creditors and not the financially-distressed company.⁹⁵ Citing *Re Econ Corp Ltd (in provisional liquidation)*,⁹⁶ the court held that whether remuneration was fair and reasonable depended first and foremost on the value contributed to the process, in terms of tangible results for the creditors and the company, as opposed to the mere quantum of debt involved or the time spent. Fairness would also be assessed contextually, and from a holistic and mathematical standpoint. Other factors to be taken into consideration would include, *inter alia*, the nature of the work involved, the time spent, the assistance provided by employees, the scope of work and reasonable disbursements incurred.⁹⁷

91 *RBS v TT (No 2)* at [28]–[30].

92 *Ibid*, at [21].

93 *Ibid*, at [32]–[33].

94 *Ibid*, at [36].

95 *Ibid*, at [31].

96 [2004] 2 SLR(R) 264.

97 *RBS v TT (No 2)* at [31] and [35].

The 2017 Companies Act amendments

Summary of key amendments

[44] The 2017 Companies Act amendments include amendments relating to the transparency of ownership and control of companies, as well as amendments to reduce the regulatory burden of doing business. Here, we will focus on those amendments relating to insolvency and restructuring. These latter amendments implemented the recommendations of the Insolvency Law Review Committee (“ILRC”) and the Restructuring Committee convened by the Ministry of Law.⁹⁸ The 2017 Companies Act amendments also adopted the Model Law into Singapore law. We will discuss this important development in a separate section below at paragraphs [69] to [78].

[45] The first category of 2017 Companies Act amendments relating to insolvency concern schemes of arrangement. Prior to the reforms in 2017, the scheme of arrangement had evolved into the Singapore default debtor-in-possession restructuring regime. The 2017 reforms built on the regime by grafting onto it several new features, of which four are key. It should be noted that some of these features are drawn from elements of Chapter 11 of the United States Bankruptcy Code.⁹⁹ First, new forms of moratoria were introduced under section 211B of the Companies Act, including an automatic moratorium. We will go on to discuss this in detail in the next section. Second, the concept of “super priority” for rescue financing was introduced under section 211E of the Companies Act. We will also discuss this provision in detail below. Third, section 211H of the Companies Act now allows the court to “cram down” dissenting creditors. Normally, a scheme of arrangement must be approved by the requisite majority of each class of creditors (see paragraph [27] above). Under section 211H, the court may approve the scheme despite this threshold not being met by one or more classes of dissenting creditors, provided that the same threshold is met amongst the creditors taken as a whole, and the court is satisfied that the interests of the minority creditors are sufficiently protected. Fourth, section 211I of the Companies Act allows the court

98 Report of the Insolvency Law Review Committee, October 4, 2013. Available at <www.mlaw.gov.sg/news/public-consultations/public-consultation-on-ILRC-report.html> (accessed on May 2, 2019).

99 11 USC (US) (1978).

to approve a scheme of arrangement without a meeting if it is clear that the requisite approval of the creditors would be forthcoming. This allows the implementation of what are known as “pre-pack” restructurings, which have already been negotiated with the creditors prior to court proceedings.

[46] The second category of insolvency-related amendments relate to judicial management. The most important change is that judicial management may now be ordered under section 227B of the Companies Act when a company “is *likely* to become unable to pay its debts”, as opposed to the previous “*will* be unable to pay its debts”. This addressed the criticism that judicial management often came too late to save a company. Next, under section 227B(5), judicial management can now be ordered even if a secured creditor objects, based on a weighing of the likely prejudice caused to the various classes of creditors. The objections of a secured creditor are thus no longer fatal to an application for judicial management. Finally, provisions for super priority for rescue financing similar to those under section 211E were introduced for judicial management in section 227HA.

[47] The third category of insolvency-related amendments relate to cross-border insolvency. These amendments go beyond the adoption of the Model Law. The new section 351(2A) of the Companies Act lists relevant connecting factors to support a decision on whether a company has a substantial connection to Singapore. This is an important threshold issue as only foreign companies with a substantial connection to Singapore are liable to be wound up (section 351(1)(d)). The liability of a company to be wound up in Singapore is in turn a prerequisite for it to seek judicial management (section 227AA) or a scheme of arrangement (section 210(11)) in Singapore. Before these amendments, the court’s insolvency jurisdiction was exercised on the basis of a common law “sufficient nexus” test: see paragraph [66] below. Another important amendment is the abolition of ring-fencing. Under the old section 377(3)(c) of the Companies Act, a Singapore liquidator of a foreign company could only repatriate the company’s recovered Singapore assets to the foreign liquidator after satisfying its debts and liabilities incurred in Singapore. Under the present section 377(3)(c)(ii), the default position is that assets recovered in Singapore should be paid to the foreign liquidator so as to facilitate the effective administration of a cross-border insolvency.

Moratoria under section 211B of the Companies Act

[48] Breathing space is vital for a company to formulate a restructuring or rehabilitation plan and to build consensus with its creditors. For there to be breathing space, there must be a stay of proceedings against the company. In the case of a scheme of arrangement, prior to 2017, the main statutory mechanism for this purpose was the moratorium under section 210(10) of the Companies Act. Section 210(10) provides:

Where no order has been made or resolution passed for the winding up of a company and any such compromise or arrangement has been proposed between the company and its creditors or any class of such creditors, the Court may, in addition to any of its powers, on the application in a summary way of the company or of any member, creditor or holder of units of shares of the company restrain further proceedings in any action or proceeding against the company except by leave of the Court and subject to such terms as the Court imposes.

[49] The 2017 Companies Act amendments introduced a new form of moratorium under section 211B of the Companies Act:

- (1) Where a company proposes, or intends to propose, a compromise or an arrangement between the company and its creditors or any class of those creditors, the Court may, on the application of the company, make one or more of the following orders, each of which is in force for such period as the Court thinks fit:
 - (a) an order restraining the passing of a resolution for the winding up of the company;
 - (b) an order restraining the appointment of a receiver or manager over any property or undertaking of the company;
 - (c) an order restraining the commencement or continuation of any proceedings (other than proceedings under this section or section 210, 211D, 211G, 211H or 212) against the company, except with the leave of the Court and subject to such terms as the Court imposes;

...

[50] Section 211B complements section 210(10) and does not replace it. As a result, there are now two forms of moratoria available at the preparatory stages of a scheme of arrangement. The differences

between them were summarised by the High Court in *Re IM Skaugen SE and other matters*¹⁰⁰ (“*IM Skaugen*”).

[51] First, while section 210(10) may be invoked only when the scheme “has been proposed”, under section 211B it is sufficient that a scheme of arrangement is *intended* to be proposed.¹⁰¹ This addressed the observation of the ILRC that sometimes a moratorium is needed precisely to allow the company time to work out a scheme of arrangement to propose to the court.

[52] Second, under section 210(10), the company would have to wait for the court to rule on its application before a moratorium could take effect. An application under section 211B, however, immediately gives rise to an automatic moratorium. This automatic moratorium lasts for a period of 30 days (unless the court rules on the application before that: section 210(13)), and covers all the types of proceedings which the court has the discretion to enjoin when it subsequently hears the application under section 210(1) (section 210(8), subject to section 210(9)).¹⁰²

[53] Since the automatic moratorium takes effect before the court has the opportunity to consider the merits of the application, section 211B(4) sets out in detail the evidence that is to be filed in support of the section 211B(1) application. Section 211B(4) requires the company to provide, *inter alia*, evidence that there would be support from creditors of sufficient importance (section 211B(4)(a)) and a brief description of the intended scheme of arrangement (section 211B(4)(b)). These requirements serve as safeguards against abuse of the section 211B process, including the automatic moratorium.¹⁰³ As such, they are worth exploring in some detail.

[54] In *IM Skaugen*, a question arose as to how section 211B(4)(a) and (b) should be interpreted in the two possible scenarios in a section 211B application. In one scenario, the applicant has proposed a scheme of arrangement, as it would under section 210(10) (“the First Scenario”); in another scenario, the applicant merely intends to propose a scheme, but has not done so (“the Second Scenario”). The High Court held that under

100 [2019] 3 SLR 979.

101 *IM Skaugen* at [37].

102 *Ibid*, at [38].

103 *Ibid*.

the Second Scenario, both section 211B(4)(a) and section 211B(4)(b) had to be satisfied; under the First Scenario, only section 211B(4)(a) needed to be satisfied.¹⁰⁴ Much turned on this interpretation, as in *IM Skaugen* one of the applicants was in the First Scenario, while two other applicants were in the Second Scenario.

[55] Since section 211B(4)(a) needed to be satisfied in every section 211B application, a further question arose as to how the requirement of evidence of creditor support ought to be understood. Under the First Scenario, this requirement could be understood with reference to the case law relating to the grant of a moratorium under section 210(10), given the parallels between the applications under both provisions.¹⁰⁵ In respect of section 210(10), the High Court in *Re Conchubar Aromatics Ltd and other matters*¹⁰⁶ and *Pacific Andes Resources Development Ltd and other matters*¹⁰⁷ ("*Pacific Andes*") held that the proposed scheme of arrangement had to contain sufficient particularity for the court to make a broad assessment that there was a reasonable prospect of the scheme working and being acceptable to the general run of creditors.¹⁰⁸ This same test applied to section 211B(4)(a) in the First Scenario.¹⁰⁹ On the other hand, under the Second Scenario, where there was no proposed scheme of arrangement, there was no sense in asking for evidence of creditor support for any specific scheme. Instead, in applying section 211B(4)(a) under the Second Scenario, the court should make a broad assessment based on the description supplied under section 211B(4)(b), whether there would be a feasible scheme which would merit consideration by the creditors.¹¹⁰ In such a scenario, evidence of this would primarily come from creditor support for the moratorium, which is the means by which any such feasible scheme would be devised.¹¹¹

[56] When it comes to the application for the court's sanction of a scheme of arrangement under section 210(3) of the Companies Act, it is well established that if there is sufficient opposition such that the

104 Ibid, at [47] and [54].

105 Ibid, at [55].

106 [2015] SGHC 322.

107 [2018] 5 SLR 125.

108 See *IM Skaugen* at [56].

109 Ibid, at [58].

110 Ibid, at [58].

111 Ibid, at [50].

scheme would not be passed if brought to a vote, the court will decline to sanction the scheme as it would be an exercise in futility.¹¹² On the other hand, the court in *IM Skaugen* held that when it came to an application for a moratorium under section 210(10), evidence that there was significant support from the creditors would not be undermined by the opposition of a major creditor, even if that opposition might be sufficient to prevent a scheme from being adopted.¹¹³ This is because it would be premature to judge the proposed or intended scheme on this strict basis at such an early stage, when both the shape of the scheme and the creditors' positions are likely to evolve.

[57] Thirdly, the court could order a moratorium under section 211B to apply to any person within its jurisdiction, whether in Singapore or abroad.¹¹⁴ This is in contrast with the High Court's conclusion of the position under section 210(10) in *Pacific Andes*. There, the court had held that it had no power, whether under section 210(10) or as part of its inherent jurisdiction, to apply the moratorium beyond Singapore.¹¹⁵ That being said, the moratorium under section 211B cannot have true extra-territorial effect. Instead, section 211B(5)(b) clearly limits its scope to persons within the jurisdiction of the Singapore court.¹¹⁶ This reflects the balance which the ILRC sought to strike between the need for efficacy of Singapore restructuring processes globally, and that of comity between States.¹¹⁷

[58] Lastly, the law now expressly recognises the importance of group restructuring. Even where only one company in a group needs to restructure, it is often important to involve all related companies within the group in the restructuring plan. Thus, once the court grants an applicant a section 211B moratorium, related companies can seek similar moratoria under section 211C, even if they themselves are not restructuring.¹¹⁸ As a logical extension of this point, courts should readily recognise that in a group restructuring, individual applications ought to be seen with the group context in mind. In *IM Skaugen*, the court therefore rejected the argument that the application

112 *Re Ng Huat Foundations Pte Ltd* [2005] SGHC 112 at [9].

113 *IM Skaugen* at [65]–[67].

114 *Ibid.*, at [39].

115 *Pacific Andes* at [17] and [27].

116 *IM Skaugen* at [39].

117 *Ibid.*

118 *Ibid.*, at [40].

was not bona fide as the applicant was a shell company, because a successful group restructuring may well require all entities of the group, including shell entities, to be granted some form of relief from creditors.¹¹⁹ Another way in which the group context of such applications should be borne in mind is in considering the support of the key creditors of the group as a whole. Thus, the court held that in addition to the statutory requirement to consider the support of the applicant company's own creditors under section 211B(4)(a), it was also relevant to consider whether the biggest creditors of the group as a whole were supportive of the group restructuring efforts, as this would shed light on the prospects for the schemes of arrangement of the individual companies that were a part of the group restructuring plan.¹²⁰

[59] Beyond the strict boundaries of statutory interpretation, another point which touches on a different facet of restructuring is, in our view, equally important for the success of schemes of arrangement. This is the need to recognise that the support of the court alone is insufficient to ensure the best possible prospects for a restructuring. Often, there is a ready role for a paradigm that goes significantly beyond the traditional adversarial model and looks at collaboration and negotiation. *IM Skaugen* thus concluded by urging parties in all restructurings to consider the benefits of appointing an insolvency mediator to develop the restructuring plan or to monitor the progress of the scheme during a section 211B moratorium.¹²¹ Although sections 210 to 212 now provide a comprehensive statutory framework for schemes of arrangement, it remains equally important for the court to promote effective restructuring practices through the judicious exercise of its discretion. In that regard, courts should make full use of the discretion conferred by section 211B(5)(a) to subject moratoria to "such terms as the Court imposes" to point the parties towards tools such as mediation that are likely to promote the resolution of their disputes.¹²²

Super priority for rescue financing

[60] The 2017 Companies Act amendments also introduced the concept of "super priority" for rescue financing in a scheme of

119 *Ibid*, at [73].

120 *Ibid*, at [63].

121 *Ibid*, at [93]–[94].

122 *Ibid*, at [91].

arrangement, under section 211E. As then Senior Minister of State for Finance and Law Indranee Rajah explained in Parliament, super priority gives debts or security interests for rescue financing priority over all pre-existing security interests, subject to the safeguard that those pre-existing interests are adequately protected.¹²³ This concept is adapted from Chapter 11 of the United States Bankruptcy Code, although the statutory provisions are not entirely similar.¹²⁴ Given this connection, it is unsurprising that when the High Court heard the first application under section 211E in *Re Attilan Group Ltd*¹²⁵ (“*Attilan Group*”), it considered the US authorities as a useful guide in illuminating its provisions.¹²⁶

[61] Under section 211E(9), “rescue financing” is defined as financing which is necessary for the survival of the whole or part of the undertaking of the company as a going concern, or financing which is necessary to achieve a more advantageous realisation of the assets of the company compared to a winding up. Section 211E(1) provides for four different possible types of priority for rescue financing:

- (a) an order that if the company is wound up, the debt arising from any rescue financing obtained, or to be obtained, by the company is to be **treated as if it were part of the costs and expenses of the winding up mentioned in section 328(1)(a)**;
- (b) an order that if the company is wound up, the debt arising from any rescue financing obtained, or to be obtained, by the company is to have **priority over all the preferential debts specified in section 328(1)(a) to (g)** and all other unsecured debts, *if the company would not have been able to obtain the rescue financing from any person unless the debt arising from the rescue financing is given the priority mentioned in this paragraph*;
- (c) an order that the debt arising from any rescue financing to be obtained by the company is to be secured by —
 - (i) a **security interest on property of the company that is not otherwise subject to any security interest**; or

123 *Singapore Parliamentary Debates, Official Report* (March 10, 2017), Vol 94.

124 *Re Attilan Group Ltd* [2018] 3 SLR 898 at [50].

125 [2018] 3 SLR 898.

126 *Attilan Group* at [51].

- (ii) a subordinate security interest on property of the company that is subject to an existing security interest,

if the company would not have been able to obtain the rescue financing from any person unless the debt arising from the rescue financing is secured in the manner mentioned in this paragraph;

- (d) an order that the debt arising from any rescue financing to be obtained by the company is to be **secured by a security interest, on property of the company that is subject to an existing security interest, of the same priority as or a higher priority than that existing security interest**, if –

- (i) *the company would not have been able to obtain the rescue financing from any person unless the debt arising from the rescue financing is secured in the manner mentioned in this paragraph; and*

- (ii) *there is adequate protection for the interests of the holder of that existing security interest.*

(Emphasis in bold and italics added.)

In the provisions set out above, the nature of the priority of the rescue financing debt is emphasised in bold, while the criteria for obtaining such priority is emphasised in italics. It is worth noting that although section 211E is given the caption “super priority for rescue financing”, not every priority conferred by the court under section 211E is strictly speaking “super priority”. Instead, only the priority conferred by section 211E(1)(b) is properly called “super priority debt” (section 211E(9)).

[62] It will be apparent from the extract of section 211E(1) above that there are no statutorily-defined criteria for priority under section 211E(1)(a). This may be compared with § 364(b) of Chapter 11, which likewise confers a similar degree of priority on the expenses to which it applies. Nevertheless, in both instances, the courts have crafted principles on which their discretion is to be exercised.¹²⁷ In *Attilan Group*, the High Court held that in an application under section 211E(1)(a), one of the key factors to consider was whether the applicant company had made reasonable attempts to obtain rescue financing without

¹²⁷ See *Attilan Group* at [58]–[59].

this priority.¹²⁸ In that case, the court refused to grant the applicant's section 211E(1)(a) application because there was insufficient evidence of any such efforts.¹²⁹ Although the section 211E(1)(b) application in *Attilan Group* necessarily failed for the same reason, given the statutory prerequisite, the High Court nevertheless also briefly considered the relevant considerations for the court's exercise of its discretion beyond the statutory requirements. Without deciding on the matter, the court suggested that some of the factors adopted in the US cases would also be relevant under section 211E(1)(b). These included whether the terms of the financing agreement were fair, reasonable and adequate in light of the circumstances, and whether the financing agreement was negotiated in good faith and at arm's length.¹³⁰

[63] The recognition that the court should exercise its discretion under section 211E(1) in a principled way is an important one, because it must be remembered that section 211E "disrupts the expected order of priority of the various creditors of the company".¹³¹ There should therefore be sufficient safeguards in this process to ensure that the priority of existing creditors is only compromised when, and to the extent, it is necessary for ensuring a favourable outcome for the restructuring as a whole. Following the guidance provided by the court in *Attilan Group*, subsequent applications under section 211E have met with more success; for example, the High Court accepted the necessity of the rescue financing in *Re AT Reservation Network Pte Ltd*¹³² and granted it "super priority" under section 211E(1)(b).

Cross-border insolvency

The Gibbs rule

[64] The *Gibbs* rule is the name given to the rule first set out by the English Court of Appeal in *Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux*.¹³³ It holds that the discharge of a debt is not effective unless it is in accordance with the law governing the debt.¹³⁴ This means that before the English courts, foreign insolvency

128 Ibid, at [61].

129 Ibid, at [62].

130 Ibid, at [66]–[67].

131 Ibid, at [61].

132 High Court Originating Summons No 963 of 2018 (unreported).

133 (1890) LR 25 QBD 399.

134 See *Pacific Andes* at [46].

proceedings are only effective to discharge debts governed by English law if such discharge is effective according to English private international law. In this regard, an English rule which is sometimes called the *Dicey* rule holds that a court of a foreign jurisdiction only has jurisdiction to bind a person if that person was present in the foreign country or had submitted to the jurisdiction of that court (e.g. by appearing in those proceedings or through prior agreement).¹³⁵ Taken together, the *Gibbs* rule means that English courts will not recognise the discharge of debts governed by English law in foreign insolvency proceedings, unless the creditor submitted to the jurisdiction of the foreign court in question. By refusing to submit to jurisdiction in this manner, a creditor may use the *Gibbs* rule to stymie any attempt at restructuring in a foreign jurisdiction where there exist debts governed by English law.

[65] The *Gibbs* rule has been the subject of concerted criticism. For example, in *Pacific Andes*, the Singapore High Court cited Look Chan Ho, who made a series of arguments against the rule.¹³⁶ For one, the *Gibbs* rule views obligations through a contractual lens when insolvency law does not operate on a similar basis; instead, it concerns the post-insolvency treatment of pre-insolvency entitlements, which cannot be a consensual matter. In addition, where parties enter into transactions with companies that operate across borders, they should expect that their contractual rights will be subject to the insolvency law of one or more of those jurisdictions in the event of a restructuring or insolvency. Moreover, a refusal to recognise the discharge of debt in a foreign insolvency proceeding is tantamount to refusing to recognise foreign insolvency proceedings, because such recognition is crucial to the efficacy of insolvency proceedings. As such, Professor Ian Fletcher has suggested adding a proviso to the *Gibbs* rule stating that the possibility of insolvency proceedings in a jurisdiction with which a party to a contract has an established connection should be recognised as within the parties' reasonable expectations in entering their relationship.¹³⁷ This amounts to an extension of the *Dicey* rule in the context of insolvency proceedings.

135 See *Rubin and another v Eurofinance SA and others (Picard and others intervening)* [2013] 1 AC 236 at [7].

136 *Pacific Andes* at [47], citing Look Chan Ho, *Cross-Border Insolvency: Principles and Practice* (Sweet & Maxwell, 2016), paras 4-096–4-107.

137 *Pacific Andes* at [48], citing Professor Ian Fletcher, *Insolvency in Private International Law*, 2nd edn (Oxford University Press, 2005), para 2.129.

[66] The High Court in *Pacific Andes* approved of Look Chan Ho's criticisms of the *Gibbs* rule, and endorsed Professor Fletcher's reformulation. In that case, the court held that a number of applicant companies did not have a sufficient nexus¹³⁸ with Singapore to bring an application for a moratorium under section 210(10) of the Companies Act, as they were not listed in Singapore and had no economic activity here.¹³⁹ However, in discussing why the various factors the applicants raised failed to give rise to a jurisdictional nexus, the High Court was careful to make clear that it did not consider the fact that the debts were governed by foreign law to be one such factor. In particular, the relevant debts under consideration were governed by Hong Kong law, which accepted the *Gibbs* rule.¹⁴⁰ It was in that context that the court explained why it did not accept the rule.

[67] Despite the criticism it has received, the *Gibbs* rule continues to be good law in England. For example, it was recently applied by the English Court of Appeal in *Gunel Bakhshiyeva (in her capacity as the Foreign Representative of the OJSC International Bank of Azerbaijan) v Sberbank of Russia and others*,¹⁴¹ in which the court reaffirmed the *Gibbs* rule and rebuffed an attempt to circumvent its effects by means of an application under the Model Law for a stay of all proceedings in England until the foreign restructuring was completed. The *Dacey* rule, which undergirds the practical effect of the *Gibbs* rule, was also strenuously affirmed by the UK Supreme Court in *Rubin and another v Eurofinance SA and others (Picard and others intervening)*¹⁴² ("*Rubin*").

[68] In our view, the *Gibbs* rule is an anachronism in today's world. The traditional rules of private international law have long been transformed in the insolvency context to a new paradigm of universalism, in which courts do what they can to assist foreign insolvency proceedings. This is a necessary development because in the increasingly common scenario of cross-border insolvencies, an inability to centralise the restructuring of the entire undertaking in one main proceeding causes a proliferation of conflicts and duplicative work

138 It is worth noting that following the 2017 Companies Act amendments, the concept of a "sufficient nexus" has been given a statutory footing in s 351(1)(d) and (2A) of the Companies Act, which uses the term "substantial connection".

139 *Pacific Andes* at [37].

140 *Ibid*, at [46].

141 [2018] EWCA Civ 2802 at [85]–[95].

142 [2013] 1 AC 236 at [115] *et seq*.

across jurisdictions. The *Gibbs* rule is also at odds with the approach taken under the Model Law, which the UK has also adopted. We turn now to look at a central effort to ease those burdens of cross-border insolvency in Singapore – the implementation of the Model Law.

Recognition under the Model Law

[69] On the one hand, there is increasingly a global consensus that insolvency law today cannot remain anchored in the idea of territorialism, in which each country looks after its own when companies undergo restructuring or insolvency. On the other hand, a truly universalist outlook, which aims for the unification of substantive laws on insolvency across the world, is too ambitious a goal at present, and would face considerable resistance. A middle ground lies in allowing and promoting cooperation and coordination between jurisdictions without replacing existing insolvency regimes. The Model Law, which was promulgated by UNCITRAL in 1997, seeks to achieve this through a number of procedural mechanisms to be adopted by each enacting State:¹⁴³

- (a) allowing foreign insolvency representatives access to the courts of the enacting State;
- (b) provisions for the recognition by the enacting State of foreign insolvency proceedings;
- (c) provisions for relief to be granted by courts of the enacting State to assist foreign insolvency proceedings; and
- (d) cooperation and coordination between courts and insolvency representatives, both within and across States.

[70] The Model Law was implemented in Singapore through the 2017 Companies Act amendments. Section 354B of the Companies Act provides for the Model Law, as set out in the Tenth Schedule to the Companies Act with modifications (“the Singapore Model Law”), to have the force of law in Singapore. This was a landmark in Singapore’s commitment to facilitate the practice of cross-border insolvency.

143 See *UNCITRAL Model Law on Cross-Border Insolvency Law with Guide to Enactment and Interpretation* (UNCITRAL, 2014), para 24; Kannan Ramesh JC, “Cross-Border Insolvencies: A New Paradigm” (speech delivered at the International Association of Insolvency Regulators’ 2016 Annual Conference and General Meeting, September 6, 2016). para 18.

[71] At the heart of the facilitation of cross-border insolvencies under the Model Law is the distinction between foreign main proceedings and foreign non-main proceedings. These terms refer respectively to insolvency or restructuring proceedings which take place either in the State where the debtor has its centre of main interests (“COMI”), or in a State where the debtor has an establishment but not its COMI. In both cases, the foreign representative has direct access to the Singapore courts pursuant to Article 9 of the Singapore Model Law, and both types of foreign proceedings can be recognised in Singapore upon presentation of the relevant documentation to the court under Article 15 of the Singapore Model Law.

[72] The difference lies in the fact that upon recognition of a foreign *main* proceeding, an automatic moratorium with effects similar to a domestic winding up or judicial management in Singapore comes into effect (Article 20). There is no automatic moratorium in aid of a foreign *non-main* proceeding. However, for both types of foreign proceedings, the foreign representative may apply to the Singapore courts for various kinds of moratorium relief, together with other types of relief, such as the examination of witnesses (Article 21). The concept of the COMI and the foreign main proceeding under the Model Law illustrates its vision of modified universalism: the Model Law envisions cross-border insolvencies as being coordinated from the State to which the debtor is most closely connected, with assistance being given to this main effort by other jurisdictions around the world where the debtor has dealings. A practical illustration can be seen in the English High Court’s recognition of a moratorium granted by the Singapore High Court under section 211B of the Companies Act as a foreign main proceeding in *H & CS Holdings Pte Ltd v Glencore International AG*.¹⁴⁴ The English court then considered whether to make an exception to the automatic stay to allow pending arbitrations to proceed against the company in England, based on an analysis of whether doing so would contribute to the efficacy of the Singapore restructuring proceedings.

[73] It is apparent that the determination of a debtor’s COMI is an important question under the Model Law. However, besides Article 16(3) which sets out a presumption that a debtor’s registered office is its COMI, the Model Law does not define the term. Fortunately,

144 [2019] EWHC 1459 (Ch).

the determination of COMI is one area where there is significant continuity between the position at common law in Singapore prior to the implementation of the Singapore Model Law and the interpretation of the provisions of the Singapore Model Law. This can be seen in the decision of the High Court in *Re Opti-Medix Ltd (in liquidation) and another matter*¹⁴⁵ (“*Opti-Medix*”).

[74] *Opti-Medix* was decided prior to Singapore’s adoption of the Model Law. In that case, the Tokyo District Court granted bankruptcy orders against two companies incorporated in the British Virgin Islands. The liquidator appointed by the Tokyo court applied for recognition of the Tokyo proceedings in Singapore so as to administer the companies’ Singapore assets. The High Court declined to follow the position taken by the UK Supreme Court in *Rubin*, which held that it was not for the courts to depart from the traditional test of domicile in relation to the recognition of foreign insolvency proceedings. Instead, the court in *Opti-Medix* held that the rising tide of universalism in Singapore insolvency law pointed to the relevance of considering the companies’ COMI in deciding whether the foreign insolvency proceedings ought to be recognised.¹⁴⁶ The court found that Japan was “essentially the sole place where actual business was carried on” by the two companies, and thus recognised the Japanese liquidator’s appointment.¹⁴⁷ Because of that, any presumption in relation to the place of incorporation would have been rebutted by clear evidence.¹⁴⁸

[75] Following Singapore’s adoption of the Model Law, the High Court has applied the Model Law in two decisions involving the insolvency proceedings in the United States in respect of Singapore-registered Zetta Jet Pte Ltd. *Re Zetta Jet Pte Ltd and others*¹⁴⁹ (“*Zetta Jet (No 1)*”) concerned an injunction issued by the Singapore High Court enjoining Zetta Jet Pte Ltd from carrying out further steps in US insolvency proceedings. The company had breached the injunction by, *inter alia*, obtaining the appointment of a Chapter 7 trustee. When the Chapter 7 trustee applied for recognition of the US proceedings in Singapore, the Singapore High Court refused recognition on grounds of public

145 [2016] 4 SLR 312.

146 *Opti-Medix* at [17]–[18].

147 *Ibid*, at [24].

148 *Ibid*, at [25].

149 [2018] 4 SLR 801.

policy under Article 6 of the Singapore Model Law. This was because non-compliance with a Singapore injunction, which had resulted in the appointment of the foreign representative in question, undermined the administration of justice in Singapore.¹⁵⁰ The court recognised that Article 6 of the Singapore Model Law set a lower threshold than under Article 6 of the Model Law, since it omitted the word “*manifestly*” in the phrase “manifestly contrary to ... public policy”;¹⁵¹ however, it held that the recognition of the foreign insolvency proceedings under the present circumstances would also have been “manifestly contrary” to public policy.¹⁵²

[76] Subsequently, the parties discharged the Singapore injunction by consent, and the Chapter 7 trustee applied again for recognition in *Re Zetta Jet Pte Ltd and others (Asia Aviation Holdings Pte Ltd, intervenor)*¹⁵³ (“*Zetta Jet (No 2)*”). The application was heard by the same *coram* of the High Court. The court found that the result of this discharge was that recognition of the US proceedings no longer undermined the administration of justice in Singapore, and Article 6 was no longer engaged.¹⁵⁴

[77] The court thus went on to decide whether to recognise the US proceedings as a foreign main proceeding under Article 17 of the Singapore Model Law. This involved asking whether the US was the company’s COMI. First, the court had to decide the relevant time at which this question was to be answered. This involved a consideration of the English, European, Australian and US positions, as well as that set out in the 2013 Guide to the Model Law.¹⁵⁵ The court decided to follow the US position, which was the date of the filing of the application for recognition. It held that this allowed room for the debtor company to take legitimate measures to shift its COMI in order to restructure itself in a jurisdiction with the most appropriate frameworks for doing so.¹⁵⁶ In this connection, it is worth noting the High Court’s observation in *Pacific Andes* that “forum shopping in a *bona fide* attempt to restructure and so as to take advantage of a juridical advantage was permissible”,

150 *Zetta Jet (No 1)* at [29].

151 *Ibid*, at [23].

152 *Ibid*, at [26].

153 [2019] SGHC 53.

154 *Zetta Jet (No 2)* at [121].

155 *Ibid*, at [52].

156 *Ibid*, at [57].

so long as the aim was to achieve a better outcome for the company and the creditors, and not to evade debts.¹⁵⁷ The flexibility provided by assessing COMI at the date of application for recognition facilitates what the court in *Pacific Andes* called “good forum shopping”.

[78] The court then set out its analysis of the company’s COMI. It stressed that the appropriate focus was on actual facts rather than legal structures, as the COMI ought to be discernible to creditors.¹⁵⁸ On an analysis of the presumption regarding the debtor’s registered office under Article 16(3), the court held that the presumption did not require proof on the balance of probabilities; the simple presence of evidence to the contrary was sufficient for it to be rebutted.¹⁵⁹ On the facts, the court concluded that the presumption that Zetta Jet Pte Ltd had its COMI in Singapore was displaced, primarily by evidence that its central management was conducted from the US, and that it held itself out to third parties as being US-based.¹⁶⁰

The Judicial Insolvency Network

[79] As we have explained, the Model Law envisions the insolvency administrator appointed in the insolvency or restructuring of a company in its COMI taking on the role of the foreign representative in other enacting States, seeking recognition of the main proceedings in the COMI. This, however, is not necessarily sufficient for effective coordination between jurisdictions in a cross-border insolvency. Instead, there is an increasing acceptance that it may often be best for the different courts to be able to communicate directly with each other to ensure the best chances of a successful insolvency or restructuring. The same is true of communications between insolvency administrators, and between courts and insolvency administrators.

[80] This point was made by the High Court in *Pacific Andes*. In that case, it emerged that just as the applicant company was applying to enter into a scheme of arrangement in Singapore, a number of creditors intended to apply to liquidate the company in Bermuda. The intention of bringing the liquidation proceedings was to stop proceedings which

157 *Pacific Andes* at [51].

158 *Zetta Jet (No 2)* at [82].

159 *Ibid*, at [30]–[31].

160 *Ibid*, at [104]; see also [99] and [92].

were ongoing in the US and Peru.¹⁶¹ It was obviously impossible to successfully restructure a business in one jurisdiction and liquidate the same business in another jurisdiction at the same time. For that reason, the court commented:¹⁶²

... This case is also illustrative of the need for communication and cooperation between courts and the insolvency administrators of the respective insolvency proceedings in the formulation of what is effectively a group restructuring plan. It seems axiomatic that such communication and cooperation will not only facilitate the formulation of the plan but also foster better understanding and resolution of issues involving and between the respective proceedings, and strengthen comity in the process. I had strongly encouraged the Applicants in the earlier hearings to come together with the insolvency representatives in the respective proceedings to formulate protocols for such communication and cooperation, subject to approval by the relevant courts. ...

[81] In *Pacific Andes*, the parties did not take up the court's suggestion to draw up a protocol for cross-border communication and cooperation. Recognising that such matters should not be left to practitioners and businesses alone, insolvency judges from a number of jurisdictions across the world formed the Judicial Insolvency Network ("JIN") in October 2016 at the initiation of Chief Justice Sundaresh Menon, with an inaugural meeting hosted by the Supreme Court of Singapore. The main product of the JIN is a set of guidelines for communication and cooperation between courts in cross-border insolvency matters ("the JIN Protocol"). To date, the JIN Protocol has been adopted by the United States Bankruptcy Courts for the District of Delaware and the Southern District of New York, and the Chancery Division of the English High Court, which are three of the most important jurisdictions for insolvency globally, as well as insolvency courts in Ontario, Bermuda, the Cayman Islands, the Eastern Caribbean, Florida, New South Wales, Seoul, and Midden-Nederland (the Netherlands). The Supreme Court of Singapore adopted the JIN Protocol in Registrar's Circular No 1 of 2017. The JIN Protocol also formed the basis of a cross-border protocol that was approved in March 2018 by the Singapore High Court and the US Bankruptcy Court (Southern District of New

161 *Pacific Andes* at [75]–[76].

162 *Ibid.*, at [75].

York) to jointly manage the insolvency of Ezra Holdings Ltd, a global offshore services provider for the oil and gas industry.¹⁶³

[82] The key provisions of the JIN Protocol include the facilitation of direct communications between courts in different jurisdictions on insolvency matters (Guideline 7). Where these communications are other than merely administrative in nature, parties will usually be allowed to be present (Guideline 8). Where permitted by domestic law, a court may authorise a party to a foreign proceeding to appear before it without becoming subject to its jurisdiction (Guideline 11). In cases where coordination between courts on substantive matters is paramount, Annex A provides guidelines for the conduct of joint hearings between courts. An example of such a joint hearing is found in the pre-JIN case of *Re Nortel Networks Corporation*¹⁶⁴ (“*Nortel Networks*”), in which the Ontario Superior Court of Justice and the US Bankruptcy Court for the District of Delaware held a joint hearing by teleconference. The judges of the two courts communicated with each other thereafter to determine whether they could each make findings which were consistent with each other.¹⁶⁵ With the increasing adoption of the JIN Protocol, it is hoped that more successful examples such as *Nortel Networks* will emerge. As the novelty and unfamiliarity of such practices fade, it is hoped that cross-court communication and cooperation will become an integral part of the cross-border insolvency toolkit.

The omnibus Insolvency Act

[83] The Insolvency Act was passed by Parliament on October 1, 2018. The drafting of this Act was guided by the recommendations of the ILRC and the Restructuring Committee, and is to be implemented as the third and final phase to strengthen Singapore’s insolvency and restructuring laws. The first phase of changes involved amendments to the Bankruptcy Act in July 2015, and the second phase comprised the 2017 Companies Act amendments discussed above.

[84] The Insolvency Act seeks to consolidate corporate and personal insolvency and debt restructuring laws into a single statute,

163 High Court Summons No 1195 of 2018 (High Court Originating Summons No 253 of 2018) (unreported).

164 2015 ONSC 2987.

165 *Nortel Networks* at [7] and [10].

streamlining common principles and procedures across the various regimes and rationalising existing inconsistencies.¹⁶⁶ When the Act comes into effect, the Bankruptcy Act and the provisions in the Companies Act relating to corporate insolvency and restructuring will be repealed.¹⁶⁷

[85] Provisions in the Insolvency Act will also enhance Singapore's insolvency and debt restructuring regimes. We will touch on three areas of reform.

[86] First, in relation to liquidation, the Insolvency Act provides for a new procedure for the early dissolution of a company in liquidation.¹⁶⁸ Where the Official Receiver or a private liquidator with prior consent of the Official Liquidator has reasonable cause to believe that the realisable assets of the company are insufficient to cover the expenses of the winding up, and the affairs of the company do not require any further investigation, the name of the company will be struck off the register and the company dissolved within 30 days.¹⁶⁹ This procedure streamlines the winding up process where liquidation is likely to bring little or no return to creditors.¹⁷⁰

[87] New provisions also provide that the Official Receiver will no longer be appointed as liquidator by default where there is no court- or privately-appointed liquidator; he will only be nominated to act as liquidator if the applicant takes reasonable steps but is unable to obtain the consent of a licensed insolvency practitioner to be appointed as liquidator, and the Official Receiver consents to such nomination.¹⁷¹

[88] Second, to raise standards and improve accountability,¹⁷² the Insolvency Act establishes a new licensing and regulatory regime for insolvency practitioners. Under this regime, liquidators, judicial managers and receivers must be duly licensed to carry out these offices.¹⁷³

166 *Singapore Parliamentary Debates*, Official Report (October 1, 2018), Vol 94.

167 See Insolvency Act, ss 450, 451, 525 and 526.

168 See *ibid*, ss 209–211.

169 See *ibid*, s 210(1).

170 *Singapore Parliamentary Debates*, Official Report (October 1, 2018), Vol 94.

171 See Insolvency Act, s 135(3).

172 *Singapore Parliamentary Debates*, Official Report (October 1, 2018), Vol 94.

173 See Insolvency Act, Part 3, Division 3.

[89] Third, as regards debt restructuring, the Insolvency Act introduces a new restriction on the operation of *ipso facto* clauses, i.e. in this context, contractual provisions that allow parties to terminate or modify the operation of a contract upon occurrence of specified insolvency-related events. Section 440(1) of the Insolvency Act restricts the operation of certain contractual clauses that allow for claims of accelerated payment and which terminate or modify obligations under the contract by reason only that specified restructuring proceedings are commenced or that the company is insolvent. *Ipsso facto* clauses may still be triggered on other contractually provided grounds; the specified restructuring proceedings defined under section 440(6) are restricted to applications for judicial management orders and for schemes of arrangement.

[90] In relation to schemes of arrangement, the Insolvency Act makes one amendment to the operation of section 211H of the Companies Act, which as discussed above at paragraph [45] allows the court to “cram down” dissenting creditors. Presently, section 211H(4)(b)(ii)(B) provides that where a “cram down” is made on unsecured creditors, the scheme of arrangement:

- (B) must not provide for any creditor with a claim that is subordinate to the claim of a creditor in the dissenting class, or any member, to receive or retain any property on account of the subordinate claim or the member’s interest.

Section 70(4)(b)(ii)(B) now specifies that persons subordinate in priority to the dissenting class must not receive or retain any property “of the company”. This deals with the concern that this provision might otherwise be read to require subordinate shareholders to be divested of their shares in the company if unsecured creditors are to be crammed down.

[91] Finally, section 94 of the Insolvency Act now allows a company to place itself under judicial management out of court, by way of a resolution of the company’s creditors; thereafter, judicial management will continue under the court’s supervision. This procedure seeks to minimise expense and delay in cases where creditors are supportive of judicial management. Judicial managers may also under the Insolvency Act assign proceeds of actions involving prejudicial transactions to third parties, in exchange for funding of the action;¹⁷⁴ this power will

174 See Insolvency Act, s 99 read with First Sch, para (f).

also be available to liquidators.¹⁷⁵ These provisions provide welcome clarity with regard to the permissibility of third-party funding in insolvency proceedings and address some of the concerns raised in *Vanguard* and *Fan Kow Hin*, as discussed above.

Conclusion

[92] In light of these recent developments in Singapore's insolvency regime, the Supreme Court of Singapore has sought to engage various groups of stakeholders in the insolvency sector by organising periodic lunches and meetings to facilitate discussion of new initiatives and issues concerning the insolvency sector. Attendees include lawyers and accountants in the insolvency sector, and representatives from the Law Society's Insolvency Practice Committee, IPAS, the Insolvency and Public Trustee's Office, the Ministry of Law and the Monetary Association of Singapore.

[93] The insolvency and restructuring regime in Singapore strives to facilitate the successful restructuring of businesses and to provide effective insolvency processes where other attempts fail. The 2017 Companies Act amendments, and now the omnibus Insolvency Act, also ensure that the practice of insolvency and restructuring in Singapore recognises, and is in line with, the practice of cross-border insolvency globally today. In response to these legislative developments, as well as in the interpretation of the existing law, the Singapore courts' recent jurisprudence on insolvency and restructuring advances the workability and fairness of this important area of law. We believe it also makes a contribution to the global legal discourse on these interconnected issues.

¹⁷⁵ See *ibid*, ss 144(1)(g) and 177(1)(a).

Recent Developments in Singapore Intellectual Property Law

by

Judicial Commissioner Dedar Singh Gill*

[1] In the last few years, several notable intellectual property (“IP”) decisions have emerged from the Singapore High Court and the Court of Appeal, covering a wide range of issues across different areas of IP law. This article does not seek to provide an exhaustive examination of these recent developments. Rather, it offers a confined commentary on noteworthy proceedings in trade marks, copyright and patents as well as how these cases fit into the tapestry of IP jurisprudence. These cases illustrate the different ways in which IP law is being developed and refined in Singapore.

[2] The first case of significance is the Court of Appeal’s decision in *Staywell Hospitality Group Pty Ltd v Starwood Hotels & Resorts Worldwide, Inc and another and another appeal*¹ (“*Staywell*”). Although decided several years ago, *Staywell* continues to be a landmark case on the relative grounds for the refusal of a trade mark registration as well as the grounds of trade mark infringement. It therefore cannot be left undiscussed. A full appreciation of the significance of *Staywell* requires an understanding of the case law which preceded it, beginning with *The Polo/Lauren Co, LP v Shop in Department Store Pte Ltd*² (“*The Polo/Lauren Co*”). The word mark “POLO”, had been registered by the appellant under the Trade Marks Act³ (“TMA”) in respect of, *inter alia*, clothing and footwear. The respondent operated five “suburban stores” selling an assortment of affordable goods.⁴ In early 2004, the respondent began selling clothing, handbags and shoes which bore the sign “POLO PACIFIC”. The appellant objected to the sale of

* Judicial Commissioner, Supreme Court of Singapore. All views expressed are personal and do not represent those of the Supreme Court of Singapore. All errors are entirely mine.

1 [2014] 1 SLR 911.

2 [2006] 2 SLR(R) 690.

3 Cap 332, 2005 Rev Ed.

4 *Ibid*, at [2].

goods bearing the “POLO PACIFIC” sign as it considered this to be an infringement under section 27(2) of the TMA.⁵ At first instance, the appellant’s mark was found not to have been infringed on the basis that the two signs were not similar and there was no likelihood of confusion.⁶ The matter then went before the Court of Appeal.

[3] The court dismissed the appeal. Examining the language of section 27(2), it found that the section would only be infringed where three conditions were fulfilled. The offending sign must be similar to the registered mark, both marks must be used in relation to similar goods/services and there must be a “likelihood of confusion” on the part of the public. The court would not make an automatic finding of confusion simply because the first two conditions were met.⁷ The “likelihood of confusion” was an independent inquiry. Significantly, the court went on to say that the question of the “likelihood of confusion”, for the purposes of infringement and/or refusal, had to be looked at globally, and involved a consideration of extraneous factors. The steps taken by a defendant to differentiate his goods from those of the registered proprietor were pertinent.⁸ This was a factor which had not been previously raised in trade mark infringement case law. The court was of the view that admitting such extraneous factors would not blur the distinction between a passing off action and an action for infringement. Applying this to the facts of the case, the court found that the average consumer would not have been confused because the respondent’s goods were sold in stores located in “suburban shopping centres” whilst the appellant’s retail outlets were found in “prime shopping centres”.⁹ There was also a great disparity in price between the goods and the way in which they were packaged. This sufficiently differentiated the goods.

5 Section 27(2) states:

A person infringes a registered trade mark if, without the consent of the proprietor of the trade mark, he uses in the course of trade a sign where because –

- (a) the sign is identical with the trade mark and is used in relation to goods or services similar to those for which the trade mark is registered; or
- (b) the sign is similar to the trade mark and is used in relation to goods or services identical with or similar to those for which the trade mark is registered,

there exists a likelihood of confusion on the part of the public.

6 [2006] 2 SLR(R) 690 at [7].

7 Ibid, at [25].

8 Ibid, at [28].

9 Ibid, at [34].

[4] *The Polo/Lauren Co* case was cited with approval in a subsequent Court of Appeal decision, *City Chain Stores (S) Pte Ltd v Louis Vuitton Malletier*.¹⁰ This was in turn followed by *Sarika Connoisseur Café Pte Ltd v Ferrero SpA*¹¹ (“*Sarika*”). While the Court of Appeal in *Sarika* acknowledged that the consideration of extraneous factors could undermine business certainty, it held the view that the court also had to guard against creating monopolies in the trade mark for the registered proprietor by allowing protection to extend beyond what was necessary and fairly required.¹² To achieve this, the court determined that simply considering whether the marks and goods were similar was insufficient.¹³

[5] The approach in *The Polo/Lauren Co* was also applied by the High Court in *Staywell* (see *Staywell Hospitality Group Pty Ltd v Starwood Hotels & Resorts Worldwide, Inc and another*).¹⁴ *Staywell* concerned an opposition by Sheraton International, Inc and Starwood Hotels & Resorts Worldwide Inc, which owned the registered word mark “ST. REGIS”, to an application by Staywell Hospitality Group Pty Ltd to register the mark “PARK REGIS”. Following an appeal from the decision of the Principal Assistant Registrar, the High Court found that although the marks were similar, there was no likelihood of confusion. The court accepted that trading circumstances and the means of advertisement were relevant in determining this point.¹⁵ The judge found that the websites of the two hotels looked completely different which pointed to the fact that they were not economically linked entities. The display of “Staywell Hospitality Group” on the Park Regis website was a step taken to differentiate the services.¹⁶ Identifying the Park Regis as a four-star hotel, in a different category from St. Regis, and marketing it as a business rather than a luxury hotel, reduced any confusion that may have been caused.

[6] The consideration of extraneous factors in the “likelihood of confusion” inquiry in the foregoing cases generated significant debate amongst IP practitioners. Many held the contrary view that confusion

10 [2010] 1 SLR 382 at [52]–[53].

11 [2013] 1 SLR 531.

12 *Ibid*, at [61].

13 *Ibid*, at [63].

14 [2013] 1 SLR 489.

15 *Ibid*, at [42].

16 *Ibid*, at [47].

should be determined by reference to the marks themselves. This discourse was put to rest by the Court of Appeal in *Staywell*. It allowed the opponent's appeal and upheld the opposition to registration under section 8(2)(b) and 8(4)(b)(i) of the TMA.¹⁷ The court found that there was a substantial degree of aural and conceptual similarity between the marks which gave rise to confusion. In its reasoning, the court realigned the course of the recent jurisprudence, finding that the assessment of similarity was to be done "mark-for-mark without consideration of any external matter".¹⁸ In determining whether there would be a "likelihood of confusion", factors such as the steps taken by the trader to differentiate his goods were to be excluded from the inquiry.¹⁹ Only factors intrinsic to the goods themselves and which impacted the consumers' motivations and ability to exercise care in their purchase were to be considered.

[7] The court recognised that the mere similarity of goods, marks or services did not automatically result in a finding of confusion under the TMA. This is consonant with the *dicta* of the court in *The Polo/Lauren Co*. Accordingly, the court in *Staywell* held that extraneous factors could

17 Section 8(2)(b) states:

A trade mark shall not be registered if because –

...

(b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected,

there exists a likelihood of confusion on the part of the public.

Section 8(4) states:

Subject to subsection (5), where an application for registration of a trade mark is made on or after 1st July 2014, if the whole or an essential part of the trade mark is identical with or similar to an earlier trade mark, the later trade mark shall not be registered if –

(a) the earlier trade mark is well known in Singapore; and

(b) the use of the later trade mark in relation to the goods or services for which the later trade mark is sought to be registered –

(i) would indicate a connection between those goods or services and the proprietor of the earlier trade mark, and is likely to damage the interests of the proprietor of the earlier trade mark; or

(ii) if the earlier trade mark is well known to the public at large in Singapore –

(A) would cause dilution in an unfair manner of the distinctive character of the earlier trade mark; or

(B) would take unfair advantage of the distinctive character of the earlier trade mark.

18 [2014] 1 SLR 911 at [20].

19 *Ibid*, at [95].

still be considered “to the extent that these inform[ed] the assessment of the effect of the required similarity on consumer perception”²⁰ or were extrinsic to the very nature of the goods. Purchasing practices and the degree of care paid by a consumer could be considered on a general level. Conversely, factors which were susceptible to changes that could be made by a trader such as pricing differentials, packaging and other superficial marketing choices were to be excluded.

[8] As noted above, the Court of Appeal’s decision in *Staywell* provides much needed clarity in correcting the trajectory of trade mark law. The introduction of a multiplicity of external factors had only detracted from the primary inquiry. In determining issues of similarity and confusion, the focus ought to be on the mark itself, the object of protection. Fundamentally, the *mark* is what is seen by consumers and impressions are, first and foremost, formed on the *mark*. This point of focus was lost in the earlier decisions which undermined the basis of trade mark protection.

[9] Another important point in *Staywell* is the Court of Appeal’s rejection of the doctrine of initial interest confusion, which is found in American, English and European authorities. The doctrine, whose origins are found in American law, permits a finding of infringement where there is temporary confusion that is dispelled *before* the purchase is made. The court in *Staywell* observed that the rationale of the doctrine is to protect well-known marks from dilution or prevent the misappropriation of goodwill.²¹ However, in the court’s view, this doctrine did not sit well with the provisions in the TMA. Section 8(4)(b)(ii) of the TMA, which prohibits registration of a mark where there is an earlier “well known” mark in Singapore, was specifically added to the TMA to guard against dilution. Moreover, the court held that section 8(2) concerned the origin and source of the goods, rather than their mere reputation or associative properties and consequently any dilution of a mark due to initial confusion was not actionable under the section. It also expressed policy concerns over expanding protection to include the doctrine. Besides the risk of stifling competition,²² there was also a concern that the doctrine “was not easily workable in practice and [could] introduce uncertainty”.²³

20 *Ibid*, at [65].

21 *Ibid*, at [113].

22 *Ibid*, at [114].

23 *Ibid*, at [115].

[10] The next notable trade mark case to go before the Court of Appeal was *Societe des Produits Nestlé SA and another v Petra Foods Ltd and another*²⁴ (“Nestlé”), more popularly known as the “Kit-Kat” case. Here, the Court of Appeal considered the registrability of Nestlé’s two-finger and four-finger shaped chocolate bars which had been registered as trade marks under the TMA. It had to determine whether the shapes were inherently distinctive or if they had acquired distinctiveness through use.

[11] In assessing whether the shapes were inherently distinctive, the court identified two key principles. First, a mark’s inherent distinctiveness has to be assessed by reference to the goods/services in respect of which registration had been sought, as well as the perception of the average consumer. The average consumer must appreciate the trade mark significance of the mark in question. Second, the appearance of the mark has to, “in itself”, convey trade mark significance.²⁵ Applying these principles, the court found that the shape marks lacked inherent distinctiveness. There was no evidence that average consumers appreciated the shapes as conveying trade mark significance.²⁶

[12] The court then turned to whether the shapes had acquired distinctiveness. It recognised that there were two competing tests which could be applied. The first was the “mere association” test. Under this approach, a sign acquires distinctiveness where the average consumer *associates* or *identifies* it with a particular manufacturer. The “reliance” test is more stringent. For a sign to acquire distinctiveness, a significant proportion of the relevant class of persons must have *relied* upon the sign as indicating the origin of the goods from a particular trader.²⁷ The Court of Appeal rejected the “mere association” test in favour of the “reliance” test and found that the shapes had not acquired distinctiveness. These findings may have come as a surprise to the general observer. Nevertheless, the court’s decision is on firm doctrinal ground. The purpose of a trade mark is to give the consumer “a guarantee of origin”.²⁸ Whilst consumers may have associated the shapes with Nestlé, this was distinct from relying upon them as badges

24 [2017] 1 SLR 35.

25 *Ibid*, at [33].

26 *Ibid*, at [34].

27 *Ibid*, at [36].

28 *Ibid*, at [21].

of origin.²⁹ The shapes themselves were not indicators of the origin of the goods. The decision in *Nestlé* serves as a useful reminder that trade mark registrability for shape marks is not based on consumers simply being familiar with a mark. Registered trade mark proprietors hold *property rights* and therefore possesses strong remedies against third parties. The high standards required for the registration of shape marks are necessary to ensure that certain traders do not unfairly monopolise the market.

[13] A second takeaway from *Nestlé* is the Court of Appeal's discussion of section 7(3)(b) of the TMA.³⁰ This section specifies that a sign shall not be registered where the shape of the goods is necessary to obtain a technical result. The court helpfully set out the test for section 7(3)(b) as comprising of two stages: first, identify the essential characteristics of the mark from the perspective of the average consumer and second, determine if every one of these characteristics performs a technical function.³¹ The court elaborated on the matters relevant to the assessment at stage one and endorsed the *dicta* of Mummery LJ in *Koninklijke Philips Electronics NV v Remington Consumer Products Ltd*;³² the *most important* factor in identifying a mark's essential characteristics is the perspective of "the average customer for the goods in question". It rejected the European Court of Justice's ("ECJ") position in *Lego Juris A/S v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)*³³ ("*Lego Juris*") that the perception of the average consumer is not decisive and that there are other relevant factors such as surveys, expert opinions, or data relating to previously conferred IP rights.³⁴ The court concluded that while surveys may be relevant under stage one, they might not be necessary. In addition, technical evidence is not to be admitted at this stage, although it can be considered under stage two.³⁵

29 *Ibid*, at [44].

30 Section 7(3) states:

A sign shall not be registered as a trade mark if it consists exclusively of –

- (a) the shape which results from the nature of the goods themselves;
- (b) the shape of the goods which is necessary to obtain a technical result; or
- (c) the shape which gives substantial value to the goods.

31 [2017] 1 SLR 35 at [87].

32 [2006] FSR 30 at [52].

33 [2010] ETMR 63.

34 *Ibid*, at [71].

35 [2017] 1 SLR 35 at [87].

[14] In discussing section 7(3)(b), the court in *Nestlé* also took an expansive view of the section's ambit. This is noteworthy because it highlights the role of policy considerations in judicial reasoning. The court found that shapes whose essential features were necessary to obtain a technical result in respect of the process of manufacturing the final product, fall within the scope of the prohibition in section 7(3)(b). It observed that patent law affords protection to products *and* manufacturing processes and there were good reasons to protect the latter under the patents regime.³⁶ It would be anti-competitive from a *manufacturer's* perspective, to allow the monopolisation of technical results in the manufacturing of a final product. A trade mark proprietor could potentially obtain benefits from this such as greater efficiency, cost savings, etc. A broader interpretation of section 7(3)(b) would ensure that technical solutions remained in the public domain for use by other traders. This position diverges from the approach of the ECJ in *Societe des Produits Nestlé SA v Cadbury UK Ltd*.³⁷ There, the ambit of the prohibition on technical results was held to exclude technical results relating to the manner of manufacture. The focus of the ECJ was on the needs of the *consumer*, "from a *consumer's* perspective, the manner in which the goods function is decisive and their method of manufacture is not important" (emphasis in original).³⁸ Consequently, there was no need to exclude such methods as technical prohibitions. As observed by the Court of Appeal, this approach is influenced by general considerations of unfair competition rather than the facilitation of technological advancements. The position adopted in *Nestlé* tries to accommodate both.

[15] The most recent trade mark case meriting discussion is *Burberry Limited and another v Megastar Shipping Pte Ltd*³⁹ ("*Burberry Limited*"). The respondent, a Singapore freight forwarder, was hired to arrange the transshipment of sealed containers from China to Batam. During the transshipment process, the containers' cargo was inspected by Singapore Customs and more than 15,000 counterfeit goods were found. The trade mark proprietors of the luxury brands Burberry and Louis Vuitton, whose signs were on the goods, commenced

36 *Ibid*, at [105].

37 [2015] Bus LR 1034, ECJ at [38].

38 *Ibid*, at [55].

39 [2019] SGCA 01.

infringement proceedings under section 27(1) of the TMA.⁴⁰ The central issue was whether the transshipment of counterfeit goods amounted to importation into Singapore within the meaning of section 27(4)(c) of the TMA⁴¹ and whether the appellant's marks were used "in the course of trade". It was not disputed that the goods bore counterfeit trade marks identical to the marks owned by the appellants. However, the respondent argued that there was no act of importation since the counterfeit goods were not meant for circulation in the Singapore market. It also argued that the use of the appellants' trade marks was not "in the course of trade". The goods were loaded in sealed containers. But for the inspection by Customs, the goods would never have been exposed to view in Singapore. The High Court found that transshipment did amount to importation.⁴² The term "import" under section 2(1) of the Interpretation Act⁴³ ("IA") is defined as bringing or causing goods to be brought into Singapore by land, sea or air. There is no exception for goods in transit and there is no requirement for goods to be intended for free circulation in Singapore.⁴⁴ Further, the goods had *clearly* been used "in the course of trade" because they had been shipped to Singapore commercially and were intended for sale in Batam.⁴⁵ However, the court found that the respondent was not liable as an importer. The respondent had no part in making the shipping arrangements and in loading the containers on board the vessels. Instructions to the respondent to declare transshipment status came from a third party and there was little it could have done to prevent the goods from being brought into Singapore.⁴⁶

40 Section 27(1) states:

A person infringes a registered mark if, without the consent of the proprietor of the trade mark, he uses in the course of trade a sign which is identical with the trade mark in relation to goods or services which are identical with those for which it is registered.

41 Section 27(4)(c) states:

(4) For the purposes of this section and sections 28, 29 and 31, a person uses a sign if, in particular, he –

...

(c) imports or exports goods under the sign.

42 [2017] SGHC 305 at [146].

43 Cap 1, 2002, Rev Ed. "Import" is defined as:

"import" with its grammatical variations and cognate expressions, means to bring or cause to be brought into Singapore by land, sea or air ...

44 [2017] SGHC 305 at [142].

45 *Ibid*, at [127].

46 *Ibid*, at [173].

[16] The Court of Appeal agreed with the High Court's findings. Once the goods were brought into Singapore, this constituted importation.⁴⁷ The inquiry as to trade mark use is directed at the relationship between the sign and the goods and does not depend on whether the mark is actually seen by someone in Singapore. Consumers therefore do not need to see the sign before the sign can be said to be used in a trade mark sense.⁴⁸ Accordingly, the court found that the scope of section 27(4)(c) included goods in transit.⁴⁹ The respondent had also operated "in the course of trade" because the registered marks were being used for commercial purposes. There was no need for the goods to have been sold or traded in Singapore.⁵⁰ That being said, the court highlighted the need to balance the enforcement of IP rights against the over-extension of liability to honest commercial persons who were tangentially involving in the movement of counterfeit goods.⁵¹ To establish liability, the appellants had to prove that the respondent intended to import the goods and knew, or had reason to believe, that the signs were used on the goods.⁵² The respondent had been unaware of the presence of the signs on the goods and there was no evidence of an intention to import trade marked products.⁵³ Without sufficient *mens rea*, it was not liable for infringement by means of importation.

[17] As noted by the court itself, this decision has important implications for Singapore's transshipment industry and related parties such as shippers, carriers, stevedores and freight forwarders.⁵⁴ The finding by the Court of Appeal that freight forwarders must have the requisite mental element to be liable for importation is an important consideration. Such individuals must know or have reason to believe that they were transporting infringing goods. It is not a question of strict liability. In reality, it is difficult to say when forwarders will ever possess the requisite mental element for trade mark proprietors to bring successful claims. As in *Burberry Limited*, forwarders tend not to personally handle the goods and may have no inkling as to the

47 [2019] SGCA 01 at [74(a)].

48 *Ibid*, at [35].

49 *Ibid*, at [48].

50 *Ibid*, at [30].

51 *Ibid*, at [27].

52 *Ibid*, at [55] and [68].

53 *Ibid*, at [69] and [76].

54 *Ibid*, at [23].

presence of infringing goods. With Singapore being a hub for trade, it is likely that there will be further examination as to how IP rights should best be protected *vis-à-vis* the transshipment of counterfeit goods and who will be responsible for infringing acts.

[18] Turning to the law of copyright, the most prominent recent decision is *Global Yellow Pages Ltd v Promedia Directories Pte Ltd and another matter*⁵⁵ (“*Global Yellow Pages*”). The parties in *Global Yellow Pages* were both telephone directory producers. The plaintiff brought an action for copyright infringement, alleging that the arrangement of the defendant’s data in its directory was similar to the plaintiff’s. The Court of Appeal had to determine whether copyright subsisted in the plaintiff’s works. This in turn, necessitated a discussion of what amounted to “original” within section 27 of the Copyright Act⁵⁶ (“CA”). The court considered the two main approaches which have been adopted by the courts to determine if a work is original. These are the “sweat of the brow” approach and the “creativity” approach.⁵⁷ The former focuses on the author’s labour in producing the work. In contrast, the latter emphasises the end product of the work itself. In preferring the “creativity” approach, the court found that for copyright to subsist in a literary work “there must be an authorial creation that is causally connected with the engagement of the human intellect ...”.⁵⁸ Human intellect refers to the application of “intellectual effort, creativity or the exercise of mental labour, skill or judgment”. Effort that is not applied towards the authorial creation is irrelevant. Ultimately, it is a question of fact and degree whether an individual’s acts display sufficient intellectual effort and bear “a sufficient causal nexus with the final work such that it attracts copyright”.⁵⁹

55 [2017] 2 SLR 185.

56 Cap 63, 2006 Rev Ed. Section 27 states:

- (1) Subject to the provisions of this Act, copyright shall subsist in an original literary, dramatic, musical or artistic work that is unpublished ...
- ...
- (2) Subject to the provisions of this Act, where an original literary, dramatic, musical or artistic work has been published –
 - (a) copyright shall subsist in the work; or
 - (b) if copyright in the work subsisted immediately before its first publication, copyright shall continue to subsist in the work ...

57 [2017] 2 SLR 185 at [23].

58 *Ibid*, at [24].

59 *Ibid*, at [30].

[19] These findings indicate the clear preference for the “creativity” approach in Singapore. The Court of Appeal had earlier expressed an inclination towards the “creativity” approach in *Asia Pacific Publishing Pte Ltd v Pioneers & Leaders (Publishers) Pte Ltd*.⁶⁰ However, it did not expressly reject the “sweat of the brow” approach, only considering that it might “require reconsideration one day”.⁶¹ *Global Yellow Pages* makes it clear that pure labour and effort is no longer sufficient. The court in *Global Yellow Pages* also agreed with the High Court that there has been a noticeable retreat from the “sweat of the brow” approach in recent Australian and English authorities which now place greater emphasis on the “effort and labour of authorship”.⁶² This approach puts Singapore’s case law more in line with other jurisdictions.

[20] The court found that while the plaintiff’s entire list of classifications may have attracted copyright, copyright did not subsist in the listings arranged within each Yellow Pages classification. This was because the selection process of the contents therein lacked creativity and it had simply been a fact-discovery exercise.⁶³ “[C]opyright protects not ideas, facts or data but the expression thereof”.⁶⁴ *Global Yellow Pages* therefore establishes the prerequisite of creativity in determining copyright subsistence and is a useful touchpoint for the principles underlying copyright protection.

[21] Copyright law is also being developed in response to emerging challenges. A good illustration of this is *Disney Enterprises, Inc and others v M1 Ltd and others*⁶⁵ (“*Disney Enterprises*”). The plaintiffs, owners of various copyrights subsisting in cinematograph films, sought blocking orders to require the defendant Network Service Providers (“NSPs”) to disable access to websites which contained their copyrighted material without authorisation or consent. The context of this case is best understood against the backdrop of the popularity of the internet. In recent years the easy accessibility of online content has generated a serious problem for copyright owners. The television and film industries are perhaps among the most significantly affected by these developments. Consumers want their content fast and cheap, ideally free. This demand has led to a proliferation of illegal

60 [2011] 4 SLR 381 at [41], [73], [75] and [82].

61 *Ibid*, at [35].

62 *Ibid*, at [26].

63 *Ibid*, at [38].

64 *Ibid*, at [15].

65 [2018] 5 SLR 1318.

streaming services and torrent websites which infringe or facilitate the infringement of copyright. Internet users are able to access these websites through their NSPs.

[22] In response to this, the plaintiffs in *Disney Enterprises* sought orders to disable access to a list of Fully Qualified Domain Names, which facilitated access to 53 infringing websites. The application was made pursuant to section 193DDA of the CA.⁶⁶ This section was introduced as part of the Copyright Act Amendment Bill 2014. Prior to these amendments, the main legal recourse for copyright owners whose material was made available without their authority

66 Section 193DDA states:

- (1) Where the High Court is satisfied, on an application made by the owner or exclusive licensee of copyright in a material against a network service provider, that –
 - (a) the services of the network service provider have been or are being used to access an online location, which is the subject of the application, to commit or facilitate infringement of copyright in that material; and
 - (b) the online location is a flagrantly infringing online location, the High Court may, after having regard to the factors referred to in section 193DB(3), make an order requiring the network service provider to take reasonable steps to disable access to the flagrantly infringing online location.
- (2) For the purpose of determining under subsection (1)(b) whether an online location has been or is being used to flagrantly commit or facilitate infringement of copyright in materials, the High Court shall have regard to, and give such weight as the High Court considers appropriate to, all of the following matters:
 - (a) whether the primary purpose of the online location is to commit or facilitate copyright infringement;
 - (b) whether the online location makes available or contains directories, indexes or categories of the means to commit or facilitate copyright infringement;
 - (c) whether the owner or operator of the online location demonstrates a disregard for copyright generally;
 - (d) whether access to the online location has been disabled by orders from any court of another country or territory on the ground of or related to copyright infringement;
 - (e) whether the online location contains guides or instructions to circumvent measures, or any order of any court, that disables access to the online location on the ground of or related to copyright infringement;
 - (f) the volume of traffic at or frequency of access to the online location.
- (3) For the avoidance of doubt, the High Court shall not be confined to consideration of matters specified in subsection (2) and may take into account such other matters and evidence as may be relevant.

was to issue “take down” notices to NSPs. Section 193DDA, read with sections 193DDB⁶⁷ and 193DDC,⁶⁸ dramatically changed this.

67 Section 193DDB states:

- (1) Subject to subsection (3), the owner or exclusive licensee of copyright in a material must, before applying for an order under section 193DDA(1) –
 - (a) send a notice to the owner of the online location that is intended to be the subject of the order (referred to in this section as the relevant online location owner) stating that the online location has been or is being used to commit or facilitate infringement of copyright in the material, and the intention of the owner or the exclusive licensee, as the case may be, to apply for that order if the relevant online location owner does not, within the prescribed period, cease the use of the online location to commit or facilitate infringement of copyright in the material; and
 - (b) send upon or after the end of the prescribed period referred to in paragraph (a) or after reasonable efforts are made to send the notice referred to in paragraph (a) to the relevant online location owner, a notice to the network service provider that is to be the defendant in an action under that section stating the intention of the owner or exclusive licensee, as the case may be, to apply for that order.
- (2) Every application for an order under section 193DDA(1) must be served on the network service provider who is the defendant in the action under that section, and notice of the making of the application must be given to the relevant online location owner.
- (3) At the hearing of an application for an order under section 193DDA(1), the High Court may dispense with the notice required to be sent under subsection (1)(a) and the notice under subsection (2) if the High Court is satisfied that the plaintiff, despite reasonable efforts to do so, is unable to determine the identity or address of the relevant online location owner or to send the notices to the relevant online location owner.
- (4) The relevant online location owner shall –
 - (a) have the right to be heard on an application for an order under section 193DDA(1); and
 - (b) have the same right of appeal as a party to the application.
- (5) All provisions in Division 4 of Part V shall apply, with the necessary modifications, to any application for an order under section 193DDA(1).

68 Section 193DDC states:

- (1) The High Court may, on the application of a party to an order made under section 193DDA(1), vary the order as it thinks just if the High Court is satisfied that there has been a material change in the circumstances or that it is otherwise appropriate in the circumstances to do so.
- (2) The High Court may, on the application of a party to an order made under section 193DDA(1), revoke the order if the High Court is satisfied –
 - (a) upon further evidence, that the order ought not to have been made;
 - (b) that the online location has ceased to be a flagrantly infringing online location; or
 - (c) that it is otherwise appropriate in the circumstances to do so.
- (3) In this section, a reference to a party to an order made under section 193DDA(1) includes a reference to the owner of the online location that is the subject of the order.

Copyright owners now have the ability to apply directly to courts to block access to infringing websites. Where a blocking order is made, NSPs are compelled to take reasonable steps to block their subscribers' access to these websites.

[23] The High Court in *Disney Enterprises* granted the blocking orders sought, determining that the 53 websites in question were flagrantly infringing online locations⁶⁹ and were accessible through the defendants' services. The court observed that the operators of the websites demonstrated a disregard for copyright and there was non-compliance with the take-down notices issued by the plaintiffs.⁷⁰ A number of these sites had also been blocked in other jurisdictions.⁷¹ The court granted a main injunction and a dynamic injunction, the latter seeking to provide the rights-holders with the means to more effectively deal with circumventive measures. Dynamic injunctions allow rights holders to notify NSPs of previously unidentified domain names, URLs and IP addresses that provide access to the same websites which are the subject of the main injunction.⁷² This assists rights holders in countering attempts to circumvent blocking orders by infringers who may set up new means of access.⁷³ The courts are prepared to grant such dynamic injunctions where the circumstances warrant. The new provisions and the courts' approach reflect how IP law is working to respond to emerging challenges in rights protection. This will not only strengthen copyright protection in the television and film industries but will also assist other high-value industries which fall victim to illegal streaming and downloading, such as the sporting industry.

[24] Patent law has also seen notable developments. The Court of Appeal took on the relevance of Swiss-style claims in patent proceedings in *Warner-Lambert Co LLC v Novartis (Singapore) Pte Ltd*⁷⁴ ("*Novartis*"). Swiss-style claims were first allowed by the Swiss Patent Office due to a lack of legislation for the protection of subsequent medical uses of substances and/or compositions. Such substances and compositions would ordinarily be regarded as "known" within the state of the art and would therefore lack novelty for the purposes

69 [2018] 5 SLR 1318 at [23].

70 *Ibid*, at [26].

71 *Ibid*, at [27].

72 *Ibid*, at [38].

73 *Ibid*, at [42].

74 [2017] 2 SLR 707.

of patent registration. The Swiss-style claim circumvents this issue by adopting a general formulation: “[t]he use of compound X in the manufacture of a medicament for a specified (and new) therapeutic use Y”.⁷⁵ Swiss-style claims are therefore claims over the use of a substance or composition for the *purpose of manufacturing*. As such, they do not fall within the usual method of treatment exclusions (reflected in section 16(2) of the Patents Act⁷⁶ (“PA”).

[25] Swiss-style claims have been accepted and are fairly established in several jurisdictions including the UK and Europe (although in view of Article 54(5) of the European Patent Convention⁷⁷ there is no longer a need to claim second medical use inventions in the Swiss format). Prior to *Novartis*, the validity of Swiss-style claims had not been considered by the Singapore courts. *Novartis* concerned the dismissal of an application by the High Court to amend a pharmaceutical patent under section 83(1) of the PA.⁷⁸ The proposed amendment

75 Ibid, at [80].

76 Cap 221, 2005 Rev Ed. Section 16(2) states:

An invention of a method of treatment of the human or animal body by surgery or therapy or of diagnosis practised on the human or animal body shall not be taken to be capable of industrial application.

77 Article 54 states:

- (1) An invention shall be considered to be new if it does not form part of the state of the art.
- (2) The state of the art shall be held to comprise everything made available to the public by means of a written or oral description, by use or in any other way, before the date of filing of the European patent application.
- (3) Additionally, the content of European patent applications as filed, the dates of filing of which are prior to the date referred to in paragraph 2 and which were published on or after that date, shall be considered as comprised in the state of the art.
- (4) Paragraphs 2 and 3 shall not exclude the patentability of any substance or composition, comprised in the state of the art, for use in a method referred to in Article 53(c), provided that its use for any such method is not comprised in the state of the art.
- (5) Paragraphs 2 and 3 shall also not exclude the patentability of any substance or composition referred to in paragraph 4 for any specific use in a method referred to in Article 53(c), provided that such use is not comprised in the state of the art.

78 Section 83(1) states:

In any proceedings before the court or the Registrar in which the validity of a patent is put in issue, the court or, as the case may be, the Registrar may, subject to section 84, allow the proprietor of the patent to amend the specification of the patent in such manner, and subject to such terms as to the publication and advertisement of the proposed amendment and as to costs, expenses or otherwise, as the court or Registrar thinks fit.

had comprised a change from an unpatentable method of treatment claim to a Swiss-style claim. In its reasoning, the High Court observed the potential difficulties that arise in interpreting Swiss-style claims. It is challenging to identify the nexus between the manufacture of the substance/composition and its intentional administration for treatment (*Warner-Lambert Co LLC v Novartis (Singapore) Pte Ltd*).⁷⁹ It acknowledged, however, that the subject matter of a Swiss-style claim is different from a claim that is directed towards a method of treatment by administering the compound.⁸⁰

[26] On appeal, the Court of Appeal made two observations – firstly, that the PA appears to support the patentability of second and subsequent medical uses of known substances and secondly, although Swiss-style claims are a valid way of framing claims for subsequent medical uses of a known substance, a purpose limited product claim may also suffice.

[27] In reaching this latter conclusion, the court referred to section 14(7) of the PA.⁸¹ In the court’s opinion, finding a new use for a known substance was no less novel than finding the substance itself.⁸² It was therefore persuaded that the scope of section 14(7) allows for the patenting of second and subsequent uses of a known substance. There would therefore be limited use for Swiss-style claims which involve “a fiction (implicit) behind the finding of novelty in the method of manufacture on the basis of a new therapeutic use”.⁸³ In substance, Swiss-style claims are “merely a novel and perhaps questionable way of getting around what has been perceived to be the meaning of section 14(7) of the PA ...”.⁸⁴ Whilst it accepted the validity of Swiss-style claims in principle, the Court of Appeal effectively nullified their necessity.

79 [2016] 4 SLR 252 at [89].

80 *Ibid*.

81 Section 14(7) states:

In the case of an invention consisting of a substance or composition for use in a method of treatment of the human or animal body by surgery or therapy or of diagnosis practised on the human or animal body, the fact that the substance or composition forms part of the state of the art shall not prevent the invention from being taken to be new if the use of the substance or composition in any such method does not form part of the state of the art.

82 [2017] 2 SLR 707 at [86].

83 *Ibid*, at [88].

84 *Ibid*, at [96].

[28] A final case for consideration is *Lee Tat Cheng v Maka GPS Technologies Pte Ltd*⁸⁵ (“*Lee Tat Cheng*”). The proprietor of a patent for an in-vehicle camera appealed against the findings of the High Court that the defendant’s models of in-vehicle cameras did not infringe its patent claims. The decision is significant because of the Court of Appeal’s ruling on the interpretation of patent claims and the applicability of the doctrine of equivalents in Singapore. The doctrine of equivalents is a legal rule which has been adopted by many jurisdictions for the purpose of determining if there has been patent infringement. Under this doctrine, a party is liable for patent infringement if his device/process is deemed to be the substantial *equivalent* of the claimed invention. It does not matter that it falls outside the literal scope of the patent claim.

[29] The Court of Appeal rejected the incorporation of the doctrine of equivalents into Singapore law. In doing so, it declined to follow the decision of the UK Supreme Court (“UKSC”) in *Actavis UK Ltd v Eli Lilly and Co* (“*Actavis*”), which imports the doctrine of equivalents into English law.⁸⁶ The court explained that the decision in *Actavis* had to be considered in its proper context. The case was decided shortly after Article 2 of the Protocol to Article 69 of the European Patent Convention⁸⁷ (“Article 2”) came into force. The UKSC was therefore bound to give effect to it. However, Singapore patent law operates in a “materially different context”.⁸⁸ Singapore is not a party to the European Patent Convention and its PA is modelled on the 1997 UK Patents Act. Applying *Actavis* and the doctrine of equivalents would give rise to undue uncertainty.⁸⁹ The doctrine would also introduce an element of *ex post facto analysis* focused on the operation of the patented invention at the time of infringement rather than the patentee’s objective intention as to the scope of his monopoly at the time of application.

[30] The court in *Lee Tat Cheng* also took the view that the broadened approach to claim interpretation in *Actavis* was inconsistent with

85 [2018] 1 SLR 856.

86 [2017] UKSC 48 at [53]–[54].

87 Article 2 states:

For the purpose of determining the extent of protection conferred by a European patent, due account shall be taken of any element which is equivalent to an element specified in the claims.

88 [2018] 1 SLR 856 at [51].

89 *Ibid*, at [53].

Singapore legislation. Prior to *Actavis*, English courts had adopted a purposive approach to claim interpretation as set out in the decision, *Catnic Components Ltd v Hill & Smith Ltd*.⁹⁰ Under the purposive approach, the scope of patent protection is determined by the language of the claim itself. However, the UKSC in *Actavis* found the problem of infringement to be best approached by addressing two issues: (i) whether the variant infringes any of the claims as a matter of normal interpretation and if not, (ii) whether the variant nonetheless infringes because it varies from the invention in ways that are immaterial.⁹¹ This revised approach extends beyond the scope of the patent claims. In referencing section 113(1) of the PA,⁹² the Singapore Court of Appeal observed that the wording of the section clearly confined claim construction to what was specified in the claims.⁹³ There were good reasons for this. It was fair that a patentee should be bound by the language he had chosen to frame the claims of his patent. Conjunctively applying the purposive approach would “militate against potentially harsh results that a strict literal approach might bring about”. It would also strike the appropriate balance between fair protection to patentees and certainty for third parties who rely on claims as delimiting the scope of protection.⁹⁴ In its view, *Actavis* favoured the patentee too heavily.

[31] The above cases give a brief snapshot of the developments in IP law. It is an encouraging picture. Recent decisions from the Singapore courts have realigned our jurisprudence with doctrinal principles and have also developed and clarified legal issues.

90 [1982] RPC 183.

91 [2017] UKSC 48 at [54].

92 Section 113(1) states:

For the purposes of this Act, an invention for a patent for which an application has been made or for which a patent has been granted shall, unless the context otherwise requires, be taken to be that specified in a claim of the specification of the application or patent, as the case may be, as interpreted, by the description and any drawings contained in that specification, and the extent of the protection conferred by a patent or application for a patent shall be determined accordingly.

93 [2018] 1 SLR 856 at [51].

94 *Ibid*, at [52].

Recent Developments in Singapore Land Law: Selected Aspects

by

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Introduction

[1] This paper will discuss the case law developments in the following three areas, namely, (i) co-ownership of land in relation to the issue of severance of a joint tenancy by means of a unilateral declaration in respect of registered land; (ii) indefeasibility of title/interests in land on the question of the jurisdiction of the court to do equity in appropriate cases; and (iii) the meaning of “common property” in strata-titled properties.

Co-ownership

[2] The issue of severance of a joint tenancy by means of a unilateral declaration at common law and under the Land Titles Act¹ (“LTA”) in respect of registered land was recently resolved by a five-member *coram* of the Court of Appeal in *Chan Lung Kien v Chan Shwe Ching*² (“*Chan Lung Kien*”). The decision reaffirmed the position at common law in Singapore and clarified the position under the LTA.

[3] The property in question was owned by the judgment debtor and her husband as joint tenants. In 2015, both the appellant and respondent had each obtained separate judgments against the judgment debtor. Subsequently, on July 9, 2015, the husband of the judgment debtor took steps in an attempt to sever the joint tenancy over the property. He appeared before a notary public in Melbourne, Australia and executed an instrument of declaration in the form approved pursuant to section 53(5) of the LTA whereby he declared that he wished to sever the joint tenancy and hold the property as a tenant in common with the

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1 Cap 157, 2004 Rev Ed.

2 [2018] 2 SLR 84.

judgment debtor. On July 10, 2015, the respondent obtained an order for the judgment debtor's interest in the property to be attached and taken in execution under a writ of seizure and sale ("WSS") to satisfy her judgment. The WSS was also registered with the Singapore Land Authority. On August 4, 2015, a notice entitled "Severance Notice" appeared in *The Straits Times* which was addressed to the judgment debtor, giving her notice that her husband intended to sever the joint tenancy and hold the property as a tenant in common with her. The appellant came to know of the Severance Notice and also obtained a WSS against the property which was similarly registered with the Singapore Land Authority. Thereafter, the bank, which held a mortgage over the property, obtained a mortgagee's sale. The judgment debtor's share of the sale proceeds, after settlement of the amount due to the bank, was paid to the respondent's solicitors pending the outcome of the dispute between the appellant and the respondent as to whose WSS was effective to attach to the sale proceeds. Later on, the judgment debtor was made a bankrupt.

[4] From the High Court decision,³ the appellant only appealed against the judge's ruling that the Severance Notice was ineffective in severing the joint tenancy. The appellant (as well as the respondent) did not appeal against the judge's holding that prior to severance, a joint tenant's interest in jointly held property cannot be attached. The latter issue was, thus, not before the Court of Appeal which declined to opine on the matter without the full benefit of parties' submissions.

[5] Accordingly, the issues for the Court of Appeal to consider were as follows: "first, whether a co-owner of registered land who holds his interest as a joint tenant with the other co-owner(s) can, outside of the statutorily provided procedure, unilaterally sever that joint tenancy by a declaration of intention to sever; and second, how the mode of severance provided for by sections 53(5) and 35(6) of the [LTA] is to be applied or implemented".⁴

Position at common law

[6] In *Williams v Hensman*,⁵ Page-Wood VC laid down the three recognised common law methods of severance as follows: (a) by

3 See *Chan Lung Kien v Chan Shwe Ching* [2018] 4 SLR 208.

4 *Chan Lung Kien*, n 2 above, at [1].

5 (1861) 70 ER 862 at 867.

operating on his own share; (b) mutual agreement; and (c) mutual conduct or course of dealing. The first mode of severance was considered to mean selling or assigning the share though it was thought to also include making a unilateral declaration of severance.⁶ The above three modes of severance operated at common law in England until 1925. After the English Law of Property Act 1925⁷ (“LPA 1925”) abolished tenancies in common at law and required all legal estates of co-ownership to be held in joint tenancies, these modes continued to operate in equity only.⁸ The position in Singapore is different as no similar legislation has been enacted and the common law estates of joint tenancies and tenancies in common remained in existence.⁹

[7] The position at common law as pronounced by the Singapore Court of Appeal in *Sivakolunthu Kumarasamy v Shanmugam Nagaiah*¹⁰ (“*Sivakolunthu*”) is that a unilateral declaration of severance by one joint tenant cannot sever a joint tenancy into a tenancy in common no matter how clear and unequivocal the declaration is. The court noted that a unilateral declaration was only effective for severance in England because of section 36(2) of the LPA 1925, which provided for severance by written notice. This was supported by the English Court of Appeal cases of *Harris v Goddard*¹¹ (“*Harris*”) and the majority decision of Sir John Pennycuik and Browne LJ in *Burgess v Rawnsley*¹² (“*Burgess*”). However, it was the common law prevailing before 1925 that applied in Singapore. *Sivakolunthu* has long been recognised as stating the law in Singapore.

[8] In *Sivakolunthu*, during the husband’s lifetime, the court granted a decree *nisi* on the wife’s petition for divorce and made a settlement order for the sale of the property and equal division of the sale proceeds. Before the settlement order was implemented, the husband died. The Court of Appeal ruled that the settlement order severed the

6 See Gray & Gray, *Elements of Land Law*, 5th edn (Oxford University Press, 2009), 7.4.74 and 7.4.82; and Harpum *et al* (eds), *Megarry & Wade The Law of Real Property*, 8th edn (Sweet & Maxwell, 2012), 13-041.

7 c 20 (UK).

8 Gray & Gray, n 6 above, at 7.4.67–7.4.68; and *Megarry & Wade*, n 6 above, at 13-036.

9 *Williams v Hensman*, n 5 above, was applied in the local decisions of *Tan Chew Hoe Neo v Chee Swee Cheng* [1929] 1 MLJ 643 at 646 and *Jack Chia-MPH Ltd v Malayan Credit Ltd* [1983–1984] SLR(R) 420 at [2].

10 [1987] SLR(R) 702 at [14].

11 [1983] 1 WLR 1203.

12 [1975] 3 All ER 142.

joint tenancy in the property even before the order had been carried out. In light of this, the appellant contended that the pronouncement on severance by a unilateral declaration in *Sivakolunthu* was only *obiter* and hence not persuasive on the matter as the holding that the settlement order effected severance was sufficient to dispose of the case. It was also contended that *Sivakolunthu* misinterpreted some English authorities. The appellant argued for a departure from *Sivakolunthu* and, in its place, for the proposition that at common law a unilateral declaration that is clear, unequivocal, communicated to the other joint tenant and made public is effective to sever a joint tenancy in equity.

[9] For the immediately preceding proposition, the appellant relied on two English High Court cases, namely, *Hawkesley v May*¹³ (“*Hawkesley*”) and *In re Draper’s Conveyance*¹⁴ (“*Draper’s Conveyance*”) which in the opinion of the appellant did not rely on section 36(2) of the LPA 1925. The Court of Appeal in *Chan Lung Kien* was of the view that, although *Sivakolunthu* may have misread these English High Court cases as illustrating severance under section 36(2) of the LPA 1925, there was a preponderance of English cases decided at both first instance and appellate level which held that unilateral declarations of severance were ineffective before section 36(2) was enacted. This included *Partejche v Powlet*¹⁵ (“*Partejche*”) where it was held that declaration by one of the parties that the joint tenancy should be severed was not sufficient unless it amounted to an actual agreement or an alienation of the property.¹⁶ In *In re Wilks*¹⁷ (“*Wilks*”), a mere application to court for payment of money was held to be nothing more than a declaration that the joint tenant wished a severance. It had no effect on the joint tenancy as it was not an actual alienation or disposition or a contract to sever between joint owners for the joint tenant could have withdrawn his application at any time before an order was made. In *Nielson-Jones v Fedden*¹⁸ (“*Nielson-Jones*”), the court refused to follow *Hawkesley* and *Draper’s Conveyance* as it would mean that section 36(2) of the LPA 1925 would be rendered otiose because there would already be in existence an even simpler method of severing a joint tenancy.¹⁹

13 [1956] 1 QB 304.

14 [1969] 1 Ch 486.

15 (1740) 4 West T Hard 788.

16 *Ibid* at 789–790.

17 [1891] 3 Ch 59.

18 [1974] 3 WLR 583.

19 *Ibid*, at 596D.

[10] As for *Burgess*, the Court of Appeal in *Sivakolunthu* considered Lord Denning's view that section 36(2) of the LPA 1925 was merely declaratory of the law as to severance by notice in writing which was effective in equity to sever a joint tenancy.²⁰ Sir John Pennycuick and Browne LJ took a different view in regard to the effect of the provision.²¹ In the result, they held that the second mode of severance by mutual agreement applied in the case while Lord Denning was of the view that a course of dealing need not consist of mutual conduct but could include unilateral conduct that communicated a clear intention to the other joint tenant. *Sivakolunthu* preferred the majority view in *Burgess* as better representing the position at common law. The majority view in *Burgess* as to the effect of section 36(2) was also aligned with that of the subsequent Court of Appeal case of *Harris* where it was observed that severance by a unilateral notice was not possible before the provision was enacted and that before 1925, severance by unilateral action was only possible when one joint tenant disposed of his interest to a third party.²² Having considered all the relevant cases, the Court of Appeal in *Chan Lung Kien* was of the view that there was "... more than sufficient material from which it may be concluded that in England, if it were not for s 36(2) of the LPA 1925, a unilateral written notice would not suffice to sever a joint tenancy in equity".²³

[11] From the discussion above, it can be seen that a major objection to the mode of severance by unilateral declaration is that the joint tenant who is severing can backtrack and go back to insisting on his or her right of survivorship. In *Wilks*, Stirling J held that for an act to amount to severance, "... it must be such as to preclude [the joint tenant] from claiming by survivorship any interest in the subject-matter of the joint tenancy".²⁴ The joint tenant in *Wilks* could have withdrawn his application to the court for payment of money at any time before an order was made thereon. Similarly, in *Nielson-Jones*, Walton J was of the view that the authorities were against severance by means of a unilateral declaration²⁵ as such a mode of severance had no effect on any of the four unities (i.e. of title, interest, possession and

20 *Sivakolunthu*, n 10 above, at [15].

21 *Burgess*, n 12 above, at 154.

22 *Harris*, n 11 above, at 1209B.

23 *Chan Lung Kien*, n 2 above, at [41].

24 *Wilks*, n 17 above, at 62.

25 *Nielson-Jones*, n 18 above, at 593.

time) which are essential features of a joint tenancy.²⁶ Accordingly, to argue that a unilateral declaration came within an act of a joint tenant operating on his or her own share and hence effecting severance, was insufficient. For this first mode of severance laid down in *Williams v Hensman*²⁷ to be effective, the declaration in question must be final or irrevocable in character such that the joint tenant concerned cannot go back to insisting on the right of survivorship.²⁸ Thus, in *Partejche*, it was held that a declaration was effective to amount to severance if it amounted to an actual agreement or an alienation of the property.²⁹ In *Harris*, Lawton LJ also observed to the same effect that severance by unilateral action was only possible when one joint tenant disposed of his interest to a third party.³⁰ Again in *Nielson-Jones*, Walton J held that, "The first method of severance of which the Vice-Chancellor [in *Williams v Hensman*] was talking was actual alienation, or something equivalent thereto".³¹

[12] Having reaffirmed *Sivakolunthu* as establishing the law in Singapore on modes of severance at common law,³² the Court of Appeal in *Chan Lung Kien* next considered whether the statutory mode of severance by unilateral declaration provided in the LTA was complied with.

Position under the Land Titles Act

[13] The LTA provides for a statutory mode of severance of a joint tenancy by unilateral declaration in section 53(5) and (6).³³ These provisions read as follows:

26 *Ibid*, at 588CH and 590F.

27 *Williams v Hensman*, n 5 above.

28 See Gray & Gray, n 6 above, 7.4.73.

29 *Partejche*, n 16 above. See also *Wilks*, n 17 above (and the accompanying text), where Stirling J held that the declaration must amount to an actual alienation or disposition or a contract to sever between joint owners.

30 *Harris*, n 11 above, at 1209B.

31 *Nielson-Jones*, n 18 above, at 594.

32 See also *Singapore Parliamentary Debates*, Official Report (January 18, 1993), Vol 60, Cols 375–376 on the Land Titles Bill (No 36 of 1992) which accepted the law as stated in *Sivakolunthu*.

33 For unregistered land, see Conveyancing and Law of Property Act (Cap 61, 1994 Rev Ed), s 66A(3) and (4) which provide for severance to be completed upon service of the deed of declaration.

Section 53

...

- (5) Without prejudice to any rule or principle of law relating to severance of a joint tenancy, any joint tenant may sever a joint tenancy of an estate or interest in registered land by an instrument of declaration in the approved form and by serving a copy of the instrument of declaration personally or by registered post on the other joint tenants.
- (6) Upon the registration of the instrument of declaration which has been duly served as required by subsection (5), the respective registered estates and interests in the registered land shall be held by the declarant as tenant-in-common with the remaining joint tenants, and the declarant shall be deemed to hold a share that is equal in proportion to each of the remaining joint tenants as if each and every one of them had held the registered land as tenants-in-common in equal shares prior to the severance.

[14] These provisions seek to improve on the existing law on severance of a joint tenancy at common law which is restrictive and available in very limited circumstances as seen above.³⁴ It should be noted that section 53(5) and (6) provide an additional means of severing a joint tenancy on top of other recognised methods of severance under existing law.³⁵

[15] In essence, for severance to be effective under section 53(5) and (6), three steps must be taken. First, an instrument of declaration in the approved form would have to be executed. Second, the instrument would have to be served personally or by registered post on every other joint tenant. Third, the instrument would have to be registered on the land register. In respect of the third step, it was a requirement then for the joint tenant who was severing to produce the original certificate of title for the property to the Registrar of Titles. To overcome the difficulties in procuring the original certificate of title in some cases, section 53(8) of the LTA was enacted in 2001 to allow the Registrar of Titles to dispense with production of the certificate of title if he was satisfied that the applicant for registration of an instrument of

³⁴ See n 32 above.

³⁵ *Singapore Parliamentary Debates*, Official Report (August 30, 1993), Vol 61, Col 476.

declaration was unable to produce it despite the applicant's best efforts to do so.

[16] The effect of section 53(5) and (6) was considered by the Court of Appeal in *Diaz Priscillia v Diaz Angela*³⁶ ("*Diaz*"). In the instant case, the mother and the appellant, one of her two daughters, were joint tenants of a house registered under the LTA. Subsequently, the mother had signed an instrument of declaration under section 53(5), declaring her intention to sever the joint tenancy and hold the property as tenant in common with the appellant. A copy of the instrument of declaration was served on the appellant but was not registered pursuant to section 53(6). After the mother died, the respondent, the other daughter who was the beneficiary and executor of her mother's estate, lodged a caveat on the property. The appellant applied for the caveat to be removed on the ground that she was entitled to the entire property on account of her right of survivorship. The issue was whether the mother had effected severance of the property by her execution and service of the instrument. The High Court found in favour of the respondent and the appellant appealed.

[17] The Court of Appeal held that the joint tenancy had been severed. The court reasoned that the purpose of section 53(5) and (6) is to enable a joint tenant to have "full dispositive power" and to sever the joint tenancy without obtaining the consent of the other joint tenants. These provisions are meant to provide a co-owner a simpler way of severing the joint tenancy without having to obtain the consent of the other party which sometimes may or would not be feasible. For example, the duplicate certificate of title might be in the possession of one of the other joint tenants or other person, say a mortgagee, who refused to release it. In such a case, the severing joint tenant would not be able to proceed with registration of the instrument. This would frustrate the purpose of section 53(5) and (6) which could not be the intention of the legislature.³⁷ Accordingly, once the instrument of declaration is served on the other joint tenant(s) under section 53(5), the joint tenancy is severed as between the joint tenants. However, third parties are only bound to treat the joint tenancy as severed upon registration under section 53(6). The Court of Appeal in *Diaz* held that a severance would occur under the LTA on completion of the first two steps.

36 [1997] 3 SLR(R) 759.

37 *Ibid*, at [24].

[18] In light of *Diaz*, the appellant in *Chan Lung Kien* had argued that *Diaz* recognised that the signing and service of an instrument of declaration in the form approved pursuant to section 53(5) was effective to sever a joint tenancy *inter partes* notwithstanding its non-registration. The appellant further argued that *Diaz* demonstrated that an unequivocal act that evinces a clear intention to sever should be treated as the act of a joint tenant “operating on his own share” so as to effect severance at common law.

[19] While the outcome of *Diaz* was generally accepted as just given the circumstances of the case, the Court of Appeal in *Chan Lung Kien* did not accept the contentions of the appellant which had their genesis in academic opinions. The court was of the view that the appellant had relied on academic opinions, which were confined to the facts of *Diaz*, to support his wider argument that any unilateral declaration that is clear, unequivocal, communicated and public can effect a severance in equity.

[20] The Court of Appeal in *Chan Lung Kien* did not agree with the academic view that, to overcome the difficulty of characterising the co-owner’s right as a personal right and a caveatable interest at the same time, *Diaz* could be interpreted as a case where service of an instrument of declaration under section 53(5) severed the joint tenancy in equity by an act of a joint tenant operating on her own share (i.e. the first mode of severance in *Williams v Hensman*). Thus, upon severance, each co-owner held a proprietary half-share in equity rather than a personal equity that was binding between themselves only.³⁸ In the result, *Diaz* was transformed “from a case rationalised by an interpretation of s 53 to a case rationalised by a (proposed) common law doctrine of severance by unilateral declaration”.³⁹

[21] In rejecting the academic view above as unacceptable, the Court of Appeal in *Chan Lung Kien* reasoned thus:⁴⁰

In the first place, why should service of an instrument under s 53(5) amount to an act operating on one’s own share? Under established

38 See Barry Crown, “Severance of a Joint Tenancy” [1998] Sing JLS 166 at 170.

39 *Chan Lung Kien*, n 2 above, at [59]. See also Barry Crown, “Developments in the Law of Co-Ownership” [2003] Sing JLS 116 at 122. This suggestion by Crown was also supported by Tan Sook Yee *et al*, *Tan Sook Yee’s Principles of Singapore Land Law*, 3rd edn (LexisNexis, 2009), para 15.69, n 112.

40 *Chan Lung Kien*, n 2 above, at [62].

law, a unilateral declaration, even if communicated or unequivocal or clear, does not operate on a joint tenant's share at common law as *Sivakolunthu* has established. Going back to first principles, the act of serving the instrument does not destroy any of the four unities. Secondly, it was not the purpose of the legislation to expand on the first mode of severance: the intention, as clear from the Parliamentary debates, was to provide a completely new mode of severance and Parliament's intention must be respected.

[22] The court helpfully explained how the mode of severance in section 53(5) and (6) is to be applied. Given the framework in section 53(5) and (6), the decision in *Diaz*, although well-intentioned, could not be supported. To hold that compliance with section 53(5) alone is sufficient to effect severance under the LTA would make the registration requirement in section 53(6) redundant. This would go against the whole rationale of the three-step approach to effect severance provided therein and where registration is the cornerstone of the LTA.⁴¹ While section 53(8) will now make it easier to register an instrument of declaration as production of the certificate of title may be dispensed with, the Court of Appeal in *Chan Lung Kien* made it clear that that was not the basis of their decision. Instead, "Our construction of ss 53(5) and 53(6) is based on a plain reading of the language of the sections in their context and with a view to implementing the Parliamentary intention they represent".⁴²

[23] On the facts in *Chan Lung Kien*, there was no severance of the joint tenancy under the LTA as the instrument of declaration was not registered. Also, the manner in which the husband of the judgment debtor purported to serve the instrument did not fully comply with the requirements in section 53(5) which requires service "personally or by registered post". Among others, the Court of Appeal noted that the modes of service adopted, which were posting the instrument via a certificate of posting and placing a newspaper advertisement in Singapore, did not satisfy the statutory requirement as the LTA does not provide for the specified mode of service to be dispensed with or substituted.⁴³ Even if the husband of the judgment debtor did not know the whereabouts of the latter, and hence could not effect

41 *Ibid*, at [64].

42 *Ibid*, at [65].

43 *Ibid*, at [68].

personal service, he could have effected service by registered post. In *Chan Lung Kien*, severance only came about later by operation of law when the judgment debtor was made a bankrupt.

[24] The Court of Appeal in *Chan Lung Kien* has greatly clarified the law on severance under the LTA which is to be welcomed. The decision provides the much needed certainty on the approach to be taken in the application of the required three steps to effect severance under section 53(5) and (6). This is welcome relief, especially given the unsatisfactory decision in *Diaz*. The registration requirement should also no longer represent an obstacle (or an excuse, as the case may be, in some cases) to effecting severance under the LTA in light of section 53(8).

[25] With the decision in *Chan Lung Kien*, it would effectively mean that section 53(5) and (6) provides for an all-or-nothing approach. Failure to sever thereunder does not open the door, so to speak, to other recognised methods of severance under existing law, at least in so far as the mode of severance by operating on one's own share is concerned. The words "Without prejudice to any rule or principle of law relating to severance of a joint tenancy" in the opening sentence of section 53(5) should not be read to provide for a fall back to other recognised methods of severance in the event of a failure to sever under the LTA. The mode of severance by an act of a joint tenant operating on his own share cannot apply as the instrument of declaration cannot be regarded as final or irrevocable⁴⁴ (in the event of failure to register), such that the severing joint tenant can go back to insisting on the right of survivorship. This is a consistent and principled approach in line with the position at common law already discussed above.

Indefeasibility of title/interests

[26] A persistent and live issue in this area pertains to the jurisdiction of the court to do equity in appropriate cases. More specifically, it relates to the applicability of constructive trusts as an exception to indefeasibility both under the LTA and outside of the statute. This issue was highlighted again recently in the High Court case of *Chia Hang Kiu v Chia Kwok Yeo*⁴⁵ where the plaintiffs failed to establish that a

⁴⁴ See discussion in para [11] of this article.

⁴⁵ [2016] SGHC 198.

trust arose in their favour and that consequently, it was unnecessary to consider whether the plaintiffs could assert their alleged unregistered beneficial interests against the defendants' registered titles. In the course of delivering the judgment, the High Court had commented that three Court of Appeal authorities, namely, *United Overseas Bank Ltd v Bebe bte Mohammad*⁴⁶ ("*Bebe*"), *Ho Kon Kim v Lim Gek Kim Betsy*⁴⁷ ("*Betsy Lim*") and *Loo Chay Sit v Estate of Loo Chay Loo*⁴⁸ ("*Loo Chay Sit*"), did not sit easily with each other on this issue and appeared to be inconsistent.⁴⁹ This issue gained prominence with the decision of the Court of Appeal in *Bebe* which took the view, albeit *obiter* as can be seen in the discussion below, that section 46(2)(c) of the LTA only encompasses express trusts.⁵⁰ The court in *Bebe* also expressed the view that Singapore courts should be slow when applying personal equities (which can take the form of constructive trusts) outside the confines of the indefeasibility statutory exceptions in the LTA so as to ensure certainty and finality in land transactions.⁵¹

[27] The issue of the application of constructive trusts in the context of indefeasibility in the Singapore Torrens system first arose for consideration before the Court of Appeal in the case of *Betsy Lim*. The appellant had granted an option to the first respondent to purchase the former's land. Clause 18(a) contained in the option provided that the first respondent would deliver one of the three detached houses to be built on the land to the appellant upon its completion. The plot in question was earmarked as the plot belonging to the appellant and to be transferred to her eventually. The option was exercised and the land was sold to the first respondent who mortgaged it to Oversea-Chinese Banking Corp Ltd ("*OCBC*") to finance the construction of the development on the property. OCBC in the facility agreement, which was supplemental to the mortgage, recognised the appellant's interest in the property. Subsequently, without the knowledge of the appellant, the first respondent discharged the mortgage to OCBC and

46 [2006] 4 SLR(R) 884.

47 [2001] 3 SLR(R) 220.

48 [2010] 1 SLR 286.

49 *Chia Hang Kiu v Chia Kwok Yeo*, n 45 above, at [100].

50 *Bebe*, n 46 above, at [73], [76] and [77].

51 *Ibid*, at [91]. See also, generally, Teo, "The Trust Statutory Exception to Indefeasibility in the Singapore Torrens system" [2017] Sing JLS 151; Crown, "Whither Torrens Title in Singapore?" (2010) 22 SAclJ 9; and Low, "The Story of 'Personal Equities' in Singapore: Thus Far and Beyond" [2009] Sing JLS 161.

re-mortgaged the land to RHB Bank purely for her own purposes, namely, as security for credit facilities granted to a company wherein the first respondent and her husband were directors and shareholders. RHB Bank in taking the mortgage acknowledged the appellant's equitable interest in the land and by clause 6(2)(b) of the regulating agreement made with the first respondent, agreed to be bound by that interest in the property. Before completion of the houses on the land, the first respondent went bankrupt and a winding-up order was made against her company. The appellant commenced proceedings in the High Court against, *inter alia*, the first respondent for breach of trust and RHB Bank for knowing receipt of trust property. The High Court dismissed her claims and the appellant appealed.

[28] In allowing the appeal, LP Thean JA, in delivering the judgment of the court, rejected the contention of the first respondent that her title to the property was absolute being the registered proprietor and that this defeated the equitable interest of the appellant. His Honour correctly pointed out that section 46(1) of the LTA was qualified by section 46(2)(b) and (c) thereof which, in essence, enabled the appellant's equitable interest to bind the first respondent's title to the land in the circumstances of the case.⁵² As for RHB Bank, they argued that their mortgage was indefeasible and that they took the land as a registered mortgagee free of the appellant's interest as there was no entry in the register of titles of the latter's interest. Thean JA dealt with RHB Bank's argument on two grounds. First, he sought to determine whether the conduct of the bank was fraudulent in disregarding the interest of the appellant in the property. As Thean JA correctly pointed out, "fraud", as understood in the LTA, meant "... actual fraud, ie dishonesty of some sort, and not constructive or equitable fraud ...".⁵³ Merely to take a transfer of land with notice of an existing unregistered interest is not fraud.⁵⁴ Thean JA concluded, on the facts, that RHB Bank did not commit fraud. The bank merely had notice and knowledge of the material facts at the time of the mortgage.⁵⁵ There was no dishonest intention on the part of bank at the material time, i.e. at the time of registration of the mortgage. Thus, the facts did not justify a finding

52 *Betsy Lim*, n 47 above, at [26].

53 *Ibid*, at [45]. See also *Assets Co v Mere Roihi* [1905] AC 176 at 210; and *Waimiha Sawmilling Co v Waione Timber Co* [1926] AC 101 at 106.

54 *Betsy Lim*, n 47 above. See also LTA, s 47(1)(c) and (2).

55 *Betsy Lim*, *ibid*, at [30].

of dishonest repudiation by the bank of the appellant's unregistered interest in the land.⁵⁶ This is trite as the fraud complained of must be that which resulted in registration of the mortgage. The timing and sequence of events in *Betsy Lim* just do not coincide to make the bank's mortgage defeasible on the ground of actual fraud.

[29] However, the appellant was entitled to bring a claim *in personam* on the second ground against the bank.⁵⁷ The following factors rendered RHB Bank's subsequent conduct, i.e. after registration of the mortgage, in repudiating the interest of the appellant unconscionable: it was a condition of acceptance by the first respondent of the bank's loan that the latter would not claim the appellant's interest as part of the mortgage; the bank had knowledge of the appellant's interest; the regulating agreement acknowledged, recognised and committed the bank to honouring the interest as the valuation for the loan excluded the value of the appellant's interest.⁵⁸ As such, Thean JA found that it was:

“[U]tterly inequitable” for [RHB Bank] to renege from their obligation and insist on the absolute nature of their interest as a mortgagee of the whole of the property and repudiate the equitable interest of [the appellant] in the property. Such a stand taken by [RHB Bank] is certainly unconscionable, though not fraudulent or dishonest. In the circumstances, equity would compel them to honour their obligation and a constructive trust ought to be imposed. In our judgment, [RHB Bank] took the mortgage of the property subject to the constructive trust in favour of [the appellant].⁵⁹

[30] In this regard, *Betsy Lim* followed the decision of the majority in the Australian High Court case of *Bahr v Nicolay (No 2)*⁶⁰ (“*Bahr*”) in imposing a constructive trust. The Bahrs had entered into an agreement to sell their land to Nicolay. It provided for a leaseback for three years by the Bahrs and for the Bahrs to buy back the land thereafter. Nicolay later sold the land to the Thompsons who registered as proprietors.

56 *Ibid*, at [46].

57 See the Privy Council cases of *Frazer v Walker* [1967] 1 AC 569 at 585 and *Oh Hiam v Tham Kong* [1980] 2 MLJ 159 at 165, on appeal from New Zealand and Malaysia respectively, and the Australian High Court case of *Bahr v Nicolay (No 2)* (1988) 164 CLR 604 at 637.

58 *Betsy Lim*, n 47 above, at [49].

59 *Ibid*.

60 *Bahr v Nicolay (No 2)*, n 57 above.

The Thompsons acknowledged the existence of the agreement between the Bahrs and Nicolay. Later, when the Thompsons refused to sell the land to the Bahrs, the latter brought an action against Nicolay and the Thompsons claiming, *inter alia*, specific performance of the agreement that the Bahrs had entered into with Nicolay. The majority in the High Court held that, by taking the transfer knowing of and accepting an obligation to resell, the Thompsons were bound by a constructive trust in favour of the Bahrs.⁶¹ The minority in *Bahr* was of the view that the Thompsons' acknowledgment created an express trust that they held the property subject to the Bahrs' interest.⁶²

[31] In the result, RHB Bank was required to account to the appellant, when they exercise the power of sale, one-third of the net proceeds of sale after deducting all the expenses incurred in the sale.

[32] The application of constructive trust, among others, in *Betsy Lim* was heavily criticised in *Bebe*. In *Bebe*, the respondent had mortgaged her land to UOB on account of fraud perpetrated by one of the respondent's daughters and the said daughter's husband. Later, UOB sought to recover the outstanding loans from the respondent and to enforce the mortgage against her. The High Court found in favour of UOB and the respondent appealed. In allowing the appeal, the Court of Appeal in *Bebe* found, *inter alia*, that the solicitors for UOB had not been wilfully blind to the existence of a fraud against the respondent by her daughter and the daughter's husband. The conduct of UOB's solicitors amounted to, if anything, no more than negligence or lack of due diligence in finding out the true state of affairs.⁶³ In the result, the mortgage could not be set aside on the ground of fraud under section 46(2)(a) of the LTA.

[33] On the application of constructive trust as an exception to indefeasibility both within and outside the LTA, the Court of Appeal in *Bebe* had this to say:

As for the personal equity in *Bahr v Nicolay* giving rise to a constructive trust, which this court accepted in *Betsy*, its consistency with s 47(2)(a) of the LTA is doubtful and may have to be reconsidered at an appropriate time. As regards all other unspecified personal

61 *Ibid*, at 638 and 656.

62 *Ibid*, at 619.

63 *Bebe*, n 46 above, at [22], [24]–[27].

equities, we are of the view that having regard to the policy objectives of the LTA to reduce uncertainty and to give finality in land dealings, our courts should be slow to engraft onto the LTA personal equities that are not referable directly or indirectly to the exceptions in s 46(2) of the LTA. These exceptions are ... capable of encompassing most of the *in personam* actions at common law or in equity that a court exercising *in personam* jurisdiction may grant.⁶⁴

[34] *Bebe's* comments on the application of constructive trusts are, it is respectfully submitted, merely *dicta*. It was sufficient for the court to dispose of the issue before it of whether or not there was fraud on the part of UOB's solicitors without going into detail on the personal equity of constructive trusts. Furthermore, the court held that UOB's solicitors were guilty of no more than negligence or lack of due diligence in finding out the true state of affairs. This being so, there was then no reason for the court in *Bebe* to engage in a discussion of constructive trusts which can only be imposed where the conscience of the registered proprietor is affected.⁶⁵ The unconscionable behaviour of the registered proprietor is one of the key elements for the imposition of a constructive trust⁶⁶ and there were none in *Bebe* to begin with. Thus, *Betsy Lim* would still represent the law on the application of constructive trusts in the context of the Singapore Torrens system.

[35] *Bebe* also referred to section 47(3) of the LTA as another reason for prohibiting the application of constructive trusts. Section 47 of the LTA is concerned with the position of a prospective purchaser who is dealing with the registered proprietor at the contract stage of the transaction. Subsection (3) of section 47 provides that: "The protection afforded by this section [i.e. section 47] shall commence at the date of the contract or other instrument evidencing such dealing." The protection mentioned is to be found in section 47(1) where a prospective purchaser, who is not guilty of fraud,⁶⁷ when dealing with the registered proprietor, is not required or in any manner concerned:

64 *Ibid*, at [91].

65 See Gray & Gray, n 6 above, at 7.3.7, citing *Ashburn Anstalt v Arnold* [1988] 2 WLR 706 at 728.

66 Gray & Gray, *ibid*, at 7.3.8.

67 Section 47(2) of the LTA provides that for "the purpose of subsection (1) [of section 47], the knowledge that any unregistered interest is in existence shall not of itself be imputed as fraud".

- (a) to inquire or ascertain the circumstances in or the consideration for which the current proprietor or any previous proprietor is or was registered;
- (b) to see to the application of the purchase money or any part thereof; or
- (c) to be affected by notice (actual or constructive) of any trust or other unregistered interest, any rule of law or equity to the contrary notwithstanding.

[36] The effect of section 47(3) is that a prospective purchaser who finds the land register free from caveats, can safely enter into his contract which will then overreach the earlier unregistered interest.⁶⁸ This is in line with the principle that “the register is everything”⁶⁹ and that the Torrens system rewards the diligent and not the indolent.⁷⁰

[37] Unfortunately, the effect of section 47(3) as interpreted by the Court of Appeal in *Bebe* in relation to the question of indefeasibility has given rise to difficulties. The Court of Appeal in *Bebe* had stated, *inter alia*, that “Section 47(3) goes further in providing that the protection afforded by s 46(1) commences at the date of the contract or other instrument evidencing such dealing ...”⁷¹ and that “... any fraud, or personal claim, or defeasible condition, or event or overriding interest that can defeat the title of the registered proprietor must *exist before and at the time* the contract is entered into or at the time of registration of the instrument”.⁷² Accordingly, any personal equity claim that arises after the registered proprietor has obtained his or her protection under section 47(3) or section 46(1) of the LTA cannot affect his or her right to an indefeasible title as giving effect to it would be inconsistent with sections 46(1) and 47(3) itself.

[38] In essence, the Court of Appeal in *Bebe* had opined that a claim in equity, among others, if it is to be effective in defeating the interest

68 Baalman, *The Singapore Torrens System: Being a Commentary on the Land Titles Ordinance, 1956 of the State of Singapore* (Singapore: Govt Printer, 1961), pp 93–94.

69 See *Waimiha Sawmilling Co Ltd (in liquidation) v Waione Timber Co Ltd* [1926] 1 AC 101 at 106; *Fels v Knowles* [1906] 26 NZLR 604 at 620; and *Tai Lee Finance Co Sdn Bhd v Official Assignee* [1983] 1 MLJ 81 at 84.

70 *United Overseas Finance Ltd v Mutu Jeras* [1989] 1 SLR(R) 446 at [12].

71 *Bebe*, n 46 above, at [93] (emphasis in original).

72 *Ibid*, at [94] (emphasis in original).

of a prospective purchaser or title of a registered proprietor, must have existed *before and at the time* the contract is entered into or *at the time of registration* of the title or interest respectively. To construe otherwise *after* the relevant parties have obtained the protection under sections 47(3) or 46(1) of the LTA is to go against, and be inconsistent with, the legislative intent laid down in these provisions.

[39] The one obvious observation that can be made is that the protection referred to in section 47(3) is that provided in section 47(1) itself (given the words “this section” employed in section 47(3)) and not section 46(1) as the Court of Appeal in *Bebe* had mistakenly thought.⁷³ In addition, both sections 47 and 46(1) are concerned with different scenarios, i.e. section 47 deals with a situation at the contract stage (where registration of the title or interest has yet to take place) while section 46(1) deals with a situation where registration has already taken place. In the latter situation involving section 46(1), the protection by way of the quality of indefeasibility is *prima facie* conferred⁷⁴ on the title or interest that is registered.

[40] The interpretation of the Court of Appeal in *Bebe* would also give “permanent” protection to a prospective purchaser irrespective of his or her conduct *after* the conclusion of the contract or *after* registration of his or her title or interest. The prospective purchaser or registered proprietor might have acted unconscionably thereafter, as happened in *Betsy Lim*. It is important to note that a “purchaser” is the strongest person under the LTA.⁷⁵ It is telling that the word “purchaser” is not used in both sections 47 and 46(1) and (2). This would mean that the

73 The Court of Appeal in *Bebe*, *ibid*, had stated thus (at [93]): “Section 47(3) goes further in providing that the protection afforded by s 46(1) ...”. Cf the language in s 47(3): “The protection afforded by *this section* [i.e. section 47] shall commence at the date of the contract or other instrument evidencing such dealing” (emphasis added).

74 In *Tay Jui Chuan v Koh Joo Ann* [2010] 4 SLR 1069 at [24] and *Loo Chay Sit*, n 48 above, at [14], the Singapore Court of Appeal held that a registered proprietor is entitled to rely on the presumption of indefeasibility of title to the property which is good against the whole world until it is proved otherwise.

75 A “purchaser” is defined in section 4(1) of the LTA to mean “a person who, in good faith and for valuable consideration, acquires an estate or interest in land, and includes a mortgagee, chargee and lessee ...”. See also s 157(1) of the LTA which reads: “*Notwithstanding anything in this Act*, no purchaser who has become a proprietor shall be subject to action for the recovery of land or of money on the plea that his vendor, or any predecessor in title, may have acted in bad faith” (emphasis added).

position of the prospective purchaser after the conclusion of the contract or the title subsequently obtained by the registered proprietor (unless they qualify as a “purchaser”) is still open to attack in appropriate cases, such as where the prospective purchaser, after the conclusion of the contract, discovers before presenting the instrument of transfer for registration that the vendor’s signature was forged and, nevertheless, goes ahead to obtain registration, then his or her registered title or interest can still be defeated under section 46(2) as registration in the circumstances cannot confer indefeasibility.

[41] Another reason for arguing for the application of constructive trusts in the area of indefeasibility is the recognition of resulting trusts as an exception thereto. In *Loo Chay Sit*, the appellant claimed to have paid for the property which was registered in the name of Loo Chay Loo. After the appellant commenced proceedings against Loo Chay Loo, the latter passed away. The issue was whether the respondent held the property in question on a resulting trust for the appellant. The High Court found in favour of the respondent. On appeal, the Court of Appeal ruled that, given Loo Chay Loo was the registered proprietor, the respondent enjoyed the presumption of indefeasibility of title under section 46(1) of the LTA. In holding that the appellant had failed to discharge the burden of proving that he had paid for the property, the Court of Appeal observed that “... in order to impugn Loo Chay Loo’s title ..., the appellant has to prove the exceptional circumstances in the LTA, as a result of which the presumption of indefeasibility of title is displaced. In so far as the appellant relies on the doctrine of resulting trusts as one such exception, he has to prove that he had paid for the property so as to establish a resulting trust in his favour”.⁷⁶

[42] The Court of Appeal, in referring to “the doctrine of resulting trusts as one such exception” to displace the presumption of indefeasibility of title in the LTA, can be taken to recognise by way of *dicta*, for the very first time, that resulting trusts also constitute an exception to indefeasibility in the LTA, presumably coming within the trust exception in section 46(2)(c). Seen in this light, express trust is no longer the only type of trust (as was until then understood to be the case in *Bebe*)⁷⁷ that can come within this provision. With the recognition of resulting trusts as a statutory exception to indefeasibility, there is no

⁷⁶ *Loo Chay Sit*, n 48 above, at [14].

⁷⁷ See n 50 above.

good reason to exclude constructive trusts in appropriate cases given that both resulting and constructive trusts arise by operation of law to ensure fairness and justice.

[43] While the court in *Bebe* was correct in expressing the view that RHB Bank in *Betsy Lim* was subject to an express trust coming within section 46(2)(c) of the LTA in respect of their promise to recognise the appellant's interest in the land as there was a written regulating agreement, there could arise situations in which the arrangement between the parties is not in writing but the conscience of the registered proprietor is, nevertheless, affected. In such circumstances, the express trust statutory exception in the LTA would not be applicable.⁷⁸ Given that there can be unconscionable conduct arising after registration has taken place, it would be inequitable that the registered proprietor should be able to take the title or interest free from the right or interest of the claimant which has arisen in the circumstances. *Betsy Lim* has demonstrated how the constructive trust can serve as a useful remedy where there is no room for the application of actual fraud (which resulted in registration of the instrument) or express trust (or resulting trust for that matter). This would further reinforce the argument for recognition of constructive trusts to be applied in appropriate circumstances in the area of indefeasibility.

[44] To recognise constructive trusts as coming within section 46(2)(c) of the LTA or operating as a personal equity outside of the LTA is also not inconsistent with the policy objectives of the Torrens system. In fact, the Privy Council cases of *Frazer v Walker*⁷⁹ and *Oh Hiam v Tham Kong* ("*Oh Hiam*")⁸⁰ have made it clear that the Torrens system does not oust the court's jurisdiction to do equity in appropriate cases. The system is designed to provide simplicity and certitude in transfers of land, which is amply achieved without depriving equity of the ability to exercise its jurisdiction *in personam* on grounds of conscience.⁸¹ Thus, for example, effect should be given to a contractual licence that

78 See Civil Law Act (Cap 43, 1999 Rev Ed), s 7(1).

79 *Frazer v Walker*, n 57 above. See also *Regal Castings Ltd v Lightbody* [2008] 2 NZLR 153 at [22] and [148]. Cf Katharine Sanders, "Land Law in the New Zealand Supreme Court" in A Stockley and M Littlewood (eds), *The New Zealand Supreme Court: The First Ten Years* (2015), Ch 14 at pp 323–329.

80 *Oh Hiam*, n 57 above.

81 *Ibid*, n 57 at 164.

is binding on a third-party purchaser who subsequently becomes the registered proprietor based on a constructive trust arising by virtue of the application of the principles in *Ashburn Anstalt v Arnold*⁸² as, in doing so, it reflects the true state of affairs of the title to the land. This will enable the policy objectives of ensuring certainty of title and finality in land dealings to be achieved without necessarily compromising on ensuring fairness and justice to the claimant⁸³ as well in appropriate cases. These two objectives can co-exist without sacrificing the other. It is a case of killing two birds (i.e. achieving certainty and fairness at the same time) with one stone, so to speak.

[45] Notwithstanding that the Court of Appeal in *Bebe* had cautioned that the statements in *Frazer v Walker* and *Oh Hiam* do not necessarily apply to the LTA, the Singapore Torrens system is no exception. The court in *Bebe* did not disapprove absolutely of the application of principles of equity or personal equities in the Singapore Torrens system. Instead, it advised that Singapore courts “should be *slow* to engraft onto the LTA”⁸⁴ principles or doctrines of equity not specifically provided for in the statutory exceptions to indefeasibility in section 46(1) and (2) of the LTA so as to reduce uncertainty and to give finality in land dealings. In fact, the Court of Appeal conceded as much that the statutory exceptions to indefeasibility in the LTA are not exhaustive of all claims.⁸⁵ There is, accordingly, no absolute bar or prohibition to the application of equity in the Singapore Torrens system in appropriate cases.

82 [1988] 2 WLR 706. In this case, Fox LJ by way of *dicta* in the Court of Appeal made it clear that, in certain circumstances, a constructive trust may be imposed on a third party to bind him or her to a contractual licence where the third party’s conscience is affected (at 728H and 730B). This would be where, for example, the third party had notice of the contractual licence and paid a lower price for the land (at 726H) or where he or she expressly undertook to honour the contract entered into between the owner of the land and the claimant (at 727G–728A). It is the constructive trust, and not the contractual licence *per se*, that binds the third party.

83 The claimant may take the additional step of lodging a caveat under s 115(1) of the LTA to protect his or her equitable interest in the land by virtue of the constructive trust arising in his or her favour. See also the definition of “interest” in s 4(1) of the LTA.

84 *Bebe*, n 46 above, at [91] (emphasis added).

85 *Ibid.*

Meaning of “common property” in strata-titled properties

[46] “Common property”, in respect of strata-titled properties, is defined in section 2(1)(a) of the Building Maintenance and Strata Management Act⁸⁶ (“BMSMA”) to mean:

- (a) in relation to any land and building comprised or to be comprised in a strata title plan, such part of the land and building –
 - (i) not comprised in any lot or proposed lot in that strata title plan; and
 - (ii) used or capable of being used or enjoyed by occupiers of 2 or more lots or proposed lots;

[47] The correct interpretation and application of this provision was recently considered in *Sit Kwong Lam v MCST Plan No 2645* (“*Sit Kwong Lam*”).⁸⁷ The appellant owned a unit in a strata development. The unit occupied the 29th and 30th floors of one of the towers in the development. The appellant had undertaken unauthorised installations involving the replacement of the fixed glass panels bordering two areas of his unit on the 29th floor with sliding panels and the installation of timber decking on two wide ledges beyond those panels outside the unit (“Work 1”). He had also covered the entirety of the flat roof on the 30th floor, outside the unit, with similar timber decking (“Work 2”). The flat roof was accessible to all unit owners in the development through a common staircase. The respondent, the management corporation of the development, also discovered that the appellant had, similarly without authorisation, installed an air-conditioning ventilation unit on an external wall enclosing the unit at the 30th floor, in the same vicinity as Work 2 (“Work 3”). The respondent requested the appellant to remove the unauthorised works which, however, remained in place. The appellant subsequently failed to secure approval at an annual general meeting for the exclusive use and enjoyment of the areas (collectively “the areas”) where the unauthorised works had been carried out.

[48] The appellant applied to the Strata Titles Board (“STB”) seeking a number of orders. The STB found, *inter alia*, that the areas in question

86 Cap 30C, 2008 Rev Ed. See also BMSMA, s 2(1)(c).

87 [2018] 1 SLR 790.

were common property and ruled in favour of the respondent. It was undisputed that the areas in question were not marked out as falling within the unit on the strata title plan but were instead demarcated as common property. The appellant appealed to the High Court.⁸⁸

[49] It was crucial to determine if the two limbs in the definition of “common property” should be read disjunctively or conjunctively. In the former (which was argued for by the respondent), in order to constitute common property, the relevant part of the land or building need only fulfil one of two conditions, that is, either (a) not be comprised in any unit or proposed unit in the strata title plan; or (b) be used or capable of being used or enjoyed by the occupiers of two or more units or proposed units. In the latter interpretation (argued for by the appellant), both conditions had to be fulfilled in order for a part of the land or building to be regarded as common property. This was material as it was undisputed that each of the works had not been installed on a part of the land or building falling within any unit or proposed unit in the strata title plan and so the first condition was clearly fulfilled.

[50] Having regard to legislative history and case law,⁸⁹ the High Court rightly held that the two limbs in the definition of “common property” in section 2(1)(a) of the BMSMA are to be read conjunctively. Second, the proper application of the second limb of the definition was to ask whether the area or installation in question was for the exclusive use of the occupier of the unit in question (in which case it would not be common property) rather than whether it was for the use of the occupiers of two or more units (in which case it would be common property).⁹⁰ There was a subtle but significant purpose to reading the second limb in this manner. The fact that the area or installation could not be used by the occupiers of two or more units did not *a fortiori* mean that it was intended for the exclusive use of a single unit. It may not in fact be intended for the direct use of any occupier at all.⁹¹

88 See [2017] SGHC 57.

89 Reference was made to *MCST Plan No 367 v Lee Siew Yuen* [2014] 4 SLR 445 at [27] and *Lee Lay Ting Jane v MCST Plan No 3414* [2015] SGSTB 5 at [31].

90 See n 88 above, at [78].

91 *Ibid*, at [82].

[51] A clear illustration of this was the wide ledges on which Work 1 was located. The wide ledges were not accessible to any unit owners, the appellant included. While adjoined to the unit, they were clearly not intended for the appellant's personal use as they were originally sealed off from the unit by fixed glass panels. It was not surprising then that access had been blocked, as the ledges did not appear to have been safe for use. They were not meant to serve as balconies for the unit given the height of the parapet and the fact that they were not reflected as part of the unit in the strata title plan.

[52] In dismissing the appeal, the High Court rejected the appellant's argument that so long as the area or installation was incapable of being used by the occupiers of two or more units, it would not be common property. This was because the appellant's approach would create an absurdity regarding the issue of ownership and responsibility for maintenance. For strata developments, only two forms of ownership are statutorily recognised: common ownership over common property and individual ownership in relation to the unit. This was not a distinction without difference but one of seminal importance. Responsibility for the former falls on the management corporation and the latter on the owner of the unit. The appellant's approach would leave areas or installations which could not be used by the occupiers of two or more units, but which were also not meant for the exclusive use of a unit, in a state of uncertainty. They would not be common property. At the same time, they could not be said to form part of a unit. The appellant's approach would give rise to a third category of property (in addition to common property and individual units) which was unsatisfactory.⁹² Adopting the exclusive use approach removed any uncertainty as to the ownership and responsibility for maintenance.⁹³ The requirement of exclusive use was inherent in the second limb of the definition of "common property" in section 2(1)(a) and represented the true legislative intention.⁹⁴

[53] It would appear that the exclusive use approach laid down by the High Court as a default proposition or general rule goes against the

92 Ibid, at [86].

93 Ibid, at [85].

94 Ibid, at [83]. The High Court also held that Works 1, 2 and 3 did not fall within the exception in statutory by-law 5(3)(c) in the Second Schedule to the Building Maintenance (Strata Management) Regulations 2005 (S 192/2005) as they were not undertaken to prevent harm to the appellant's children (at [100] and [101]).

legislative mandate in the second limb of section 2(1)(a) of the BMSMA which is to consider whether the area or installation in question was for the use of the occupiers of two or more units. This is notwithstanding that the same outcome will be arrived at applying either approaches. In addition, apart from clear cut cases, such as a swimming pool or tennis court in a strata development, where the amenity is for the use and enjoyment of all unit owners, the exclusive use approach may not necessarily help to resolve the issue in question in difficult cases. In this regard, the approach of the Court of Appeal in *Sit Kwong Lam* in dealing with the correct interpretation to be accorded to the second limb of section 2(1)(a) is to be welcomed, a decision which we will now turn to.

[54] At the outset, the Court of Appeal noted the significant fact that the areas concerned were demarcated as common property on the strata title plan. The strata title plan has to be approved by the Chief Surveyor and registered.⁹⁵ That being the case, it established, on a presumptive basis, that the areas in question were part of the common property of the development. The burden was, thus, on the appellant to prove that the areas did not come within the meaning of “common property” in section 2(1)(a).⁹⁶

[55] The Court of Appeal took the same view as the High Court that the two limbs of section 2(1)(a) should be read conjunctively and not disjunctively, a conclusion supported by the ordinary meaning of the text read in its context. The word “and” separated the two limbs which meant they were to be read conjunctively. Further, the legislative purpose was aligned with the plain and clear meaning of the definition in section 2(1)(a).⁹⁷

[56] The Court of Appeal also rejected the view that the BMSMA provided for a third category of property in strata developments. The appellant had argued that the BMSMA implicitly recognised such a third category of property and since such property did not come within the purview of the management corporation, any unit owner would be free to carry out works or activities on such property as he or she wished. The Court of Appeal rejected this argument, observing that strata developments were founded on the concept of community

95 Land Titles (Strata) Act (Cap 158, 2009 Rev Ed), s 9(1)(b) and (3).

96 *Sit Kwong Lam*, n 87 above, at [35] and [37].

97 *Ibid*, at [44] and [45].

living and to ensure harmony, it required the limits of each unit owner's personal rights and duties to be clearly demarcated from the rights and duties of the management corporation. The recognition of a third category of property would disrupt the harmony and would not ensure that strata developments would be properly managed and maintained contrary to the intention of Parliament.⁹⁸

[57] However, the exclusive use approach adopted by the High Court in interpreting the second limb of section 2(1)(a), so as to prevent there being a third category of property (in addition to common property and individual units), was criticised by the Court of Appeal. Under settled principles of statutory interpretation, the ordinary meaning of the text of a provision read in its context should be given primacy. The fact that a term had been defined in a statute indicated that Parliament must have specifically addressed its mind as to the intended meaning of the term.⁹⁹ This was the case with the text of the second limb of section 2(1)(a) which was clear and unambiguous. There was nothing in the Parliamentary debates which suggested that some other meaning was intended. A proper construction of the second limb, in a manner that was consistent with its text, would not lead to the creation of such a third category of property.¹⁰⁰

[58] In this regard, the words "used or capable of being used or enjoyed by occupiers of 2 or more lots or proposed lots" in the second limb should be interpreted broadly. The words "use" and "enjoy" are to be read in accordance with their ordinary dictionary meanings. As the Court of Appeal further explained:

In our judgment, based on their plain meanings, the word "enjoy" has a wider ambit than the word "use". We agreed with the STB that any area or installation that could affect the appearance of a building in a strata development, or that was part and parcel of the fabric of the building, could, by its mere presence, be "enjoyed" by some or even all subsidiary proprietors of the development. Indeed, there

98 Ibid, at [51].

99 Ibid, at [53]. For these principles of statutory interpretation, reference was made to the Australian High Court case of *PMT Partners Pty Ltd v Australian National Parks and Wildlife Service* (1995) 131 ALR 377 at [18] and cited by the Singapore High Court in *Dyna-Jet Pte Ltd v Wilson Taylor Asia Pacific Pte Ltd* [2017] 3 SLR 267 at [95].

100 *Sit Kwong Lam*, n 87 above, at [57].

was no need for the area or installation to be physically accessible by the subsidiary proprietors (or any of them) in order to be “enjoyed” by the said proprietors.¹⁰¹

We also considered that the second limb of the definition of “common property” in s 2(1) of the BMSMA would be satisfied so long as the area or installation in question was “capable” of being used or enjoyed by occupiers of two or more lots. This meant that an area or installation not comprised in any lot need not *at any particular point in time* be used or enjoyed by occupiers of two or more lots to be considered common property.¹⁰²

[59] In addition, areas or installations which the management corporation had a duty to control, manage, administer or maintain would presumptively be taken to have satisfied the second limb unless shown otherwise. As such, situations where an area or installation that was not within any unit and which would also fail to satisfy the second limb “would be so few and far between as to pose, in essence, a largely theoretical rather than actual problem”.¹⁰³

[60] A similar approach can also be seen in the recent earlier High Court decision in *Wu Chiu Lin v MCST Plan No 2874*.¹⁰⁴ One of the issues concerned the question whether the external walls of the penthouse units in the development constituted common property. In holding that they did, the court commented by way of *dicta* that the second limb “... is meant to assist in delineating more clearly where the line is to be drawn between what is or is not common property; it does not delineate an area that is neither common property nor private property (i.e. a ‘no man’s land’)”.¹⁰⁵ The second limb is meant to be construed in a very broad fashion, such that “even prospective intangible forms of interaction by [unit owners] with a particular area of a development that may result in them deriving some form of benefit would be sufficient for that area to satisfy the second limb”.¹⁰⁶ As such, the category of a “no man’s land” hanging over a development

101 *Ibid*, at [59].

102 *Ibid*, at [60] (emphasis in original).

103 *Ibid*, at [62].

104 [2018] 4 SLR 966.

105 *Ibid*, at [63].

106 *Ibid*, at [75]. See BMSMA, s 2(1)(c) Example (b) which now includes an external wall of a building as being part of common property.

is more perceived than real as the definition of “common property” in section 2(1)(a) does not, in practice, allow the concept of a “no man’s land” to exist. It was, accordingly, not necessary to resort to the exclusive use approach laid down by the High Court in *Sit Kwong Lam* to deal with the uncertainties associated with this category.

[61] For the reasons above, the Court of Appeal in *Sit Kwong Lam* found that the various unauthorised works undertaken had been installed on common property. In regard to the ledges on which Work 1 had been constructed, it was, *inter alia*, immaterial that they were not physically accessible by any unit owner given that an area or a feature in a development could be enjoyed without having to physically access it. The flat roof and wall on which Works 2 and 3 had been installed were also part and parcel of the fabric of the building and contributed to its appearance. Further, the appellant did not argue that the respondent was not responsible for their maintenance. In the result, the unauthorised works breached the relevant prescribed statutory by-laws and did not come within the exceptions therein.¹⁰⁷

[62] The approach taken by the Court of Appeal on the meaning of “common property” in the BMSMA is in line with the intention of Parliament which looks at, *inter alia*, whether the area or installation concerned is for the use or enjoyment of the occupiers of two or more units. This requirement in the second limb of section 2(1)(a) of the BMSMA does not require a consideration of the exclusive use approach adopted by the High Court. The Court of Appeal applied settled principles of statutory interpretation in ascertaining the meaning of “common property” therein. The second limb in section 2(1)(a) was interpreted broadly and the words “used” and “enjoyed” therein were given their ordinary meanings to achieve the legislative intent. The Court of Appeal decision has provided much needed clarity on the meaning of “common property” in the BMSMA which avoids the strained interpretation given by the High Court.

Conclusion

[63] The recent legal developments in the areas discussed have, without doubt, added to, as well as enriched, the *corpus* of Singapore land law. The cases discussed have further clarified the law in the respective

¹⁰⁷ See also n 94 above.

areas which is to be welcomed, providing a firmer foundation for future developments. Needless to say, the decided cases have, in no small measure, contributed immensely to the development of Singapore land law. At the same time, a critical analysis has been proffered to provide an alternative perspective to the issues at hand in the hope that it will facilitate a positive and more robust development of the law in the affected area(s).

Recent Judicial Developments in Singapore Tort Law

by

Professor Gary Chan Kok Yew*

Introduction

[1] Historically, common law torts have developed in a piecemeal fashion as they adapted to societal circumstances and conditions. Over time, however, a pantheon of torts have been created and shaped by the judges and Parliament as academics and scholars attempt to rationalise their existence and scope. Occupying a significant portion of the law of obligations (or private law) generally, tort law's coverage is indeed extensive. The range of interests protected under tort law generally include physical integrity, mental well-being, property, reputation and economics.¹ It also intersects and interacts on a fairly regular basis with major areas of law such as contract law (e.g. how contractual framework impacts on duty of care and the tort of inducing breach of contract), equity (e.g. breach of confidence and the tort of misuse of private information), and criminal law (e.g. the defence of *ex turpi causa*, breach of statutory duty and tort of conspiracy).

[2] Tort law possesses an innate capacity for growth and development. Legal principle and policy will continue to inform and impact on its present and future directions. In the last few years, the Singapore courts have had occasion to consider and reflect on the following core tort issues:

- What should be the scope of duty of care for claims in negligence? How do we ensure legal certainty and coherence in its application to the myriad contexts?

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1 See Gary Chan Kok Yew and Lee Pey Woan, *The Law of Torts in Singapore* (Academy Publishing, 2016), Ch 1.

- What is the standard of care expected of medical doctors in respect of the advice to be communicated by doctors to their patients?
- In what circumstances can we accommodate new heads of damages in negligence?
- How do we determine the quantum of damages recoverable with respect to the defence of contributory negligence?
- What is the distinction between statements deserving of absolute versus qualified privilege?
- In what circumstances may a director be protected from personal liability with respect to company torts?
- Should the tort of malicious prosecution extend to civil proceedings? Should we recognise the tort of abuse of process?
- Should punitive damages be allowed and if so, what is the permitted scope?

[3] The seemingly basic and perhaps prosaic nature of the abovementioned questions belie the tremendous challenges faced by the courts, in particular, the Singapore Court of Appeal in developing persuasive, coherent and thoughtful responses to the issues raised. This article seeks to examine and discuss the most significant Singapore Court of Appeal decisions on tort law since 2016. Notwithstanding the short period of examination, the list of relevant judicial decisions is by no means insignificant. In fact, it is comprehensive in scope, covering several torts (including negligence, defamation, harassment, economic torts and malicious prosecution) and the damages recoverable. More importantly, as we will see below, they contribute significantly to our understanding of legal concepts, principles, and public policy in this evolving area of torts.

[4] Reference will be made to comparative developments in other common law jurisdictions (such as the United Kingdom, the United States, Canada, Australia and New Zealand) as well as specific Malaysian tort developments.

Tort of negligence

The general duty of care approach

[5] We begin with the tort of negligence. The “neighbour principle” in *M’Alister (or Donoghue) v Stevenson*² is more than eight decades old. Duty of care in the tort of negligence has progressed from its initial basis in foreseeability with respect to a claim for personal injury to the assessment of the closeness of the relationship (or proximity) between the plaintiff and the defendant in economic loss claims and policy considerations in more novel cases.

[6] Until 2007, there were two competing judicial approaches in Singapore toward duty of care with one set of case precedents favouring Lord Wilberforce’s universal *Anns* two-stage test (consisting of foreseeability/proximity and public policy) in economic loss claims³ and the other, applying the incremental three-part test in *Caparo Industries plc v Dickman*⁴ (based on foreseeability, proximity and whether it is fair, just and reasonable to impose a duty of care) in personal injury and property damage claims.⁵ Bearing in mind the need for greater legal coherence, *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency*⁶ (“*Spandeck*”) – a judgment delivered by the former Chief Justice Chan Sek Keong – ushered in a universal framework for duty of care in Singapore regardless of the type of damage. In a sense, the decision signaled a fresh start given the disparate judicial approaches mentioned above. Yet, the Court of Appeal in *Spandeck* was clearly cognisant that the new approach should develop in an incrementalist fashion with reference to the rich tradition of prior Singapore and common law case precedents.

2 [1932] AC 562.

3 *RSP Architects Planners & Engineers v Ocean Front Pte Ltd* [1995] 3 SLR(R) 653; *RSP Architects Planners & Engineers v Management Corporation Strata Title Plan No 1075* [1999] 2 SLR(R) 134.

4 [1990] 2 AC 605. See UK Supreme Court case of *Robinson v Chief Constable of West Yorkshire Police* [2018] 2 WLR 595 (that the *Caparo* test would only be relevant for novel cases outside the established categories).

5 *TV Media Pte Ltd v De Cruz Andrea Heidi* [2004] 3 SLR(R) 543 (personal injury); *The Sunrise Crane* [2004] 4 SLR(R) 715 (property damage).

6 [2007] 4 SLR(R) 100.

[7] The *Spandeck* framework consists of the following:

1. A preliminary threshold of factual foreseeability that enquires whether the defendant would foresee harm to the plaintiff. This preliminary threshold, if satisfied, does not immediately give rise to any duty of care but merely provides the factual foundation for the legal (and normative) proximity requirement below.
2. The proximity requirement that signifies the close relationship between the plaintiff and defendant. The requirement may be met by reference to the three facets (physical, circumstantial and causal) of proximity and the twin criteria of voluntary assumption of responsibility and reliance. If the proximity requirement is satisfied, a *prima facie* duty of care arises. This proximity requirement has been expanded to include factors such as the defendant's control over the risks of harm, vulnerability and dependence of the plaintiff, and knowledge of the defendant about the risks of harm to the plaintiff flowing from developments in the post-*Spandeck* cases.⁷
3. Policy considerations (i.e. macro social welfare and competing moral claims) which may override or limit the scope of the *prima facie* duty of care. Such considerations include concerns with the potential opening of the floodgates of litigation, and indeterminate liability for an indeterminate period for an indeterminate class of persons, contradictions with statutory impositions or performance of statutory duties, and inconsistencies with the allocations of risks through contract and insurance.⁸

[8] As mentioned above, the preliminary threshold and the two stages of proximity and policy considerations should be examined by reference to prior case precedents based on the notion of incrementalism. Nonetheless, where there is a novel factual matrix not entirely covered by existing case precedents, courts have the leeway to consider, by reference to public policy, whether the law should be extended to found liability in such novel scenarios. These opportunities for extension arose in recent years in *ACB v Thomson*

7 E.g. See *Toh Siew Kee v Ho Ah Lam Ferroccement (Pte) Ltd* [2013] 3 SLR 284; *Anwar Patrick Adrian and another v Ng Chong & Hue LLC and another* [2014] 3 SLR 761.

8 E.g. *Tan Juay Pah v Kimly Construction Pte Ltd* [2012] 2 SLR 549 at [85].

*Medical Centre Pte Ltd*⁹ (“ACB”) and *NTUC Foodfare v Co-operative Ltd v SIA Engineering Co Ltd*¹⁰ (“NTUC Foodfare”) to which we should now direct our attention.

Relational economic loss in negligence: Examining circumstances of loss not type

[9] The Singapore Court of Appeal in *NTUC Foodfare* developed further the proximity requirement as applied to a claim for relational economic loss. The appellant had a lease of the transit lounge at the Terminal 2 building in Changi Airport and operated a food kiosk within the leased premises. The kiosk operations sustained business losses resulting from the closure of a segment of the lounge pursuant to the Building and Construction Authority’s order. This state of affairs arose from the negligent act of an air tug operator (the second respondent) causing physical damage to a pillar that supported the floor of the lounge in the Terminal 2 building. Though the building was owned by Changi Airport, and the leased premises were not damaged, the air tug operator was found liable in negligence to the kiosk operator for business losses. The first respondent company that employed him was vicariously liable.

[10] The High Court¹¹ had disallowed the claim for pure economic losses noting, amongst others, that there was insufficient causal and circumstantial proximity, an absence of voluntary assumption of responsibility and reliance, and rejected the argument based on spreading of losses via insurance (as *NTUC Foodfare* was already insured for damaged equipment and loss of profits). The Court of Appeal disagreed with the High Court’s approach, and found factual foreseeability, physical proximity between the air tug operator who was operating within a very restricted area and the kiosk, and causal proximity between the air tug operator’s breach and the loss of profits suffered by the kiosk operator during the closure period. Part of the lounge area had to be closed by the authorities for safety reasons due to the damage sustained to the pillar and the loss of profits had directly arisen from the non-operation of the kiosk which was necessitated by the closure order. In addition, the air tug operator would have known

9 [2017] 1 SLR 918.

10 [2018] 2 SLR 588.

11 *NTUC Foodfare Co-operative Ltd v SIA Engineering Co Ltd & Anor* [2017] SGHC 250.

that the damage to the structure supporting the floor of the lounge would result in a determinate class of persons (occupants of that floor) suffering economic loss from the inability to use their premises. Thus, the relationship between the parties was sufficiently close to warrant the imposition of a *prima facie* duty of care under *Spandeck*.

[11] On policy considerations, it noted that the respondents, and not merely the kiosk operator, had taken out third-party insurance such that the “insurance factor cancels out”.¹² There was also no clause in the agreement between NTUC Foodfare and Changi Airport that excluded tortious liability of the respondent’s employees to NTUC Foodfare.

[12] This decision is significant for a few reasons. First, Steven Chong JA issued a timely reminder that it is the circumstances in which the loss arises rather than the type of loss that matters for duty of care.¹³ Secondly, there is no exclusionary rule against claims for economic losses in Singapore which means a party which does not own the damaged property may nevertheless recover economic losses provided the *Spandeck* requirements are met. Thirdly, relational economic loss claims are not to be treated separately but should be analysed using the *Spandeck* framework. The Court of Appeal preferred to rely on the proximity requirement in *Spandeck* rather than the specific *ratios* in the following foreign authorities:

- (a) The Australia High Court decision in *Caltex Oil (Australia) Pty Ltd v The Dredge “Willemstad”*¹⁴ which held that a duty of care was owed by the defendant who negligently damaged a pipeline which led to the plaintiff’s economic losses¹⁵ based on the “known plaintiff” test notwithstanding that the plaintiff did not own the pipeline; and
- (b) The Canada Supreme Court decision in *Canadian National Railway Co v Norsk Pacific Steamship Co Ltd et al*¹⁶ (“Norsk”) which imposed a

12 [2018] 2 SLR 588 at [56] (citing *Photo Production Ltd v Securicor Transport Ltd* [1978] 1 WLR 856 at 866A, *per* Lord Denning MR).

13 [2018] 2 SLR 588 at [2].

14 (1976) 136 CLR 529.

15 The economic loss is for expenses incurred by the plaintiff to arrange alternative means of transport of the oil.

16 (1992) 91 DLR (4th) 289.

duty of care on the basis that the plaintiff was in a “joint venture” with the owner of the property (a bridge) that was damaged by the defendant’s negligence.

[13] Steven Chong JA opined that it was not necessary to rely on the specific “known plaintiff” test in view of the proximity requirement which is based on a determinate class of persons.¹⁷ Similarly, the learned judge noted that the “joint venture” model in *Norsk* was based on the relationship between the plaintiff and the property owner rather than the defendant, which is the focus under the proximity requirement.¹⁸ The author further notes that the relationship between the plaintiff and the property owner was not based on a joint venture in the traditional sense as there were no joint contributions to an enterprise or sharing of risks by the parties.¹⁹

[14] Thus, in both these cases as well as another,²⁰ the proximity requirement in *Spandeck* would, according to the Court of Appeal, adequately address the relational economic loss claims. A decade on, the Singapore Court of Appeal has continued to endorse the *Spandeck* framework as the one true guide for duty of care in the tort of negligence.²¹

A new head of damage in negligence: Upkeep costs, loss of autonomy and genetic affinity

[15] The next case examines how medical technology and human error prompted a strong response from the Judiciary culminating in a new head of damage recoverable in the tort of negligence. Clearly, the category of interests protected under tort law, though wide, is never closed.

17 [2018] 2 SLR 588 at [65].

18 *Ibid*, at [70].

19 Kit Barker, “Relational Economic Loss and Indeterminacy: The Search for Rational Limits” in Simone Degeling, James Edelman and James Goudkamp (eds), *Torts in Commercial Law* (Thomson Reuters, 2011), pp 163–194 at 184.

20 The Court of Appeal also considered *Perre and others v Apand Pty Ltd* (1999) 198 CLR 180 which did not reveal a clear *ratio* from the seven separate judgments.

21 *Cf* the recent judicial pronouncement in *Darnley v Croydon Health Services NHS Trust* [2018] 3 WLR 1153 at [15] that “the common law in this jurisdiction has abandoned the search for a general principle” to determine duty of care.

[16] In *ACB*, in vitro fertilisation (IVF) was sought by the appellant (a Chinese female) and her husband (a Caucasian). Due to a mix-up of the sperm samples by the defendants (comprising a fertility clinic and embryologists), the appellant's egg was fertilised by the sperm of an unknown Indian donor. The appellant and her husband subsequently discovered that the baby's skin tone and colour were different. She claimed in the tort of negligence for pain and suffering relating to the pregnancy, mental distress and upkeep costs to raise the baby as well as for breach of contract.

[17] The claims for pain and suffering and mental distress were not disputed. On the issue of upkeep costs, there were contrasting legal positions in England and Australia. In *MacFarlane v Tayside Health Board*,²² the English court was reluctant to treat the child as a financial liability but rather a "mixed blessing". The High Court in Australia in *Cattanach v Melchior*,²³ on the other hand, allowed a claim for upkeep costs but this decision has been statutorily overruled in certain states.²⁴ The Singapore High Court disallowed the claim for upkeep costs on the ground that this was not an unwanted birth case. Choo J observed that the plaintiff had wanted all along to have a baby and even contemplated expenses to bring up the baby. The Court of Appeal agreed with the outcome but not the reasoning of the High Court. The significant point in the present case was that the appellant wanted to have a child conceived with her husband's sperm and did not wish to raise another baby that was not completely theirs.²⁵ The High Court had thus omitted to consider the "purpose" for which upkeep expenses were incurred.²⁶

[18] As Andrew Phang JA delivering the Court of Appeal judgment explained, upkeep costs cannot be a cognisable head of loss as the obligation to maintain one's child is an obligation at the heart of parenthood.²⁷ The upkeep costs claim was fundamentally inconsistent with the nature of the parent-child relationship and would place the appellant in a position where her personal interests as a litigant would conflict with her duties as a parent.²⁸ With respect to the claim for

22 [2000] 2 AC 59.

23 (2003) 215 CLR 1.

24 Such as New South Wales and Queensland.

25 [2017] 1 SLR 918 at [41].

26 *Ibid*, at [38].

27 *Ibid*, at [86].

28 *Ibid*, at [86].

financial costs of bringing up the child, there is no distinction between a claim based on contract or tort.²⁹

[19] Such a total denial of recovery would not be satisfying to the court and indeed to the appellant given the clear breach of duty of the defendant which had brought about the appellant's state of affairs in a manner that was contrary to the parties' expectations. New issues were therefore raised at the appellate stage, including the possibility of a claim for loss of autonomy. The claim for loss of autonomy was rejected on three grounds (namely, the conceptual, coherence and over-inclusiveness objections). From a conceptual angle, the Court of Appeal noted that there are several ideological accounts of "autonomy". At this level of abstraction, ideological differences are not unexpected. The author argues that this conceptual objection *per se* is not fatal to the possibility of characterising loss of autonomy as a head of damage. But there are other stronger objections.

[20] With respect to the coherence objection, the notion of lost autonomy (for example, when a person is compelled to belt up whilst in a motor vehicle) does not cohere with the idea of actionable damage in negligence in terms of being "worse off" as stated in the House of Lords decision in *Rothwell v Chemical & Insulating Co Ltd*³⁰ ("*Rothwell*"). Being compelled to belt up in a motor vehicle might in fact result in the person being more physically secure. Moreover, lost autonomy as a head of damage would be over-inclusive. If such a head of damage were accepted, the claimants in *Rothwell* would have been able to reframe their claim as an infringement of their right to be free of physiological changes or the right to be free from the fear of developing a life-threatening disease.³¹

29 Ibid, at [102]–[105]. See also the recent English case of *ARB v IVF Hammersmith* [2018] EWCA 2803 (that the legal policy objections in *MacFarlane* to a claim for economic costs of bringing up a healthy child would be similarly applied to contractual claims).

30 [2008] 1 AC 281 (asymptomatic physical changes to the body do not in themselves constitute personal injuries in negligence).

31 See *Shaw v Kovac* [2017] EWCA Civ 1028 (rejecting a claim for a particular head of damage based on the alleged wrongful invasion of the patient's personal autonomy due to the doctor's negligence in undertaking a medical procedure without obtaining the patient's informed consent, and noting that any increase in suffering due to the claimant's awareness that his personal autonomy was invaded upon through want of informed consent could be reflected in the award of general damages).

[21] Though no upkeep costs for raising the child was allowed, the case resulted in the “birth” of a new head of damage in the tort of negligence. The Court of Appeal decided that damage to the appellant’s interest in “genetic affinity” is a cognisable injury. As the loss of genetic affinity is more narrowly defined than lost autonomy, it largely avoids the abovementioned coherence and over-inclusiveness objections. This interest in genetic affinity, as Judge of Appeal Andrew Phang explained, exists at the bilateral level between parent and child as well as multilaterally between the parents and their extended relations, the child’s relationship with his siblings as well as the family’s relationship with the wider community.³² Moreover, the learned judge noted that for the appellant, there was “the interest in maintaining the integrity of her reproductive plans” where she had made a conscious decision to have a child with her husband in order to “maintain an intergenerational genetic link and to preserve ‘affinity’.”³³ The reference to the “interest in maintaining the integrity of her reproductive plans” suggests that the notion of loss of autonomy is still relevant.³⁴ Indeed, Andrew Phang JA had referred to the concept of autonomy as a “background consideration”³⁵ even if it was not persuasive as a head of actionable damage.

[22] Two interesting questions may be raised. Strictly speaking, it is the appellant’s husband rather than the appellant herself who had suffered a loss of genetic affinity since the appellant was the biological mother.³⁶ As such, should the husband have been the rightful claimant? Another issue is whether, based on the definition and extensive scope of genetic affinity, claims from siblings and grandparents or other

32 [2017] 1 SLR 918 at [128].

33 *Ibid*, at [135].

34 Jordan English and Mohammad Jaamae Hafeez-Baig, “Recovery of Upkeep Costs, Claims for Loss of Autonomy and Loss of Genetic Affinity: Fertile Ground for Development?” (2018) 41 *Melbourne University Law Review* 1360 at 1380.

35 [2017] 1 SLR 918 at [125].

36 Jordan English and Mohammad Jaamae Hafeez-Baig, “Recovery of Upkeep Costs, Claims for Loss of Autonomy and Loss of Genetic Affinity: Fertile Ground for Development?” (2018) 41 *Melbourne University Law Review* 1360 at 1379; Tsachi Keren-Paz, “Gender Injustice in Compensating Injury to Autonomy in English and Singaporean Negligence Law” (2018) *Feminist Legal Studies*, published online on November 22, 2018.

kin could be entertained in negligence against the fertility clinics and doctors.³⁷

[23] In this case, the appellant alone retained a genetic link to Baby P. However, it is fair to say that both the appellant and her husband have *collectively* lost genetic affinity to have a child with a *combination* of their gametes. Given this scenario, it would be appropriate for either the biological mother *or* the husband *or* both of them to make the claim. In addition, in order to confine the proper claimants to the appellant and her husband, the author suggests that the notion of loss of genetic affinity as an actionable head of damage should be conceptualised as one associated with lost autonomy. This conceptualisation may help to differentiate the position of the parents who have suffered from lost autonomy with respect to their reproductive plans (as noted by the Court of Appeal) from the siblings and grandparents who have not.

[24] This head of damage for loss of genetic affinity comports with the realities faced by parents whose reproductive plans to have a child of their own have been thwarted. The reference to loss of genetic affinity is carefully tailored to deal with this unique factual matrix arising from the mix-up of the sperm samples. Though a claim based on lost genetic affinity applies to the instant case, it may not be directly relevant in future cases, for example, where a couple intends to use a non-parental sperm or in the event of negligent sterilisation such as in *Rees v Darlington Memorial Hospital NHS Trust*³⁸ (“Rees”). It is open for debate whether the concept of loss of autonomy will be relevant as an important “background consideration” or a narrower version of the concept of autonomy might be entertained as a possible head of damage in these other cases.

[25] With respect to the quantification of damages, the Singapore Court of Appeal in *ACB* benchmarked the award for loss of genetic affinity by reference to a percentage (30%) of the financial costs of raising

37 Kumaralingam Amirthalingam, “Reproductive negligence: unwanted child or unwanted parenthood?” (2018) 134 *Law Quarterly Review* 15 at 20; Craig Purshouse, “Autonomy, Affinity, and the Assessment of Damages: *ACB v Thomson Medical Pte Ltd* [2017] SGCA 20 and *Shaw v Kovak* [2017] EWCA Civ 1028” (2017) 26(4) *Medical Law Review* 675 at 688.

38 [2004] 1 AC 309. See also Tom Foxtan, “Inaccurate Conception: *ACB v Thomson Medical*” (2018) 81(2) *Modern Law Review* 337 at 342–343.

Baby *P*. The merit of this approach is that it allows for the recovery of substantial damages to the mother. However, the appellant making an argument for substantial damages at the assessment stage will face a (similar) conflict between her duty as a parent and interests as a litigant. Further, the consequence of benchmarking the award against the financial costs of raising the child is that the assessment of damages for loss of genetic affinity would in practice depend on the socio-economic status of the particular family concerned.³⁹ This means that the greater the family's financial means to spend on education and household items for the child, the more significant the quantum of the award for loss of genetic affinity.

[26] The Court of Appeal considered alternatives such as the "conventional award" in *Rees* (that is, a fixed sum that would be awarded to *all* future claimants) and an award for "necessary expenses in avoiding or coping with restrictions on autonomy"⁴⁰ but eventually rejected both of them. Instead, it preferred awarding a conventional sum of general damages in respect of non-pecuniary losses that takes into account the particular motivations of the appellant for seeking IVF. It should also be mentioned that the Court of Appeal did not endorse the alternative head of vindictory damages. It has been critiqued by Lord Dyson as "an unruly horse" and by Lord Collins for creating confusion as to the purpose of an award of damages in *R (Lumba) v Secretary of State for the Home Department*.⁴¹ It may also be questioned why vindictory damages would even be needed when it does not appear to address the consequences of, but are merely concerned with, an infringement of a right.⁴²

[27] One commentator noted the merits of the award which is "individualised", "substantive and not derisory" and the fact

39 See Kumaralingam Amirthalingam, "Reproductive negligence: unwanted child or unwanted parenthood?" (2018) 134 *Law Quarterly Review* 15 at 19–20; Tsachi Keren-Paz, "Gendered Injustice in Compensating Injury to Autonomy in English and Singaporean negligence Law" (2018) *Feminist Legal Studies*, published online on November 22, 2018.

40 As suggested by the *amicus curiae* Professor Goh Yihan.

41 [2012] 1 AC 245.

42 See James Edelman, "Vindictory Damages" in Kit Barker, Karen Fairweather and Ross Grantham (eds), *Private Law in the 21st Century* (Hart Publishing, 2017), p 355.

that the costs of unwanted parenthood are not pecuniary.⁴³ The assessment of damages is indeed correctly based on the individual and subjective circumstances faced by the claimant and the surrounding circumstances objectively ascertained. This accords with the approach for compensatory damages based on the quantification of the claimant's loss.

[28] If the nature of the loss of genetic affinity is indeed non-pecuniary, then the quantification of that loss should as far as possible reflect its nature. In order to avoid the reference to pecuniary measures (such as the financial costs of raising the child) for assessment of damages, one approach might be to focus on the nature and extent of the non-pecuniary impact flowing from the defendant's breach. If so, the award for loss of genetic affinity may be based on factors such as the substantive adverse impact on the parents in bringing up the child who does not share genetic affinity with the parents⁴⁴ and even the extended family members, the degree of significance of the genetic link for the parents⁴⁵ and the permanence or relatively long-term duration of the impact.⁴⁶ That being said, it is difficult to ascertain the appropriate quantum based on these fairly general factors and, in all likelihood, the amount of damages recoverable would be significantly less than 30% of the financial costs of bringing up the child.

[29] The more basic problem with the above proposal based on the non-pecuniary aspects of the lost genetic affinity is that they overlap with a claim for mental distress (falling short of psychiatric harm) which is not allowed in the tort of negligence. The Supreme Court of New York County in *Andrews v Keltz*⁴⁷ held that the patients (husband

43 Tsachi Keren-Paz, "Gendered Injustice in Compensating Injury to Autonomy in English and Singaporean negligence Law" (2018) *Feminist Legal Studies*, published online on November 22, 2018. The author however thought that there was obliviousness to gendered equality considerations.

44 In this case, the impact was significant as the child was born with different racial features. As stated in the appellant's affidavit, they had suffered from public reactions to Baby P.

45 As mentioned above, both the appellant and her husband have collectively lost genetic affinity in that Baby P does not possess the combination of their gametes.

46 The duration of impact would have to take account of the claimants' present and future interactions with extended family members and the wider community in which they inhabit.

47 838 NYS 2 d 363.

and wife) who sought IVF services from the defendants (physicians and embryologists) and their child could not recover damages for mental distress in respect of the negligent acts of the defendants in using sperm from another person to fertilise the wife's eggs, thereby depriving them of the opportunity to have a child of their genetic make-up. Furthermore, there is *dicta* in the Northern Irish case of *A and B by C (their mother and next friend) v A Health and Social Services Trust*⁴⁸ that the abuse and offensive remarks attacking the children because of their skin colour did not constitute injury to the recipients of the comments.⁴⁹

[30] Other causes of action may be considered⁵⁰ such as a claim for mental distress arising from the invasion of the mother's bodily autonomy (which is akin to trespass to the person)⁵¹ since the sperm from a third-party donor was implanted in her womb without informed consent even if she was aware of the broad nature of the doctor's procedure. An alternative is breach of contract giving rise to mental distress as in *Farley v Skinner*⁵² though the context involving the sale of a house affected by aircraft noise is materially different. In *Yearworth and others v North Bristol NHS Trust*,⁵³ the English court allowed the claim by the plaintiffs for mental distress consequent upon the destruction of their sperm samples on the basis that the object of the bailment arrangement – described as “closely akin to contract” – was to “preserve the ability of the men to become fathers” and thus provided the plaintiffs “non-pecuniary personal or family benefits”.

Standard of care of medical doctors in negligence: From doctor to patient

[31] Traditionally, in the event of a conflict of expert opinion relating to the doctor's negligence whether in diagnosis, treatment or advice,

48 [2011] NICA 28. Note that it is a wrongful life claim by the children, not a wrongful birth or conception case.

49 *Ibid.*, at [10].

50 See Tom Foxton, “Inaccurate Conception: *ACB v Thomson Medical*” (2018) 81(2) *Modern Law Review* 337 at 346–347.

51 See M Fordham, “An IVF Baby and a Catastrophic Error – Actions for Wrongful Conception and Wrongful Birth Revisited in Singapore” (2015) *Sing JLS* 1–9 at 6.

52 *Farley v Skinner (No 2)* [2002] 2 AC 732 cited with approval in *Tan Chin Seng v Raffles Town Club Pte Ltd* [2005] 2 SLR(R) 302 at [55].

53 [2009] 3 WLR 118.

the courts will apply the “peer review” approach in *Bolam v Friern Hospital Management Committee*⁵⁴ (“*Bolam*”). Where a respectable body of medical opinion is of the view that the medical doctor’s acts or omissions are proper, the doctor is adjudged not negligent. This is followed by a second enquiry in *Bolitho v City and Hackney Health Authority*⁵⁵ (“*Bolitho*”) as to whether there was a “logical basis” to the medical opinion and whether it weighed the comparative risks and benefits to reach a “defensible” conclusion. In the vast majority of cases, the courts would regard the medical opinion as not illogical, a conclusion that would absolve the medical doctor of liability.⁵⁶ The tests in *Bolam* and *Bolitho* were previously applied not only to cases of allegedly negligent diagnosis and treatment but also negligent advice.⁵⁷

[32] In the past, this approach was endorsed by the Singapore Court of Appeal in *Khoo James v Gunapathy d/o Muniandy*⁵⁸ (“*Gunapathy*”) with the lingering words of caution “[w]e often enough tell doctors not to play god; it seems only fair that, similarly, judges and lawyers should not play at being doctors”. This deferential attitude to the medical profession was further justified by concerns over defensive medicine and medical costs.⁵⁹ The Court of Appeal in *Gunapathy* also clarified the two-stage analysis based on the *Bolitho* addendum: (a) whether the expert had directed his mind to the comparative risks and benefits; and (b) whether the expert had arrived at a “defensible” conclusion in relation to two factors: (i) the medical opinion was internally consistent on its face; and (ii) that it should not ignore or be contrary to known medical facts or advances in medical knowledge.

[33] This adherence to the *Bolam* and *Bolitho* tests with respect to the giving of medical advice came under severe criticism in several parts of the common law world, namely, the United States,⁶⁰ Australia,⁶¹

54 [1957] 1 WLR 582.

55 [1998] AC 232.

56 One notable exception is *Hucks v Cole* [1993] 4 Med LR 393 (doctors negligent for failing to treat a patient with penicillin despite great risks of puerperal fever).

57 *Sidaway v Board of Governors of the Bethlehem Royal Hospital and the Maudsley Hospital* [1985] AC 871.

58 [2002] 1 SLR(R) 1024 at [3].

59 *Ibid*, at [144].

60 E.g. *Canterbury v Spence* 464 F 2d 772 (1972).

61 E.g. *Rogers v Whittaker* [1992] 3 Med LR 331; *Naxakis v Western General Hospital* (1999) 197 CLR 269; *Rosenberg v Percival* (2001) 205 CLR 434.

Canada⁶² and Malaysia which have adopted the approach based on patient autonomy.

[34] A differently-constituted Singapore Court of Appeal from the *Gunapathy* case has recently applied a modified version of the UK Supreme Court decision of *Montgomery v Lanarkshire Health Board*⁶³ on the requisite standard of care of medical doctors. Essentially, the Singapore Court of Appeal in *Hii Chii Kok v Ooi Peng Jin London Lucien*⁶⁴ (“*Hii Chii Kok*”) held that, with respect to the giving of advice by a medical doctor, the *Bolam* and *Bolitho* tests should no longer be applicable. Sundaresh Menon CJ noted that the patient is more passive with respect to diagnosis and treatment but plays a more active role with respect to advice. Instead of *Bolam* and *Bolitho*, the standard of care expected of doctors giving advice to patients should adhere to a three-stage enquiry:

1. To identify the exact nature of the information to be provided by the doctor to the patient and establish why it is relevant and material;
2. To determine whether the information was in the possession of the doctor at the relevant time; and
3. Whether the doctor was justified in withholding the information (based on waiver, emergency treatment and therapeutic privilege).

Overall, the Court of Appeal in *Hii Chii Kok* has struck a fine balance between the principle of beneficence versus patient autonomy. Under the first stage of the enquiry, the information is determined to be relevant and material from the perspective of a reasonable patient in the individual patient’s shoes,⁶⁵ or where the doctor knew or had reason to believe that the individual patient would have considered it to be so. Whilst materiality of risks has always been important even in *Bolam* and *Bolitho*, the important difference here is the *change*

62 E.g. *Reibl v Hughes* (1980) 114 DLR (3d) 1.

63 [2015] 2 WLR 768. The *Montgomery* test has been applied in medical negligence cases such as *Worrall v Antoniadou* [2016] EWCA 1219 at [31]; *Lunn v Kanagaratnam* [2016] EWHC 93, QB.

64 [2017] 2 SLR 492.

65 For a medical disciplinary case concerning the doctor viewing matters from the patient’s position, see *SMC v Wong Him Choon* [2016] 4 SLR 1086 at [4].

of perspective from doctor to patient concerning *how* materiality of risks is to be assessed. Factors to be taken into account include the likelihood of the risks materialising, the gravity of the consequences should the risks materialise and the personal circumstances of the patient to the extent the doctor knew or ought reasonably to have known of them. Material information would include the diagnosis of the medical condition, prognosis of that condition with and without treatment, the nature of the medical treatment, the risks associated with medical treatment, the alternatives and their associated risks and benefits.⁶⁶ Only information of reasonable alternatives⁶⁷ are required to be disclosed.⁶⁸ The doctor is not obliged to disclose, for example, information concerning fringe alternatives or practices.⁶⁹ Material information, according to Sundaresh Menon CJ in *Hii Chii Kok*,⁷⁰ refers to information which may be required to help patients make an informed decision about their health and that it should not be limited to risk-related information.

[35] To apply the materiality test based on the perspective of the reasonable patient, the patient's particular circumstances (for example, whether the patient is a model or a sportsman or sportswoman) would be relevant. This approach takes account of the patient's subjective circumstances; yet, it adopts an objective standard of the reasonable patient and enquires from a reasonable doctor's perspective as to what the individual patient would consider material information.

[36] Further, the emphasis on proper communications between the doctor and patient cannot be gainsaid.⁷¹ The fact that a patient has signed a standard consent form which includes the possible risks of

66 *Dickson v Pinder* 2010 ABQB 269, Alberta Court of Queen's Bench at [68].

67 Note contrary opinion in *AH v Greater Glasgow Health Board* [2018] CSOH 57 at [42]–[46] that what would amount to reasonable alternatives in *Montgomery* is to be defined by the doctors rather than the patient. For example, doctors are only obliged to disclose alternatives which the doctor considers are clinically suitable for the patient. There was no breach of duty in the case for the failure to disclose the alternative treatments.

68 *Malinowski v Schneider* 2010 ABQB 734, Alberta Court of Queen's Bench at [40].

69 *Seney v Crooks* 1998 ABCA 316, Court of Appeal of Alberta at [57]–[58]. The orthopaedic surgeon failed to disclose an alternative medical procedure which was not a fringe alternative in the sense that it did not fall outside the specialty of orthopaedics or other form of healthcare.

70 [2017] 2 SLR 492 at [138].

71 *Al Hamwi v Johnson* [2005] EWHC 206, QB.

a medical treatment may not, on its own, be sufficient; the doctor should take reasonable steps to ensure the patient understands the risks involved.⁷²

[37] The second stage of the inquiry is a factual one focusing on whether the doctor possessed the information to begin with. Without the relevant information, the doctor would not be able to provide the medical advice. The lack of information could be due to negligent diagnosis or treatment which may have prevented the doctor from acquiring the material information. In the latter scenario, the assessment of whether the diagnosis or treatment was negligent would require the application of the *Bolam* and *Bolitho* tests.

[38] Unlike the first stage, the third stage of inquiry – whether the doctor is justified in withholding the information – is assessed from the *doctor's* perspective. The patient can exercise his or her right to waive, whether by express words or other unequivocal manner of communication, the disclosure of information by the doctor. The assessment of an emergency situation sufficient for the defence of necessity – where the patient is unable to make decisions and is under threat of death or serious harm – is based on the *Bolam* and *Bolitho* tests as medical expertise will be crucial in this regard. However, whether the doctor in question can withhold information from the patient based on therapeutic privilege in order to avoid serious mental or physical harm to the patient is to be assessed objectively by the court without reference to *Bolam* and *Bolitho*. Ultimately, the doctors (respondents) in *Hii Chii Kok* were held not to be negligent whether based on the old law in *Gunapathy* or the newly-minted approach to medical advice based on modifications to *Montgomery*.

[39] Though the approach in *Hii Chii Kok* represents a departure from case precedents with respect to medical advice, it nonetheless clarified and re-affirmed the existing legal position in other respects. The Singapore Court of Appeal opined that the *Bolam* and *Bolitho* tests do not supplant the general overarching professional standard based on what the ordinary skilled member of the medical profession

72 *Dickson v Pinder* 2010 ABQB 269, Alberta Court of Queen's Bench at [86]–[87]. The patient in question did not understand the full implications of a stroke, one of the risks stated in the consent form. See also *Malinowski v Schneider* 2010 ABQB 734, Alberta Court of Queen's Bench at [69]–[70].

would reasonably have done in the defendant's shoes. Rather, the tests represent a "convenient" and "efficient" means of determining the professional standard and supply a "practical mode" for implementing that standard.⁷³

[40] Furthermore, the Court of Appeal in *Hii Chii Kok*⁷⁴ noted that the patient autonomy approach was already evident in the Singapore Medical Council Ethical Code and Ethical Guidelines (2016 Edition).⁷⁵ The author also notes that the Singapore Medical Council Ethical Code and Ethical Guidelines (2002 Edition) had earlier recognised the need for providing adequate information on the benefits, risks and options albeit without explicitly mentioning "patient autonomy".⁷⁶ In similar vein, *Montgomery* itself may be characterised as representing a legal evolution⁷⁷ rather than a revolution. Lord Woolf MR in *Pearce v United Bristol Healthcare NHS Trust*⁷⁸ had already opined two decades ago that a doctor should disclose any "significant risk which would affect the judgment of the reasonable patient". The *Montgomery* test is also in line with the UK General Medical Council's (GMC) guidance which requires doctors to set out potential benefits, risks, burdens and likelihood of success of each option.⁷⁹

[41] Nonetheless, compared with *Bolam* and *Bolitho*, the *Montgomery* decision represents a shift from medical paternalism to a doctor-patient relationship based on the autonomy of the patient in partnership with

73 [2017] 2 SLR 515 at [57].

74 *Ibid*, at [118].

75 See ECEG (2016), p 37. See also C6(3) of the 2016 ECEG (on disclosure of material risks that would be significant to patients in particular circumstances).

76 Para 4.2.2 of ECEG (2002) ("doctor's responsibility to ensure that a patient under his care is adequately informed about his medical condition and options for treatment so that he is able to participate in decisions about his treatment. If a procedure needs to be performed, the patient shall be made aware of the benefits, risks and possible complications of the procedure and any alternatives available to him.")

77 See Sarah Devaney, "The Transmutation of Deference In Medicine: An Ethico-Legal Perspective" (2018) 26(2) *Med Law Rev* 202 at 208 (that the decision in *Montgomery* was aligned with the prevailing standards of medical profession on disclosure of information to patient).

78 [1999] PIQR 53 at [21].

79 See para 9 of GMC Guidance 2008, "Consent: Patients and Doctors Making Decisions Together" at <https://www.gmc-uk.org/-/media/documents/consent--english-0617_pdf-48903482.pdf> (accessed on June 25, 2019).

the doctor in the context of person-centred care.⁸⁰ The same may be said about *Hii Chii Kok*. Such an approach is also consistent with the partnership model in healthcare decision-making recommended by the National Medical Ethics Committee based on the tenets of “sharing” and “consensus”.⁸¹

[42] A final note on the Malaysian courts which have made important pronouncements on standard of care for the medical profession. In the case of *Foo Fio Na v Dr Soo Fook Mun* (“*Foo Fio Na*”),⁸² the doctor was negligent in failing to warn the patient of risks of paralysis associated with a surgery to treat her neck injuries. In so far as medical advice of risks is concerned, the *Bolam* test was not applicable; instead, the Federal Court favoured the Australia test in *Rogers v Whittaker*.⁸³ Subsequent to *Foo Fio Na*, there emerged in Malaysia two lines of case precedents⁸⁴ supporting either (i) the point that the *Bolam* test no longer applies to medical negligence and that the standard of care in medical negligence should instead be governed by the test in *Rogers v Whittaker*; or (ii) the proposition that the test in *Foo Fio Na* and *Rogers v Whittaker* apply only to medical advice to a patient whilst *Bolam* and *Bolitho* tests should apply to diagnosis and treatment only.

[43] The Federal Court in *Dr Hari Krishnan and another v Megat Noor Ishak bin Megat Ibrahim and another and another appeal*⁸⁵ has recently confirmed that the principle in *Foo Fio Na*, in specifically making reference to *Rogers v Whittaker*, apply only to medical advice and not diagnosis and treatment. For diagnosis and treatment, it opined that the courts are ill-equipped to resolve such differences of opinion. Thus,

80 Jonathan Herring, “Elbow Room for Best Practice? Montgomery, Patients’ Values, and Balanced Decision-Making in Person-Centred Clinical Care” (2017) 25(4) *Medical Law Review* 582.

81 National Medical Ethics Committee, “Ethical Guidelines for Healthcare Professionals on Clinical Decision-Making in Collaboration with Patients”, September 2012.

82 [2007] 1 MLJ 593.

83 [1992] 3 Med LR 331.

84 *Zulhasnimar bt Hasan Basri & Anor v Dr Kuppu Velumani P & Ors* [2017] 5 MLJ 438 at [52]–[53].

85 [2018] 3 MLJ 281. The Federal Court held at [74] that the ophthalmologist and the anaesthetist respectively had failed to warn the patient of the “material” risks of bucking and blindness from the operation. The patient had previously enquired about the need for an operation and would attach significance to the warnings of such risks.

Bolam and *Bolitho* will continue to apply to determine the standard of care with respect to medical diagnosis and treatment. The *Bolam* test “removes from the court the responsibility of resolving a dispute that it is not equipped to resolve”.⁸⁶ This is similar to the Singapore position. The Malaysian Court of Appeal in *Ahmad Zubir bin Zahid v Datuk Zainal Abidin Abdul Hamid and others*⁸⁷ has, however, recently doubted the approach in *Montgomery*.⁸⁸

Contributory negligence and the right of way

[44] In Singapore, the defence of contributory negligence is enshrined under section 3(1) of the Contributory and Personal Injuries Act.⁸⁹ The general legal test is whether the plaintiff ought to have reasonably foreseen that his failure to act prudently could result in harm to himself and had thereby failed to take reasonable measures to guard against that foreseeable harm.⁹⁰ The degree of care required would depend on a few factors, including the likelihood of injury, the gravity of injury, and the cost of guarding against such risks.

[45] How is the general test to be applied when the plaintiff (a pedestrian) is crossing the road with the traffic lights in his favour? Can or should he nonetheless be adjudged contributorily negligent? The legal issue in *Asnah bte Ab Rahman v Li Jianlin*⁹¹ (“*Asnah*”) – whether the plaintiff (respondent), who was injured by a taxi driven by the defendant (appellant) when he was crossing the road with the traffic lights in his favour, was contributorily negligent – has indeed given rise to some judicial disagreement within the Court of Appeal.

86 Ibid, at [60] (citing the prior Federal Court decision in *Zulhasnimar bt Hasan Basri & Anor v Dr Kuppu Velumani P & Ors* [2017] 5 MLJ 438).

87 [2018] MLJ 1534 at [19].

88 The Malaysian Court of Appeal stated that *Montgomery* is “generic in nature and has no confined parameters as to what the medical profession should do or should not do”; and that the “costs of treatment will be multifold as well as professional indemnity insurance for doctors may also increase”. The Malaysian Court of Appeal also suggested that “[t]he law on medical negligence in Malaysia needs appropriate legislative intervention to provide proper safeguards for patients as well as doctors”.

89 Cap 54, 2002 Rev Ed.

90 *Jones v Livox Quarries Ld* [1952] 2 QB 608.

91 [2016] 2 SLR 944.

[46] Whilst the majority judges⁹² in *Asnah* found the respondent (pedestrian) contributorily negligent for 15% of the damages awarded, the dissenting judge⁹³ decided that the appellant (taxi driver) should bear the entire loss. The majority felt that in the interests of road safety, pedestrians should remain vigilant when they utilise pedestrian crossings and that they ought to foresee the risks that motorists may run red lights. Moreover, this need for pedestrians to look out for motorists at signalised pedestrian crossings was consistent with the majority's interpretation of the Highway Code.⁹⁴ Further, the respondent had already crossed to a road divider; in this regard, the majority opined that the respondent should have checked for approaching traffic before he left the centre-divider and stepped onto the second half of the road when the tragic accident occurred.

[47] The dissenting judge felt that the majority did not, in assessing contributory negligence, give sufficient emphasis to the question whether it was reasonable to expect the respondent to guard against the particular type of conduct that caused the damage (in this case, the appellant's dangerous driving). Based on the speed of the taxi as it was traveling on a straight road for 60 to 70 metres and approaching the crossing, the appellant should have clearly appreciated that the lights were in the respondent's favour (and against the appellant) for a sufficiently long period of time. Moreover, the statistics of accidents due to motorists running red lights as referred to by the majority judges might not have fully appreciated the different situations when a motorist drove past a red light (including the special circumstances in the present case). In similar vein, the dissenting judge interpreted the scope of application of the particular provision in the Highway Code to be narrow such that it could not apply to these unique factual circumstances.

[48] In sum, whilst the judges were agreed on the general test for the defence of contributory negligence, they differed as to the level of emphasis given to the driver's conduct and the statistical information of motorists running red lights, the interpretation of the Highway Code and even the evidence as to whether the respondent had checked for traffic when he stepped off from the centre-divider.

92 Chao Hick Tin JA and Quentin Loh J.

93 Sundaresh Menon CJ.

94 Cap 276, R 11, 1990 Rev Ed, r 22.

[49] The majority decision is a salutary reminder that road users and pedestrians should continue to pay “some” care and attention for their own safety even when they have the statutory right of way. As a matter of general principle, a prudent road user should guard against the possibility that other road users may flout traffic rules. Nonetheless, on the facts, the standard expected of the pedestrian to take care of his own safety can be described as a fairly high one considering the reckless conduct of the taxi driver (as compared to the pedestrian who had the right of way). That being said, the majority judges had not overlooked the greater causative potency and blameworthiness of the appellant’s dangerous driving, and had deemed it fair to reduce the amount of damages by what they regarded as a “modest” 15%.⁹⁵

Tort of harassment and false statements

[50] Another notable instance of judicial disagreement concerns the scope of the Protection from Harassment Act⁹⁶ (“PHA”). The statute was enacted in 2014 to impose criminal sanctions on the perpetrators of acts of harassment and to grant protection orders⁹⁷ and allow for civil remedies⁹⁸ to victims of harassment. Though the term “harassment” has not been explicitly defined, the conduct targeted under the statute include the use or making of any threatening, abusive or insulting words or behaviour that cause harassment, alarm and distress,⁹⁹ the threat of unlawful violence¹⁰⁰ and unlawful stalking¹⁰¹ which are found in sections 3 to 7 of the statute. The bulk of the court judgments have dealt with criminal charges and sanctions meted out under the statute.¹⁰² Recently, in 2017, a protection order was granted by the High Court requiring the respondent – who managed a sports coaching company – to remove from the respondent’s Internet webpages allegations against

95 [2016] 2 SLR 944 at [120].

96 Cap 256A, 2015 Rev Ed.

97 Section 12.

98 Section 11.

99 Sections 3 and 4. Section 3 requires the intention to cause harassment, alarm or distress. Section 4 refers to conduct which must be heard, seen or otherwise perceived by the victim.

100 Section 5.

101 Section 7.

102 E.g. *Lim Teck Kim v Public Prosecutor* [2019] SGHC 99; *Sim Kang Wei v Public Prosecutor* [2019] SGHC 129; *Tan Yao Min v Public Prosecutor* [2018] 3 SLR 1134 (all of the above relating to s 7); *Public Prosecutor v Ye Lin Myint* [2019] SGDC 36 (s 3); *Public Prosecutor v Darragh Jason Peter* [2017] SGDC 252 (s 6).

its ex-employee (the appellant) concerning the latter's incompetence as a coach and molestation of the athletes he had coached, as well as to desist from posting further abusive and insulting communications concerning the appellant.¹⁰³

[51] A more contentious issue in recent times pertains to the interpretation of a unique provision, namely, section 15 of the PHA regarding a false statement which has been published about a "person". Upon the application by the "person", the District Court is empowered to order the author of the false statement to give a notification that highlights the falsehood and to indicate the true facts provided it is just and equitable to do so ("section 15 order"). In *Attorney-General v Ting Choon Meng*,¹⁰⁴ Dr Ting alleged that the Ministry of Defence had conducted a "war of attrition" in a lawsuit concerning patent infringement against a company to deplete the latter's financial resources. In response, the Government applied for a section 15 order that the allegation was false and that it should not be published without a notification of falsehood and the true facts.

[52] The judges in the Court of Appeal essentially differed on whether the Singapore Government is a "person" entitled to apply to the District Court. It was decided by a bare majority¹⁰⁵ of 2:1 that the Government had no right to apply for such an order under section 15 of PHA. Based on the majority's interpretation of the parliamentary debates, particularly the Minister's speech leading to the enactment of PHA, the word "person" should be confined to human beings and not artificial entities who cannot suffer from or be subject to harassment.¹⁰⁶ Within the context of the statute, they regarded section 15 as conferring an additional remedy in the nature of a "quasi" self-help remedy¹⁰⁷ falling short of a criminal sanction or civil remedy.

[53] The dissent¹⁰⁸ was based on an alternative interpretation of "person" in section 15 by reference to section 2 of the Interpretation Act which states that a "person" "include[s] any company or association or body of persons, corporate or unincorporated". On this basis, the

103 *Benber Dayao Yu v Jacter Singh* [2017] 5 SLR 316.

104 [2017] 1 SLR 373.

105 Chao Hick Tin JA and Andrew Phang JA.

106 [2017] 1 SLR 373 at [22].

107 *Ibid.*

108 Dissenting judge Sundaresh Menon CJ.

word “person” under section 15 could include the Government unless the context suggests otherwise. Whilst the “person” in the context of the harassment-related provisions in sections 3 to 7 would relate to natural persons who may experience harassment, alarm or distress, the dissenting judge argued that the same cannot apply to section 15.¹⁰⁹ In fact, it was contended that section 15 is independent of sections 3 to 7 and offers a “standalone remedy”.¹¹⁰ Though doubts remain as to whether there is indeed a definitive interpretation of this rather tricky provision, it is clear the majority decision on section 15 represents the legal position in Singapore.

[54] It should be briefly highlighted that recent amendments to the statute have been passed by the Singapore Parliament in May 2019.¹¹¹ Apart from setting up specialised Protection from Harassment Courts and allowing for simplified procedures for protection orders and expedited protections orders, penalties have been enhanced for offences against vulnerable persons and intimate partners. A new offence of doxxing – the publication of personally identifiable information to harass the victim – has also been introduced. With respect to tort developments, the amendments have sought to clarify that entities and not merely individuals may be liable for harassment-related behaviour. Furthermore, under the proposed changes, entities including corporations (but not the Government)¹¹² are entitled, if they are victims of falsehoods, to apply for a section 15 order.

Tort of defamation: Absolute versus qualified privilege

[55] In the tort of defamation, Singapore courts have benefited from the wide-ranging judgments importing perspectives and insights from the various common law jurisdictions such as Australia, Canada, England, Malaysia and New Zealand since 1965.¹¹³ Notwithstanding

109 [2017] 1 SLR 373 at [76].

110 *Ibid*, at [87]. Sundaresh Menon CJ at [100] relied on the Minister’s speech to the effect that a person can invoke s 15 to correct falsehoods even if there is no recourse to other provisions in the statute.

111 See Ministry of Law’s write-up, April 1, 2019 on the changes at <<https://www.mlaw.gov.sg/content/minlaw/en/news/press-releases/Enhancements-to-the-Protection-from-Harassment-Act-POHA.html>> (accessed on June 17, 2019).

112 The Government may, however, have recourse to the separate Protection from Online Falsehoods and Manipulation Bill which was passed by the Singapore Parliament on May 8, 2019.

113 See Gary Chan Kok Yew, *Tort of Defamation before the Singapore Courts 1965–2015: A Comparative and Empirical Study* (Academy Publishing, 2017).

the significance of common law principles in this area, the proverbial balance between the protection of reputation and the promotion of free speech and expression of opinions varies across the jurisdictions due to different policy considerations and local conditions (such as the value placed on public debate, reputations of political and public figures, and the perceived role of the media).

[56] Amongst other issues, the scope of protection afforded to complaints made to the police and other statutory authorities that defame the plaintiff and whether they ought to be protected by absolute or qualified privilege have given rise to contrary views. There were three seemingly inconsistent case precedents in Singapore¹¹⁴ which could not provide a conclusive answer to the issue at hand. The English¹¹⁵ and Malaysian¹¹⁶ courts have adopted absolute privilege with respect to statements made to the police. In contrast, the Australian¹¹⁷ and Canadian¹¹⁸ positions incline towards qualified privilege.

[57] The five-judge Court of Appeal has in *Goh Lay Khim and others v Isabel Redrup Agency Pte Ltd and another appeal*¹¹⁹ recently clarified that complaints to the police or statutory authorities do not fall within statements made for the purpose of or in connection with judicial proceedings that are traditionally protected by absolute privilege. Prakash JA, who delivered the unanimous judgment, stated that such complaints are for the purpose of allowing the prosecuting authorities to decide whether to bring charges before the courts, and hence should only be protected by qualified privilege.¹²⁰ It may be argued that there is a distinction between statements made in the course of judicial proceedings to ascertain the truth of a matter (which are absolutely privileged) and communications to prosecuting authorities which only

114 *D v Kong Sim Guan* [2003] 3 SLR(R) 146 (that explanations made by a psychiatrist to the allegations of a complainant in response to the Complaints Committee of the Singapore Medical Council were protected by absolute privilege); cf *Silas Saul Robin v Sunrise Investments (Pte) Ltd* [1991] 1 SLR(R) 169; and *Tang Liang Hong v Lee Kuan Yew* [1997] 3 SLR(R) 576 (police report protected by qualified privilege though absolute privilege was not raised).

115 *Buckley v Dalziel* [2007] 1 WLR 2933; and *Westcott v Westcott* [2009] QB 407.

116 *Lee Yoke Yam v Chin Keat Seng* [2013] 1 MLJ 145 (statements made in a first information report).

117 *Mann v O'Neill* (1997) 145 ALR 682.

118 *Hanisch v Canada* [2003] BCJ NO 1518; *Caron v A* [2015] BCCA 47.

119 [2017] 1 SLR 546.

120 *Ibid.*, at [77]–[78].

aid in determining whether circumstances warrant the initiation of proceedings to ascertain the truth (and hence should only be protected by qualified privilege).¹²¹

[58] The complainant in question had reported to the police and the Council of Estate Agencies (“CEA”) that an estate agent may have committed forgery in a respect of an option relating to the purchase of property. That the complaint only attracted qualified privilege was significant on the facts of the case. There was actual malice on the part of the complainant which defeated the defence as he did not genuinely believe that the statements he made to the police and the CEA were true. Moreover, his dominant motive was to injure the estate agent.

Economic torts: Director’s immunity from personal liability

[59] The economic torts are mainly targeted at intentional and unlawful conduct¹²² which harm economic interests. These torts have been developed to keep tortious liabilities within strict limits against the background of free market competition. The likelihood of harmful economic consequences arising from the defendant’s conduct cannot ground liability if the consequences are not intended by the defendant. There must also be a “tight nexus” between the intentional state of mind and the determinate class of persons targeted by the defendants.¹²³ The Singapore courts are ever mindful that tort law should not unduly restrict the free market competition amongst businessmen and corporate entities.

[60] But to what extent should economic torts restrict the conduct of directors of such corporate entities in business transactions? In this regard, the Court of Appeal’s recent clarifications in *PT Sandipala Arthaputra v STMicroelectronics Asia Pacific Pte Ltd*¹²⁴ (“*Sandipala*”) concerning directors’ scope of personal liability in respect of company’s acts are indeed welcome. This relates specifically to the *Said v Butt*¹²⁵ principle that a director who acts bona fide within the scope of his

121 *Mann v O’Neill* (1997) 145 ALR 682 at 689, per Brennan CJ, Dawson, Toohey and Gaudron JJ.

122 But economic torts are not exclusively based on unlawful conduct; the tort of lawful means conspiracy remains in Singapore law despite the anomalies: see *Panatron Pte Ltd v Lee Cheow Lee* [2000] SGHC 209.

123 *EFT Holdings, Inc v Marinteknik Shipbuilders (S) Pte Ltd* [2014] 1 SLR 860 at [111].
124 [2018] 1 SLR 818.

125 [1920] 3 KB 497.

authority as director with respect to breaches of contract entered into by the company with a third party (plaintiff) is not personally liable. The principle would be relevant in situations involving an alleged conspiracy between the directors of a company to procure the company to breach its contract with the plaintiff¹²⁶ or a conspiracy between a director and the company¹²⁷ to cause the company to breach the contract. Another case in point is where the director allegedly induces the company to breach its contract with the plaintiff. The Singapore Court of Appeal in *Sandipala* has made a clear pronouncement that, in such circumstances, the director will and should be protected from legal liability if his act in his capacity as director was not in itself a breach of any fiduciary or other personal duties owed to the company.¹²⁸

[61] Hence, in order to establish the tort of inducement of breach of contract or conspiracy to cause the company to breach the contract with the plaintiff, the onus is on the plaintiff to show that the director had breached personal duties to the company.¹²⁹ Where this is shown, the director will not be protected from legal liability under the principle.¹³⁰

[62] In *Sandipala*, Oxel Systems Pte Ltd (“Oxel”), a Singapore company, contracted to supply microchips to PT Sandipala Arthaputra (“PT Sandipala”), an Indonesian company which was engaged to produce electronic identity cards for the Indonesian Government. The microchips were produced by STMicroelectronics Asia Pacific Pte Ltd (“ST-AP”). It transpired that Oxel’s operating systems were not compatible with the Indonesian Government’s requirements. PT Sandipala refused delivery of the microchips and sued Oxel and ST-AP for breach of contract and fraudulent misrepresentation. Oxel counterclaimed against PT Sandipala for wrongfully rejecting the microchips, and against PT Sandipala and its directors for conspiring to cause Oxel loss by breaching their contractual obligations. With

126 See *Chong Hon Kuan Ivan v Levy Maurice* [2004] 4 SLR 801.

127 See *Nagase Singapore Pte Ltd v Ching Kai Huat* [2008] 1 SLR(R) 80; *Chew Kong Huat v Ricwil (Singapore) Pte Ltd* [2000] 1 SLR 385.

128 See also Peter Watts, “The Company’s Alter Ego – A Parvenu and Imposter in Private Law” (2000) NZL Rev 137 at 151 (supporting the rationale underlying the principle in *Said v Butt* to protect an agent who furthers the interests of the principal).

129 *Wang Weidong v SPM Global Services Pte Ltd and another* [2018] SGHCR 6 at [17].

130 E.g. *Tembusu Growth Fund Ltd v ACATek* [2015] SGHC 206; *Nagase Singapore Pte Ltd v Ching Kai Huat* [2008] 1 SLR(R) 80.

respect to the counterclaim in conspiracy, there was no evidence that the directors had acted in breach of their personal duties to PT Sandipala. Hence, the directors were completely absolved of personal liability.¹³¹

[63] In the Malaysian case of *Q2 Engineering Sdn Bhd v PJI-LFGC (Vietnam) & Ors*,¹³² it was stated that to establish the tort of inducement of breach of contract, the alleged inducer must be a “stranger” to the contract that is alleged to be breached. The learned judicial commissioner cited *Said v Butt* and *Imperial Oil Ltd v C&G Holdings Ltd*,¹³³ stating that in those two cases, the inducer was the “controlling mind” or “alter ego” of the contracting party alleged to be in breach¹³⁴ and were therefore not “strangers” to the contract. If the “stranger” refers to anyone who is not the controlling mind or alter ego of the company, the scope of personal liability of directors would appear to be, comparatively speaking, broader than in Singapore.

[64] As it stands, in Singapore, the principle in *Said v Butt* applies only to breaches of contract¹³⁵ and not torts. With respect to torts, the Court of Appeal in *Sandipala* recognised the principle that a director would be liable for the torts committed by the company if the director had directed or procured the commission of the torts.¹³⁶ The case of *TV Media Pte Ltd v De Cruz Andrea Heidi*¹³⁷ involved the tortious liability of a director who authorised, directed or procured his company to import and sell slimming pills that resulted in the plaintiff’s personal injury.

[65] Professor Lee Pey Woan¹³⁸ argued that the doctrine of contractual privity between a company and a third party can justify the different treatment (that is, to immunise the director from personal liability

131 PT Sandipala remained liable for breach of the supply contract.

132 [2013] 8 MLJ 157 at [94], per Lee Swee Seng JC.

133 (1990) 62 DLR (4th) 261.

134 [2013] 8 MLJ 157 at [95].

135 See Neil Campbell and John Armour, “Demystifying the Civil Liability of Corporate Agents” (2003) 62(2) *Cambridge Law Journal* 290 at 303 on the narrow scope of the principle in *Said v Butt*.

136 *Peter Gabriel & Partners v Wee Chong Jin* [1997] 3 SLR(R) 649.

137 [2004] 3 SLR(R) 543. See also *Wah Tat Bank Ltd v Chan Cheng Kum* [1975] AC 507 at 514–515 (managing director’s personal liability for company’s tort of conversion); and *Rainham Chemical Works Ltd v Belvedere Fish Guano Co Ltd* [1921] 2 AC 465 at 476, per Lord Buckmaster (that the directors were not liable unless the alleged tortious acts under the rule in *Rylands v Fletcher* had been expressly directed by them).

138 “Company and Its Directors as Co-conspirators” (2009) 21 SAclJ 409 at 427–428.

emanating from the company's breaches of contract but not for the commission of torts in general). Professor Tan Cheng Han,¹³⁹ on the other hand, was more ready to embrace an extension of the principle to company torts. He advocated a two-stage test: (i) the requirement of whether the director was involved in a "material" way in the acts that led to the company incurring tortious liability; and (ii) if the requirement is satisfied, the director may be personally liable unless the director had acted properly in discharge of his duty to the company. Huang¹⁴⁰ argued for the *Sandipala* test to also apply to torts.

[66] Caution needs to be exercised in further extending a director's personal liability for company torts due to concerns of "defensive" conduct on the part of directors which will not be conducive for commerce.¹⁴¹ Yet this has to be balanced against the need to pin legal responsibility for torts committed by the director whether personally¹⁴² or jointly with the company. With respect to the latter, two factors relating to the director's control¹⁴³ and knowledge or intentionality¹⁴⁴ *vis-à-vis* the commission of the acts constituting the tort may be relevant in order to determine whether the director had indeed authorised, directed or procured the commission of the company tort.

Malicious prosecution: Maintaining status quo and finality

[67] The tort of malicious prosecution has had a long history in so far as criminal proceedings are concerned. To establish a case, the plaintiff has to show that (i) he was prosecuted by the defendant, that is, the law must be set in motion against him on a criminal charge; (ii) the prosecution was determined in his favour; (iii) the prosecution was without reasonable and probable cause; (iv) the prosecution was

139 "Tortious Acts and Directors" (2011) 23 SAclJ 816.

140 "Reformulating The Rules On Director Liability Exclusions In *Said v Butt*" (2018) 30 SAclJ 1110.

141 *Vita Health Laboratories v Pang Seng Meng* [2004] 4 SLR(R) 162; and *Peter Gabriel & Partners v Wee Chong Jin* [1997] 3 SLR(R) 649 at [34]. See also *Rainham Chemical Works Ltd v Belvedere Fish Guano Co Ltd* [1921] 2 AC 465 at 488, *per* Lord Parmoor (that directors acting bona fide should not be regarded as the principal of the company).

142 E.g. *Standard Chartered Bank v Pakistan National Shipping Corp Ltd* [2003] 1 AC 959.

143 *TV Media Pte Ltd v De Cruz Andrea Heidi* [2004] 3 SLR(R) 543.

144 *Sea Shepherd UK v Fish & Fish Ltd* [2015] 2 WLR 694 (that joint tort liability requires commission of acts in pursuance of a common design).

malicious;¹⁴⁵ and finally (v) he suffered damage resulting from the malicious prosecution.¹⁴⁶

[68] The tort has been applied to civil proceedings involving applications for *ex parte* interlocutory orders such as the acts of maliciously initiating bankruptcy and winding-up petitions which attack the credit of the person sued,¹⁴⁷ maliciously procuring the arrest of vessels,¹⁴⁸ and maliciously starting a process for the execution of property.¹⁴⁹ Should the tort be extended to civil proceedings generally? Further, a person who brings or conducts proceedings for a dominant purpose other than to obtain justice according to law is liable to be sued under the tort of abuse of process¹⁵⁰ though this tort is not commonly used. In 2013, the Privy Council in *Crawford Adjusters (Cayman) Ltd v Sagicor General Insurance (Cayman) Ltd*¹⁵¹ held by a narrow margin to extend the tort of malicious prosecution to civil proceedings generally based on case precedents and the perceived injustice that would arise if there is no remedy against the plaintiff with respect to a legal proceeding brought maliciously without reasonable ground and with the intention to cause injury to another. This was followed shortly by the UK Supreme Court in *Willers v Joyce (No 1)*¹⁵² which reached the same conclusion on similar bases. The United States, Australian¹⁵³ and New Zealand¹⁵⁴ courts have also allowed malicious prosecution in respect of civil proceedings.

[69] In Singapore, a lengthy episode spanning three decades of litigation had engaged both the developer and the management corporation of a condominium project. This implicated the legal issue of whether the management corporation had a right of way to access a condominium development. After five legal suits (and their appeals), the developer successfully persuaded the highest court in the land that

145 *Zainal bin Kuning v Chan Sin Mian Michael* [1996] 2 SLR(R) 858.

146 *Savill v Roberts* (1698) 12 Mod Rep 208, per Holt CJ.

147 E.g. *Quartz Hill Consolidated Gold Mining Co v Eyre* (1883) 11 QBD 674.

148 *The Walter D Wallet* [1893] P 202.

149 *Clissold v Cratchley* [1910] 2 KB 244.

150 *Grainger v Hill* (1838) 4 Bing NC 212.

151 [2013] 3 WLR 927.

152 [2016] 3 WLR 477.

153 *Little v Law Institute of Victoria* [1990] VR 257.

154 *New Zealand Social Credit Political League Inc v O'Brien* [1984] 1 NZLR 84; *Rawlinson v Purnell, Jenkinson & Roscoe* [1999] 1 NZLR 479.

the management corporation did not have such a right of way. The developer, backed by the abovementioned court judgment, sued the management corporation under the tort of malicious prosecution and abuse of process respectively.¹⁵⁵ A five-judge Court of Appeal sitting in *Lee Tat Development Pte Ltd v Management Corporation Strata Title Plan No 301* (“*Lee Tat*”)¹⁵⁶ – in a comprehensive judgment delivered by Andrew Phang JA – ruled that the tort of malicious prosecution should not be extended to civil proceedings and refused to recognise the tort of abuse of process.¹⁵⁷ Malicious prosecution will however continue to apply to the special categories of cases, namely, proceedings in relation to the arrest of a ship and “*ex parte* interlocutory orders by the party initiating the proceedings, the effect of which is (potentially at least) to inflict immediate and perhaps even irreversible damage on the reputation of the other party”.¹⁵⁸

[70] First, according to the Court of Appeal, criminal prosecutions are carried out by public authorities as distinct from private parties. The effects and consequences of criminal prosecution are materially different from those in civil proceedings. Second, the concept of malice in malicious prosecution is uncertain and may be subjectively applied.¹⁵⁹ Third, defamatory statements in judicial and quasi-judicial proceedings are protected by absolute privilege in defamation. Malicious prosecution relating to such statements will militate against this absolute privilege granted by the law. Fourth, allowing malicious prosecution in civil proceedings might erode the principle of finality of proceedings¹⁶⁰ and result in increased risk of satellite litigation. Similar reasons (the need to respect the principle of finality and the

155 The other causes of action were malicious falsehood and trespass to land which will not be discussed in this paper.

156 [2018] 2 SLR 866.

157 The defendants in *Lee Hsien Loong v Leong Sze Hian* [2019] SGHC 66 counterclaimed in the tort of abuse of process and the High Court at [24]–[30] dismissed it, citing *Lee Tat*.

158 *Lee Tat*, n 156 above, at [77]. In *Malayan Banking Berhad v ASL Shipyard Pte Ltd and others* [2019] SGHC 61 at [186]–[188], the High Court decided that the facts involving an action “between a creditor claiming a security interest and defendants who claim to have defeated the security interest” or one “between an alleged victim of the tort of conspiracy and the alleged conspirators” would not fall within the abovementioned category of cases.

159 [2018] 2 SLR 866 at [99].

160 *Ibid*, at [105].

desire not to create a chilling effect for genuine litigants) apply to the court's decision not to recognise the tort of abuse of process.

[71] Some of the objections to the extension of the tort of malicious prosecution to civil proceedings – such as the need for finality in litigation and the risk of satellite litigation as well as the preservation of absolute privilege for witness statements made in connection with judicial proceedings – could arguably apply to criminal proceedings.¹⁶¹ On the uncertain scope of malice, it should be highlighted that the requirement of malice has been applied to other tort law areas such as malicious falsehood and defamation. It normally demands a high threshold of proof of improper motive or spite and ill-will towards the party defending the original civil proceeding.¹⁶² In addition, it has to be shown that there was an absence of reasonable or probable cause, a requirement which entails both a subjective and objective assessment at the time of initiating the civil proceeding. Malicious prosecution in civil proceedings could, for instance, be relevant in cases of unsuccessful civil fraud claims due to the dishonesty of the claimants.¹⁶³

[72] That being said, allowing the tort to be extended to civil proceedings may give rise to difficult decisions or satellite litigation in the future as to where the line should be drawn on the scope and type of proceedings (such as malicious defences, arbitrations, and family proceedings)¹⁶⁴ and whether it should extend to pure economic losses. At the end of the day, the decision whether to extend the tort to civil proceedings would depend on the (fine) balance amongst competing policy considerations and the likely repercussions some of which cannot be empirically assessed in advance with certainty

161 Stephen Todd, "Liability for the Malicious Institution of Civil Proceedings" (2017) 4 *Journal of International and Comparative Law* 123.

162 Another possibility to consider whether the defendant had deliberately misused the process of the court in bringing proceedings "in the knowledge that they were without foundation": see *Juman v AG of Trinidad & Tobago* [2017] UKPC 3, PC.

163 James Goudkamp, "A tort is born", Tort Legal Update (July 7, 2017) *New Law Journal* at 12.

164 But see John Sorabji, "Malicious prosecution and abuse of process: *Willers v Joyce*" (2017) 36(4) *Civil Justice Quarterly* 387–400 at 393 (that the "procedural consequences" flowing from a proposed tort reform should not "deny the existence of a substantive law right").

(such as whether the tort would serve as a unwelcome deterrence against a party's exercise of his right to access the courts and would appropriately deter the malicious bringing of law suits without reasonable or probable cause).

[73] The issue of whether malicious prosecution in civil proceedings and the tort of abuse of process are recognised in Malaysia is currently in a state of flux. First, the Malaysian court has recognised the tort of malicious prosecution in civil proceedings in *Gasing Heights Sdn Bhd v Aloyah binti Abdul Rahman & Ors*.¹⁶⁵ The very recent Malaysian Court of Appeal decision in *KHK Advertising Sdn Bhd v Siera Management Sdn Bhd (in liquidation)*¹⁶⁶ stated, however, that the tort of malicious prosecution is not extended generally to civil proceedings, citing Lord Steyn's judgment in *Gregory v Portsmouth City Council*¹⁶⁷ but only in special cases such as the initiation of winding-up proceedings.

[74] On the other hand, whilst *Gasing Heights Sdn Bhd* did not recognise the tort of abuse of process, subsequent decisions suggest a contrary position. In the Malaysian Court of Appeal decision in *Malaysia Building Society Bhd v Tan Sri General Ungku Nazaruddin bin Ungku Mohamed*,¹⁶⁸ Gopal Sri Ram JCA¹⁶⁹ accepted that the tort of abuse of process exists with reference to the "instructive judgment of the High Court of Australia in *Williams v Spautz*". Both *Malaysia Building Society Bhd* and *Williams v Spautz*¹⁷⁰ have been cited in *Vijendran all Ponniah v Bank of Commerce*¹⁷¹ and *Malaysia Building Society Bhd* was subsequently applied in *Radiant Preference Sdn Bhd & Ors v Mohaizi bin Mohamad & Anor*.¹⁷²

Punitive damages in tort: Beyond *Rookes v Barnard*

[75] Apart from the creation of a new head of damage based on loss of genetic affinity, *ACB* has made important clarifications on the scope of award of punitive damages in the tort of negligence. The latter issue has often provoked strong reactions not least due to the focus

165 [1996] 3 MLJ 259.

166 [2018] 4 MLJ 168 at [42] and [77]–[78].

167 [2000] 1 All ER 560.

168 [1998] 2 MLJ 425.

169 Denis Ong JCA and Siti Norma Yaakob JCA agreed.

170 (1992) 107 ALR 635.

171 [1998] 7 MLJ 418.

172 [2015] 11 MLJ 637 at [62].

on compensation for losses in tort law rather than to punish. Prior to *ACB*, the Singapore High Court¹⁷³ regarded *Rookes v Barnard*¹⁷⁴ on the award of punitive damages as “good law”. There was, however, no specific consideration of the “categories” approach in *Rookes v Barnard*, namely, that punitive damages may be awarded only where:

1. There had been oppressive, arbitrary or unconstitutional action by the servants of the government;
2. The defendant’s conduct was calculated to make a profit for himself which might well exceed the compensation payable to the plaintiff; and
3. Punitive damages were expressly authorised by legislation.

[76] Upon conducting a thorough survey of the common law positions in *ACB*, Andrew Phang JA opined that the “categories” test was “unprincipled” and “arbitrary” as it is not tied to the underlying rationale to punish, deter and condemn the tortfeasor.¹⁷⁵ Further, the categories are “illogical” as there is no good reason to limit the award of punitive damages to specific conduct involving government servants and profit motive.¹⁷⁶ The Court of Appeal has therefore decided to depart from it. The “categories” approach has also been rejected by other common law jurisdictions in Australia,¹⁷⁷ New Zealand¹⁷⁸ and Canada.¹⁷⁹

[77] With regard to the proper scope, the Court of Appeal stated that punitive damages serves as a “supplementary device” to remedy perceived “gaps” in the law in order to punish and deter seriously wrongful behaviour.¹⁸⁰ As Andrew Phang JA explained, though tort law is concerned primarily with compensation for losses, it is not exclusively so.¹⁸¹ In lieu of the straitjacketed “categories” approach,

173 *Afro-Asia Shipping Co (Pte) Ltd v Da Zhong Investment Pte Ltd* [2004] 2 SLR(R) 117 at [134].

174 [1964] AC 1129.

175 [2017] 1 SLR 918 at [174].

176 *Ibid.*

177 *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118.

178 *Taylor v Beere* [1982] 1 NZLR 81.

179 *Vorvis v Insurance Corporation of British Columbia* [1989] 1 SCR 1085 at 1105 per McIntyre J.

180 [2017] 1 SLR 918 at [172]–[173].

181 *Ibid.*, at [172].

punitive damages may be awarded in tort based on a singular test, that is, where the totality of the defendant's conduct is so outrageous that it warrants punishment, deterrence, and condemnation.¹⁸² Such outrageous conduct may arise from intentional and/or non-intentional torts.¹⁸³ There is therefore no bar to awarding punitive damages under the tort of negligence provided outrageous conduct on the part of the defendant, sufficient to warrant punishment, deterrence and condemnation, is demonstrated. The Court of Appeal also clarified that the threshold of outrageous conduct – which relates to the manner of the commission of the tortfeasor's act as well as its gravity – does not necessarily require proof of intentional wrongdoing or subjective recklessness.¹⁸⁴

[78] On the facts, the mistake in mixing the sperm samples in *ACB* was not so egregious as to attract punitive damages.¹⁸⁵ Due to the high threshold in *ACB* to justify an award of punitive damages,¹⁸⁶ it is unsurprising that subsequent claims for punitive damages have also been rejected locally.¹⁸⁷ In a subsequent Singapore Court of Appeal decision,¹⁸⁸ it was confirmed that punitive damages are nevertheless available in a case where there is concurrent liability in both tort and contract.

182 See also *Wilkes v Wood* (1763) 98 ER 489 at 498–499, per Pratt LJ.

183 See also the comparable English position in *Kuddus v Chief Constable of Leicestershire Constabulary* [2002] 2 AC 122.

184 [2017] 1 SLR 918 at [201] citing *A v Bottrill* [2003] 1 AC 449.

185 See *MacCarthy v Wooff* 2018 ABPC 221, Alberta Provincial Court at [64] where the claim for punitive damages was refused in a suit against a veterinarian for medical negligence as there was “no evidence to suggest that Dr. Wooff in any way acted with malice or improper motives”.

186 But see recent empirical research in the UK (excluding Scotland) which suggests that punitive damages when claimed are awarded “reasonably regularly”: James Goudkamp, “An Empirical Study of Punitive Damages” (2018) 38(1) *Oxford Journal of Legal Studies* 90.

187 The claim for punitive damages based on conversion and/or trespass to goods and chattels was denied in *Lim Kai Xin v Personal Representative of the Estate of Ong Ah Lak (Deceased) and another* [2017] SGDC 319 at [39]–[41]; and also in *Aries Telecoms (M) Bhd v ViewQwest Pte Ltd* [2018] 1 SLR 108 involving a claim for conversion and punitive damages. With respect to the plaintiff's application under O 14 r 12 in *Aries Telecoms*, the High Court decided that the defendant had not acted cynically or deliberately in retaining the plaintiff's equipment and hence the plaintiff was not entitled to punitive damages. On appeal, the Court of Appeal stated at [15] that the point on tort law was already well-established in *ACB*.

188 *PH Hydraulics & Engineering Pte Ltd v Airtrust (Hong Kong) Ltd and another appeal* [2017] 2 SLR 129 at [64].

[79] There are subsidiary rules which seek to restrict the award of punitive damages or to moderate the amount of punitive damages to be awarded. One instance is where the defendant had already been sanctioned under the criminal law in order to fulfil the aims of punishment and deterrence. Such punishment, according to the Singapore Court of Appeal in *ACB*, is a “weighty factor” but not determinative or conclusive in determining the award of punitive damages.¹⁸⁹ Underlying this is a distinction between criminal punishment and civil punishment which involves the vindication of the plaintiff’s *private* interest in punishing the defendant.¹⁹⁰

[80] One interesting issue which has yet to be examined in Singapore is whether punitive damages may be awarded against a party who is found to be vicariously liable for an employee’s outrageous tortious conduct. Thus far, this has been allowed in limited circumstance against the state responsible for exercising discipline over its officers in England and Australia¹⁹¹ notwithstanding contrary judicial views.¹⁹² In Singapore, apart from the “close connection” test to ascertain where employers are vicariously liable for employees’ torts, policy considerations such as deterrence against employers in order to encourage them to take steps to reduce the chances of future accidents and tortious conduct of their employees are also relevant.¹⁹³ Hence, on the face of it, there is some policy overlap underlying the award of punitive damages and the doctrine of vicarious liability. In view of the doctrine’s strict liability basis, however, the policy of deterrence in vicarious liability may ring hollow given that liability could not be avoided even if the employer had taken precautions.¹⁹⁴ Even if we put aside this doctrinal consideration, the practical circumstances in

189 [2017] 1 SLR 918 at [184]. Cf *Gray v Motor Accident Commission* (1998) 196 CLR 1 (majority decision that no punitive damages should be awarded as the wrongdoer had already been punished under criminal law).

190 [2017] 1 SLR 918 at [183].

191 *Thompson v Commissioner of Police for the Metropolis* [1998] QB 498; *Rowlands v Chief Constable of Merseyside Police* [2007] 1 WLR 1065 at [47], per Moore-Bick LJ; *New South Wales v Ibbett* (2006) 229 CLR 638; *dicta* in *Kuddus v Chief Constable of Leicestershire Constabulary* [2002] 2 AC 122 at [79], per Lord Hutton.

192 *Dicta* in *Kuddus v Chief Constable of Leicestershire Constabulary* [2002] 2 AC 122 at [129]–[131] and [137], per Lord Scott.

193 *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd* [2011] 3 SLR 540.

194 Anthony Gray, “Punitive Damages: Time for Re-examination” (2018) 26 *Tort Law Review* 18 at 35.

which employers may be culpable of outrageous conduct sufficient to warrant deterrence (not to mention punishment and condemnation) must be quite rare. Moreover, it would probably be difficult to ascertain the appropriate quantum of punitive damages to be awarded against an employer who is vicariously liable.¹⁹⁵

Conclusion

[81] The Singapore Judiciary's role in developing and shaping tort jurisprudence continues to be crucial. The *Spandeck* framework with the twin requirements of proximity and policy preceded by a threshold of factual foreseeability has remained a faithful guide for ascertaining duty of care in the tort of negligence. In *NTUC Foodfare*, we have benefited from the elucidation of the proximity requirement in the context of relational economic loss. Given the increased levels of patients' education and literacy, and the partnership model between doctors and patients, the new approach in *Hii Chii Kok* based on patient autonomy with modifications to *Montgomery* is certainly welcomed. Further, the bold creation of a new head of damage (loss of genetic affinity) in *ACB* is underpinned by clear logic and legal reasoning.

[82] In other areas of tort law, we have witnessed judicial decisions based on comprehensive analyses and considerations of principle and policy with a sensitivity to local conditions and circumstances. The decision in *Lee Tat* not to extend malicious prosecution to civil proceedings as well as the non-recognition of the tort of abuse of process was reached after a comprehensive and thoughtful analysis of competing policy considerations. In so far as company torts for breaches of contract are concerned, *Sandipala* offered a clear and practical principle on the scope of the director's personal liabilities based on whether the director acts bona fide in his capacity as director without breaching his fiduciary or personal duties to the company. The Singapore Judiciary in *Goh Lay Khim* has now clarified that police reports should be protected by qualified privilege as distinct from statements made in judicial proceedings which are protected by absolute privilege based on the different roles of the investigating authorities and prosecution *and* the judge in the ascertainment of

195 Stephen Todd, "Vicarious Liability, Personal Liability and Exemplary Damages" in Simone Degeling, James Edelman and James Goudkamp (eds), *Torts in Commercial Law* (Thomson Reuters, 2011), pp 409–465 at 440–442.

truth in litigation. The majority judgment in *Ting Choon Meng* has also provided a useful guide to the broad aims of the Protection from Harassment Act in pre-empting harassment and false statements under the unique section 15 order.

[83] In recent years, the use of the comparative legal approach in tort judgments has been extensive with a focus on the common law jurisdictions. Departures from the position in certain common law jurisdictions as in *NTUC Foodfare*, *Lee Tat* and *ACB* are carefully considered and amply justified. Deep research into Singapore tort law should continue to be richly rewarded in the foreseeable future not least due to the sheer variety of unique fact patterns that can arise and, based on the analysis thus far, the positive contribution of the Singapore Judiciary in directly locking horns with the complex and policy-laden issues in tort law.