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12. CONTRACT LAW

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I. Formation of a contract

A. Offer and acceptance

12.1 The High Court decision of *Avra Commodities Pte Ltd v China Coal Solution (Singapore) Pte Ltd*[1] ("*Avra Commodities*") raised basic issues of offer and acceptance. As the court summarised succinctly, the dispute turned on whether the parties concluded a contract by an exchange of four e-mails in March 2017. The plaintiff argued they did whereas the defendant argued they did not.

12.2 The plaintiff argued that it made an offer to the defendant in its first e-mail, which was accepted by the defendant in the fourth e-mail – subject to changes agreed to in the second and third e-mails – when the defendant's representative "confirm[ed] [the plaintiff's] good offer as below". The plaintiff acknowledged that a material term of the contract – the identity of the load port surveyor – had been left "to be mutually agreed" later, without agreeing a method for doing so. However, the plaintiff argued that this did not render the contract uncertain. Indeed, the parties later agreed on the load port surveyor, similar to how they had

1 [2019] SGHC 287.

concluded their previous dealings. In contrast, the defendant pressed the point that the parties had left unresolved a material term in the contract.

12.3 In dealing with whether a contract had been formed, the High Court reiterated three basic principles of contractual formation. First, the law adopts an objective approach to ascertain whether a contract had been formed. As the Court of Appeal put it in *R1 International Pte Ltd v Lonstroff AG*,[2] the parties' objective intentions must be gleaned from (a) their correspondence and conduct in light of the relevant background, which includes the industry the parties are in; (b) the character of the document which contains the terms in question; as well as (c) the course of dealings between the parties.[3]

12.4 Second, the offeree can accept an offer in any way that is a final and unqualified expression of assent to the terms of an offer. Thus, an offeree can accept by words or conduct, although it would generally be difficult for a court to find effective acceptance through a failure or omission to speak or act. However, such failure or omission can more easily constitute acceptance where the parties discuss and agree on a set of terms which are sufficiently certain to give rise to a concluded contract, but leave the remaining terms for future discussion and agreement. In this situation, if a party proposes an additional term to those already agreed, and the other party remains silent, it may be easier to infer that the latter had accepted the additional terms albeit by its silence.

12.5 Third, the parties may intend to be bound only after a final and further condition is fulfilled. This may usually be the execution of a formal contract recording their agreement in writing. Parties can also agree to be contractually bound as soon as they agree on a set of terms, and leave additional terms to be negotiated. However, this is subject to the caveat that the initial set of terms agreed must be sufficient by themselves to imbue the contract with the necessary certainty for it to be enforceable.

12.6 Applying these principles in *Avra Commodities*,[4] the High Court found that the parties' communications manifested an objective intention to be bound. This was because the parties had plainly used the language of offer and acceptance in their e-mails, which made it difficult for the defendant to deny otherwise. This was so despite the fact that the parties left further terms to be agreed, specifically that of the identity of the load port surveyor. However, this would leave the issue of whether

2 [2015] 1 SLR 521.
3 *R1 International Pte Ltd v Lonstroff AG* [2015] 1 SLR 521 at [50].
4 See para 12.1 above.

the contract was sufficiently certain as this term had not been specifically agreed: this will be discussed below.

B. Consideration

12.7 Although the doctrine of consideration has been criticised by the courts for its artificiality,[5] it remains a core element of contractual formation under the common law. There are two principal rules that underpin the doctrine. First, past consideration is not good consideration unless a causal connection between the latter promise and the prior consideration can be found. Second, consideration need only be sufficient but need not adequate.[6] This means that it is only necessary to locate what is recognised as consideration by the law; it is unnecessary that the consideration furnished be commensurate with that which is being offered in return.

12.8 In addition to these two rules, it is also clear that consideration is not only required for contractual formation but also variation of the contract. Thus, a promisee who seeks to enforce a promise to vary a contractual obligation must show that he has given something in return that is sufficient consideration for that promise.[7]

12.9 These rules were subjected to detailed analysis by the High Court in *Ma Hongjin v SCP Holdings Pte Ltd*[8] ("*Ma Hongjin*").

(1) Consideration need not be sufficient

12.10 As to the first rule, the High Court in *Ma Hongjin* summarised the applicable considerations as follows:[9]

> The court does not inquire as to the adequacy of the consideration 'so long as there is sufficient consideration furnished by the promisee in the eyes of *the law*' [emphasis in original] (*Gay Choon Ing* at [86]). The law requires only that the promisee's act, forbearance or promise has *some* economic value, even if that value cannot be quantified: *Treitel on the Law of Contract* (Edwin Peel ed) (Sweet & Maxwell, 14th ed, 2015) at para 3-027. So long as this requirement is satisfied, it does not matter if, in an objective sense, that economic value is not in any way commensurate with what the promisee receives in return. [emphasis in original]

5 See, *eg*, *Gay Choon Ing v Loh Sze Ti Terence Peter* [2009] 2 SLR(R) 332 at [100].
6 See, *eg*, *Gay Choon Ing v Loh Sze Ti Terence Peter* [2009] 2 SLR(R) 332 at [100].
7 John Cartwright, *Formation and Variation of Contracts* (Sweet & Maxwell, 2014) at para 9-08.
8 [2019] SGHC 277.
9 *Ma Hongjin v SCP Holdings Pte Ltd* [2019] SGHC 277 at [79].

12.11 This passage lays down clearly the underlying considerations behind the rule that consideration need only be sufficient, not adequate. However, as is well known, the application of this rule raises some difficulties when it is asked whether a promisee's performance of an *existing* contractual obligation can be consideration for an additional promise by the promisor. Traditionally, such performance was not sufficient consideration as it does not confer a *legal* benefit to the promisee. However, the English Court of Appeal in *Williams v Roffey Bros & Nicholls (Contractors) Ltd*[10] ("*Williams*") distinguished between legal and factual benefit, such that consideration can be taken to be sufficient if it confers either type of benefit.[11] As the High Court in *Ma Hongjin*[12] pointed out, *Williams* has been accepted by a number of Singapore cases. The court further stressed that, strictly speaking, it is not the promisee's performance of an existing contractual obligation that *itself* constitutes sufficient consideration. Rather, it is the factual benefit that accrues *to the promisor separately* from such performance that constitutes sufficient consideration. As the court puts it, "the factual or practical benefit must be extrinsic to that performance".[13]

12.12 Further, the High Court in *Ma Hongjin* also held that, in order for factual or practical benefit to constitute sufficient consideration, it must be objectively ascertained to be so, rather than dependent on what the parties subjectively thought.[14]

(2) Past consideration is no consideration

12.13 The High Court in *Ma Hongjin* also referred to the well-known rule that past consideration is no consideration. It made clear that this rule does not just look at chronology. Rather, it is the causal connection between the consideration and the promise that matters. It suffices that, at the time of an earlier act, a later promise was contemplated. This would establish that the consideration and promise are part of the same transaction.

10 [1991] 1 QB 1.

11 For completeness, while the absence of duress is required for factual benefit to be recognised under *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1 as sufficient consideration, this was not dealt with by the High Court in the present case.

12 See para 12.9 above.

13 *Ma Hongjin v SCP Holdings Pte Ltd* [2019] SGHC 277 at [88].

14 Citing Lee Pey Woan, "Contract Modifications: Reflections on Two Commonwealth Cases" (2012) 12(2) OUCLJ 189 at 198.

(3) Variation requires consideration

12.14 The High Court in *Ma Hongjin*[15] also explained that consideration is needed for a contractual variation. This is despite contrary authorities elsewhere and doubts expressed here. For example, the New Zealand Court of Appeal had ruled that consideration is not needed for a contractual variation to be binding so long as there was reliance.[16] Similarly, the High Court in *S Pacific Resources Ltd v Tomolugen Holdings Ltd*[17] expressed regret that the strict insistence on consideration for variation might frustrate the parties' expectations that the variation would be honoured. However, the High Court in *Ma Hongjin* regarded it as clear that the Court of Appeal had in *Gay Choong Ing*[18] clearly affirmed the need for consideration in Singapore law, including for contract variation. Thus, it considered itself bound by authority to require consideration for variation.

12.15 That said, the High Court differentiated between bilateral and unilateral variations. The former involves one contracting party promising to a variation in one part of the contract, in exchange for the other party's promise to vary another part of the contract. In this case of a bilateral variation, the parties' respective promises to vary would count as consideration for each other. In contrast, if only one party promises a variation, then the consideration required to support it cannot be found in the other party's promise to vary the contract. In this case of a unilateral variation, the consideration needed to support this promise to vary must be found "outside" the promise to vary.

12.16 Finally, the High Court in *Ma Hongjin*, agreeing with the High Court decision of *Benlen Pte Ltd v Authentic Builder Pte Ltd*,[19] held that parties may agree to a clause that binds them to a future variation which is not supported by consideration at the time of the variation: the parties may agree to a certain set of rules providing for their own variation of their contract. This, as the court explained in *Ma Hongjin*, does not offend the need for consideration because any future variation under the clause is sufficiently connected to the consideration that was given earlier in time for the clause itself. A slightly different way of explaining why there is sufficient consideration in this case is that the consideration needed to support the promise to vary in the future is found in the *original* exchange of promises that gave rise to the agreement in the first place. In addition,

15 See para 12.9 above.
16 See *Teat v Wilcocks* [2014] 3 NZLR 129 at [54].
17 [2016] 3 SLR 1049.
18 See para 12.7 above.
19 [2018] SGHC 61.

parties may agree that one or both of them have the power to vary the agreement; that too does not offend the need for consideration since there would be sufficient connection between the prior consideration for such power and the subsequent exercise of the power itself.

(4) Application of these rules

12.17 The High Court in *Eastern Resource Management Services Ltd v Chiu Teng Construction Co Pte Ltd*[20] ("*Eastern Resource*") had occasion to consider the application of some of these principles.

12.18 In that case, the plaintiff sued the defendant for breach of contract. The parties had entered into a joint venture agreement in 2008 ("2008 JVA") to set up an overseas test centre. The centre was to conduct the requisite trade tests for various trades for workers in Bangladesh to determine whether they can work in Singapore. It was to be owned by BEFW, a company incorporated in Bangladesh. Clause 10 of the agreement stated that it was to last for a period of six months from 1 October 2009 to 31 March 2010. If no objections were raised on the expiry date, it would be deemed agreed by all parties to continue. Clause 11 stated that the agreement "shall terminate on the expiry, revocation or suspension of [the Building and Construction Authority's ("BCA")] endorsement of the [overseas test centre]."

12.19 In early 2011, BCA imposed a quota on the number of workers who could be tested for each trade at each overseas test centre each month. The parties therefore met and agreed to new quotas for the number of workers who could be tested for each of the trades at the centre. This ratio was, as between the plaintiff, defendant and BEFW, 30:30:40.

12.20 In June 2011, the parties entered into a further agreement which concerned the cost for each worker tested at the centre. The defendant also allocated 60% of the monthly quota to the plaintiff and BEFW. The consideration point was whether the defendant had provided sufficient consideration by continuing with the 2008 JVA despite not needing to do so for the parties to enter into the June 2011 agreement.

12.21 The High Court found that the defendant had provided sufficient consideration for the June 2011 agreement. This is because the defendant had continued with the 2008 JVA although that agreement did not exhaustively set out the circumstances under which it might be terminated. While it is not explicit, the court's reasoning appears to be that because the circumstances for termination were not exhaustively

20 [2019] SGHC 19.

provided for, the defendant could have had the opportunity to terminate the 2008 JVA in May 2011 when the BCA imposed the quotas for the first time. Because the defendant chose not to do so, but instead entered into the June 2011 agreement, the decision to continue with the older contract provided sufficient consideration for the new contract.

12.22 On the other hand, the High Court did not accept that the defendant's allocation of 60% of the quota to the plaintiff and BEFW amounted to sufficient consideration. Indeed, the court noted that the May 2011 agreement already gave the plaintiff and BEFW a combined 70% of the quota. As such, it was not evident how a lesser allocation of 60% could have conferred a benefit on the plaintiff.

12.23 Two points might be made about the High Court's treatment of the consideration issue. First, it is not immediately clear why the defendant's decision to continue with the 2008 JVA, which the defendant must have taken prior to the June 2011 agreement, could constitute consideration for the latter. As the High Court of Australia put it in *Australian Woollen Mills Pty Ltd v Commonwealth*,[21] it is a requirement that:[22]

> … the statement or announcement which is relied on as a promise was really offered as consideration for the doing of the act … and that the act was really done in consideration of a potential promise inherent in the statement or announcement.

This is simply to say that consideration must not be past, and that there must be a causal connection between the promise and consideration. Yet another way of putting it is to say that the consideration must be something that is promised *at the request* of the promisor. It is not entirely clear whether the plaintiff had made such a request of the defendant to carry on with the 2008 JVA.

12.24 Indeed, the High Court in another 2019 case, *Patsystems Pte Ltd v PT Bursa Komoditi Dan Derivatif Indonesia*[23] ("*Patsystems*"), also reiterated this foundational need for a causal connection between the promise and consideration. In that case, the plaintiff had sued the defendant for breach of a software agreement. In its defence, the defendant argued that the agreement was varied so that it could withhold its payment to the plaintiff. The question then was whether the defendant provided consideration for this variation. While the defendant argued that it provided consideration by deciding to forebear from asking for a refund due to alleged non-compliance, the court found that no such

21 (1954) 92 CLR 424.
22 *Australian Woollen Mills Pty Ltd v Commonwealth* (1954) 92 CLR 424 at 456.
23 [2019] SGHC 131.

consideration was provided. This was because, even if the defendant did take such a decision, the plaintiff had not requested for it to do so. Thus, following *Combe v Combe*,[24] this proved fatal to the defendant's case because the lack of a request from the plaintiff showed that there was no connection between the promise and the supposed consideration.

12.25 As such, returning to *Eastern Resource*, it is not clear that the defendant's decision to continue with the 2008 JVA, which must have been taken at the latest in May 2011 when the BCA announced the new quotas that gave it the opportunity to withdraw, can constitute consideration for the June 2011 agreement. It may be that there was a connection between the past consideration and the subsequent agreement, but this was not clear from the judgment.

12.26 The second point concerns the High Court's finding that because 60% of the quota is less than the previously agreed-to quota of 70%, it could not have conferred a benefit on the plaintiff and therefore did not amount to consideration. While this may at first glance appear to be the court examining the substance of the promise (and hence straying impermissibly into the sufficiency of the consideration), it might be said that the court was simply assessing what the defendant was already supposed to do. Because the defendant was promising to do, in effect, what he had already promised before, this would not be sufficient consideration in the eyes of the law. However, it is also clear that a promise to perform an existing duty can amount to consideration if it conferred a factual (as opposed to a legal) benefit on the promisee.[25] Given the High Court's conclusion in *Eastern Resource* that the 60% quota did not confer a benefit on the plaintiff, it must be assumed that the court was referring to *both* legal and factual benefits.[26]

C. Promissory estoppel

12.27 In *Patsystems*, the defendant also argued that even if there was no effective variation that allowed it to withhold payment, the plaintiff had promised to forebear on insisting on future payments, and so it was estopped from insisting on those promises. This raised a question of promissory estoppel. The High Court referred to the Court of Appeal decision of *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd*,[27]

24 [1951] 2 KB 215.
25 See, *eg*, *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1.
26 For completeness, the High Court in this case held that there was *no* duress which led to the June 2011 Agreement.
27 [2018] 1 SLR 317.

which held that the defendant had the burden of proving the following elements in order to establish promissory estoppel:

> (a) The plaintiff had made an unequivocal representation to the defendant that it would not insist on its legal rights to all future S&M payments until the provision of the Global Trading Administration system to the defendant.
>
> (b) The defendant had relied on the representation by the plaintiff, resulting in a change of position.
>
> (c) It would be inequitable for the plaintiff now to enforce its legal rights to payment of its invoices.

12.28 The establishment of promissory estoppel in *Patsystems*[28] turned on whether the plaintiff had made an unequivocal representation that it would not insist on its strict legal rights. In ruling that the e-mails which the defendant relied on did not clearly show such an unequivocal representation, the High Court relied on the Court of Appeal decision of *Cupid Jewels Pte Ltd v Orchard Central Pte Ltd*[29] ("*Cupid Jewels*") for guidance on the degree of certainty and clarity needed in the representation. The Court of Appeal had held that there needed to be a clear and unequivocal representation that the party concerned would not enforce its legal rights; this was to be distinguished from an offer or invitation to treat, which would not suffice. In that case, Cupid Jewels had tried to characterise an e-mail sent by Orchard Central as the latter's offer for all arrears to be paid by 31 December 2010, which remained open and hence constituted a representation that Orchard Central would not enforce its right to the arrears. This e-mail read as follows:

> We have reviewed your request comprehensively and regret that we are unable to agree to your request of payment of your outstanding arrears in 24 months. We have reviewed, and request that all the arrears be paid by 31 December 2010.

12.29 However, the Court of Appeal regarded this e-mail as too uncertain to constitute a representation by Orchard Central that it would not enforce its rights. At the most, the court thought that this was at best an invitation to treat. At bottom, there was simply no clear representation from Orchard Central to the effect that it was not going to enforce its rights.

12.30 Given that the parties in *Patsystems* were in effect discussing a mutually acceptable payment solution, the correspondence did not show

28 See para 12.24 above.
29 [2014] 2 SLR 156.

a representation that was clear and unequivocal needed for promissory estoppel. For example, the defendant tried to place great emphasis on a sentence in the plaintiff's e-mail which read "you will not sign off on the UAT and holdback the money" as a representation that the plaintiff had promised to forebear from insisting on future payments. Similar to *Cupid Jewels*, the High Court found that this correspondence was simply too ambiguous as to be construed as a clear representation.

D. Certainty and completeness

12.31 Having held that the plaintiff's offer had been accepted by the defendant, and that they intended to create legal relations with each other, the High Court in *Avra Commodities*[30] then had to deal with whether the contract was sufficiently certain and complete. As the High Court held in *Law Chau Loon v Alphire Group Pte Ltd*,[31] citing *Gay Choon Ing*, this means that the parties' negotiations must have crystallised into a contractually-binding agreement in which there is no uncertainty as to the terms of the contract. Further, in determining whether such an agreement has arisen, the court must have regard to the context in which the agreement was concluded.

12.32 Returning to *Avra Commodities*, this required the court to find that the parties had agreed to the identity of the load port surveyor in subsequent correspondence. The court found that the parties had reached such agreement in the draft contract exchanged between them, which formalised the agreement that the parties had earlier reached. More broadly, this points to the principle that questions of certainty of terms are to be dealt with not as at the time of contract formation, but potentially at later points in time as might be relevant, given the nature of the contract and its terms.

E. Effect of a compromise agreement

12.33 The High Court in *Tan & Au LLP v Seo Puay Guan*[32] had the opportunity to consider the effect of a compromise agreement. In that case, the applicant sought a determination of how the net sales proceeds of a property which it held as stakeholder were to be distributed to the respondents. The respondents were seven siblings whose parents passed away intestate. The respondents had disputed the ownership of the property, specifically, whether it was owned by the first respondent for

30 See para 12.1 above.
31 [2019] SGHC 275.
32 [2019] SGHC 59.

his sole benefit, or held on trust for the parents' estate. This would affect the eventual distribution of the sale proceeds amongst the respondents. The first respondent, and two other siblings, argued, *inter alia*, that the settlement agreement was invalid because it was premised on an alleged trust that did not in fact exist. As such, since that agreement was invalid, the first respondent remained the sole legal and beneficial owner of the property and was entitled to the whole of the net sales proceeds.

12.34 The High Court rejected the first respondent's argument that the settlement agreement was invalid. Specifically, the court held that it was irrelevant whether there had been a trust. Relying on the Court of Appeal's decision in *Gay Choon Ing v Loh Sze Ti Terence Peter*,[33] the court summarised the effect of a compromise agreement in the following way:[34]

> (a) A settlement agreement to resolve disputes between parties puts an end to all the contested issues covered by the agreement. Thereafter, it is the settlement agreement that governs the parties' legal relationship.
>
> (b) The claims and counterclaims previously raised need not have any basis in fact or in law. They fall away.
>
> (c) The jurisprudential basis of a settlement agreement lies in contract. Therefore, the prior issues may still be relevant where the settlement agreement is affected by illegality, fraud, duress, undue influence or mistake.

12.35 As such, the High Court reiterated that when the parties have agreed to a certain factual and/or legal basis in a compromise agreement, then *that* assumed state of affairs takes over as the basis of the parties' relationship.[35] In the present case, it was therefore immaterial whether a trust had existed over the property: the whole purpose of the settlement agreement was to resolve that dispute by substituting it with an agreement of what the factual and/or legal position would be taken to be. As such, the parties were precluded from reneging on the mutual compromise and reopening the issues resolved by the compromise agreement, subject to the limited scenarios set out above, such as illegality or duress.

33 See para 12.14 above.
34 *Tan & Au LLP v Seo Puay Guan* [2019] SGHC 59 at [26].
35 *Tan & Au LLP v Seo Puay Guan* [2019] SGHC 59 at [27].

II. Terms of a contract

A. Incorporation

12.36 The Singapore International Commercial Court ("SICC") had to consider various incorporation issues in *B2C2 Ltd v Quoine Pte Ltd*[36] ("*B2C2 (SICC)*"). In that case, the plaintiff ("B2C2"), a market maker trading on the defendant's ("Quoine") currency platform ("the Platform"), had sold Ethereum ("ETH") in exchange for Bitcoins ("BTC") to other margin traders ("the Counterparties") at the rate of 10 BTC for 1 ETH ("the Disputed Trades"). This was approximately 250 times the (then) prevailing price of ETH. These anomalous trades were traceable to a technical glitch in Quoine's trading software ("Quoter Program") that caused it to stop placing orders on the Platform. The resultant abnormally thin order book had two unfortunate effects: first, it triggered a margin call and forced sale of the Counterparties' currency holdings; second, it prompted B2C2's trading software to generate orders at the "deep price" of 10 BTC for 1 ETH. A further design flaw in the Platform's system led to the matching of the Counterparties' orders with those of B2C2, resulting in the Disputed Trades.

12.37 Upon discovering the errors, Quoine unilaterally cancelled the trades and reversed the transactions. B2C2 then sued Quoine for breach of contract and breach of trust.[37] In defence, Quoine argued, among others, it was entitled to reverse the trades on the basis of an express term in the parties' agreement read in conjunction with a risk disclosure statement ("RDS"). This raised the question of whether the relevant terms in the RDS were properly incorporated into the parties' agreement so as to permit Quoine to cancel a transaction that had taken place at an aberrant value.

12.38 Quoine argued that cl (h) of the parties' agreement allowed it to alter the agreement without notice. This clause provided as follows:

> h. You agree that the Company reserves the right to change any of the terms, rights, obligations, privileges … with or without providing notice of such change. You are responsible for reviewing the information and terms of usage as may be posted from time to time. Continued use of the services

36 [2019] 4 SLR 17.

37 Interestingly, Thorley IJ also held that Quoine held the crypto assets credited to B2C2's account on trust for B2C2 and acted in breach of trust when it wrongly reversed the trades. This assumed, controversially, that the crypto assets constituted "property" that could be the subject of a trust. This holding was reversed on appeal: see *Quoine Pte Ltd v B2C2 Ltd* [2020] 2 SLR 20, and considered in ch 24 of this Ann Rev.

> or non-termination of your membership after changes are posted or emailed constitutes your acceptance or deemed acceptance of the terms as modified.

12.39 In addition to cl (h), the RDS provided as follows:

> There are many risks associated with virtual currency transactions. Please read the following to gain a sufficient understanding of the features, mechanisms, and risks in virtual currency transactions. Please execute your transaction with understanding such features, mechanisms and risks without objection and based on your own judgment and responsibility.

Ten separate risks are then described, of which two are material to the case. These are relevant because they seemingly provided for the cancellation of the parties' agreement should a transaction take place at an aberrant value.

12.40 Quoine's contention was that, when the RDS was uploaded onto its website on 22 March 2017, it had the effect of introducing a new term into the parties' agreement expressly permitting it to cancel a transaction if it had taken place at an aberrant value. However, there was no express notice placed on its website drawing attention to the modification of the parties' agreement. B2C2 therefore argued that there was insufficient notice of the RDS for it to be incorporated as part of the parties' agreement. Quoine contended this did not matter since cl (h) allowed it to modify the agreement without notice to users of the Platform.

12.41 By way of two preliminary matters, the SICC first held that a unilateral variation clause such as cl (h) was not unlawful, given that a party could reserve to itself the right to amend a contract without first obtaining the other party's consent. However, the court held that this was an unusual power and thus there had to be clear language to reserve this kind of power. Indeed, it might be added that such a power could be justified by reference to the consideration given at the point of contractual formation; fresh consideration would thus not be necessary for future variations.[38] Thus, as a starting point, cl (h) was a lawful clause but its precise effect was a matter of interpretation. The court added that while it was not necessary for the other party to consent to any modification pursuant to such a clause, the other party must have the means of knowing that there had been a modification and what it was. Secondly, in response to the fact that the RDS was not contained in the parties' main agreement, the SICC then held that it was legally permissible for a term of a contract to be contained in another document which was not itself a document having contractual effect. However, it must be clear that the term concerned was intended to have contractual effect.

38 See para 12.16 above.

12.42 Applying these principles to the present case, the SICC concluded that cl (h) gave Quoine the right to alter the parties' agreement without the counterparty's consent. The clause also absolved the need for Quoine to give express notice to the other party. However, the court held that the clause did not allow Quoine to change the terms without drawing this to the attention of the other parties. It was insufficient for Quoine to merely upload an amended agreement and expect the parties to review the terms on the website regularly so as to detect changes. Rather, Quoine had to give sufficient notice that such a modification had taken place, such as by placing a notice on the website or via e-mail. As such, the mere uploading of the RDS on the website, without any notice whatsoever, was not sufficient to incorporate the RDS and accordingly amend the parties' agreement.

12.43 Although incorporation by reference had failed in *B2C2 (SICC)*,[39] in part because it also involved a variation of contract, it must not be missed that the SICC had ruled that this is possible in an appropriate case. The Court of Appeal in *Bintai Kindenko Pte Ltd v Samsung C&T Corp*[40] had occasion to deal with just such a case. In that case, Samsung C&T was employed as the main contractor for a project. It appointed Bintai Kindenko as the project's mechanical and engineering subcontractor. However, various phases of the subcontract works were not completed on time. When the parties could not resolve these delays, Samsung C&T wrote to the bank to demand payment on the banker's guarantee provided by Bintai Kindenko. Bintai Kindenko, in turn, argued that Samsung C&T could not call on the guarantee on the ground of unconscionability. Samsung C&T responded that Bintai Kindenko was precluded from doing so due to an exclusion clause precluding such reliance. This clause was found in the particular conditions of the main contract between Samsung C&T and the employer, as well as in the particular conditions of the subcontract between Samsung C&T and Bintai Kindenko. Moreover, cl 3 of the subcontract provided that the parties' agreement "shall include" all particular conditions in the main contract.

12.44 The Court of Appeal dismissed Bintai Kindenko's appeal against the High Court's decision to allow Samsung C&T to call on the guarantee. It held that it was immaterial that Bintai Kindenko was not actually given a copy of or knew about the particular conditions of the main contract or the subcontract. In this regard, it is sufficient that a term in a signed contract (here, the subcontract) incorporated some or all the terms of a separate document by making reference to those terms. If such reference was clearly made, then parties to the contract would be bound

39 See para 12.36 above.
40 [2019] 2 SLR 295.

by those separate terms even if they did not know what those terms were at the point of contracting.

12.45 The Court of Appeal further held that this principle of incorporation by reference holds true even if the terms of the separate document contained exclusion clauses. It therefore endorsed the High Court's decision in *Press Automation Technology Pte Ltd v Trans-Link Exhibition Forwarding Pte Ltd*,[41] which held that the requirement of reasonable notice – which may usually apply to onerous and unusual conditions – did not apply in a case where terms contained in a separate document were specifically incorporated into a contract that was signed by a party that was sought to be bound. Thus, a contracting party will not be able to deny the effect of an exclusion clause in a separate document that was incorporated into its agreement by way of an incorporation clause, even if that clause was not specifically pointed out to it, so long as the incorporation clause concerned was clear. More generally, this approach reflects the courts' lesser insistence that exclusion clauses be specifically pointed out to contracting parties, given that such clauses are now subject to legislative control via the Unfair Contract Terms Act.[42]

B. Parol evidence rule

12.46 The High Court in *Wen Wen Food Trading Pte Ltd v Food Republic Pte Ltd*[43] had occasion to consider the parol evidence rule. The plaintiff's principal business was the operation of food stalls. The defendant, on the other hand, operated food courts. In March 2014, the defendant successfully tendered to operate food courts. The plaintiff was approached to take up stall licences at the food courts. The key dispute was how long the licences were to last. According to the plaintiff's case, the defendant's leasing manager had represented that the plaintiff could expect a six-year licence period at the food courts. The defendant denied this, arguing that the relevant licence agreement clearly provided for the licence period to be for just two years, from 2016 to 2018. When the licences were due to expire in 2018, the defendant refused to renew them, which led to the plaintiff suing for the wrongful repudiation of the licence agreement.

12.47 The High Court held that ss 93 and 94 of the Evidence Act[44] applied to defeat the plaintiff's case. These sections of the Evidence Act codify the common law parol evidence rule and provide that evidence

41 [2003] 1 SLR(R) 712.
42 Cap 396, 2014 Rev Ed. See also *AEG (UK) Ltd v Logic Resource Ltd* [1996] CLC 265.
43 [2019] SGHC 60.
44 Cap 97, 1997 Rev Ed.

of any oral agreement or statement should not, in general, be admitted for the purpose of contradicting, varying, adding to, or subtracting from the terms of a written contract. Thus, the court had no difficulty in rejecting the plaintiff's argument that there was a need to consider extrinsic evidence to establish the "factual matrix" of the agreement. This was because the express terms of the licence agreement clearly provided that the licensing period was merely for two years. Admitting extrinsic evidence of the alleged oral representation that the period was for six years would contradict the documents and offend the parol evidence rule.

12.48 For completeness, the High Court also found that none of the six exceptions under s 94 to the parol evidence rule (as embodied in s 93) was applicable. In particular, s 94(*a*) allows extrinsic evidence to prove facts which "would invalidate any document" or entitle the plaintiff to a "decree or order thereto". The plaintiff sought to rely on this exception by alleging that the defendant had committed fraud. However, since the plaintiff did not plead fraud or indeed any other fact which would invalidate the licence agreement, its case under s 94(*a*) failed.

12.49 The High Court also considered that the plaintiff could not rely on s 94(*c*). This subsection allows a separate oral agreement constituting a condition precedent to the attaching of any obligation under a contract to be proved by extrinsic evidence. However, the plaintiff could not show that a licence period of six years was a condition precedent to the licence agreements. This is because a condition precedent cannot be implied in the face of clear and express provisions to the contrary. Moreover, an oral agreement cannot be construed as a condition precedent where the written agreement has already become binding and has been performed.

12.50 On appeal, the Court of Appeal agreed with the trial judge. It did consider s 94(*b*) to be potentially applicable as the pleaded facts could give rise to a claim based on an oral collateral contract. However, it rejected this argument as such a contract would be inconsistent with the terms of the licence agreement, which included an entire agreement clause and did not provide for a renewal option beyond the two-year period.

III. Interpretation of terms

A. General approach

12.51 The general principles of contractual interpretation have been largely settled in Singapore. The challenge remains in their application to specific facts in particular cases. The High Court in *Crescendas Bionics*

Pte Ltd v Jurong Primewide Pte Ltd[45] ("*Crescendas Bionics*") had occasion to restate the relevant principles, quoting[46] from the Court of Appeal's decision in *CIFG Special Assets Capital I Ltd v Ong Puay Koon*[47] ("*CIFG*"):

> (a) The starting point is that one looks to the text that the parties have used.[48]
>
> (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.[49]
>
> (c) The reason 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".[50]
>
> (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.[51]

12.52 In brief, these principles emphasise the first importance of the text which the parties have used, as understood in their ordinary meaning and supplemented by the relevant context. However, in the end, the meaning which the court ascribes to the text must be one which the words can reasonably bear. The effect of these principles is to hold the parties to the ordinary meaning of the words they have used, as opposed to allowing them to plead alternative meanings derived from the context. Indeed, the Court of Appeal in *Sembcorp Marine Ltd v PPL Holdings Pte Ltd*[52] had laid down what the High Court in *Crescendas Bionics* termed as "strict requirements in relation to pleadings of extrinsic facts for the purpose of contractual interpretation";[53] these requirements are as follows:[54]

> (a) First, parties who contend that the factual matrix is relevant to the construction of the contract must plead with

45 [2019] SGHC 4. The Court of Appeal allowed the appeal against the High Court's decision, but not on the point of contractual interpretation: see *Jurong Primewide Pte Ltd v Crescendas Bionics Pte Ltd* [2019] SGCA 63.
46 [2019] SGHC 4 at [104].
47 [2018] 1 SLR 170 at [19].
48 See *Lucky Realty Co Pte Ltd v HSBC Trustee (Singapore) Ltd* [2016] 1 SLR 1069 at [2].
49 See *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at [125], [128] and [129].
50 See *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [72].
51 See, *eg*, *Yap Son On v Ding Pei Zhen* [2017] 1 SLR 219 at [31].
52 See para 12.51 above.
53 *Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd* [2019] SGHC 4 at [105].
54 *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [73].

specificity each fact of the factual matrix that they wish to rely on in support of their construction of the contract.

(b) Second, the factual circumstances in which the facts in (a) were known to both or all the relevant parties must also be pleaded with sufficient particularity.

(c) Third, parties should in their pleadings specify the effect which such facts will have on their contended construction.

(d) Fourth, the obligation of parties to disclose evidence would be limited by the extent to which the evidence is relevant to the facts pleaded in (a) and (b).

12.53 The High Court in *Crescendas Bionics* had to apply these principles to the interpretation of certain clauses in a letter of intent ("LOI") signed between the parties on 26 June 2008. In particular, the court had to consider whether the "Preliminaries Sum" under cl 1.0 of the LOI is a fixed sum of $12.3m or one that could be renegotiated between the parties. In this regard, cl 1.0 provided as follows:

> The Contract Sum shall be at the total sum of **Singapore Dollars Ninety-Five Million Eight Hundred and Eighty/ Seventy Thousand Only (S$95,870,000.00)** (excluding prevailing GST). [The incorrect type-written amount "Eighty" was changed with a written word "Seventy"]
>
> [The remainder of cl 1.0 then breaks down the Contract Sum into two components, namely, the Guaranteed Maximum Price and the Preliminaries (Fixed Sum).]
>
> [emphasis in original in bold]

12.54 The controversy in the possible meaning of "Preliminaries Sum" arose because cl 7.1 apparently provided for the possibility of renegotiation in its second paragraph:

> 7.1 Management Contractor's Preliminaries
>
> Ten (10%) percent down-payment of the Preliminaries of S$12,300,000.00 (ie S$1,230,000.00) shall be payable to the Management Contractor within thirty (30) days from Date of this letter or from the date of acceptance of this letter by the Management Contractor, whichever is the later. Subsequent payments for the Preliminaries shall be on monthly basis, basing of the actual work done/certified. The down-payment monies shall be adjusted progressively from the payments due from 13th to 18th interim payments.
>
> *The fixed sum Preliminaries portion of the contract condition (including but not limiting to necessary cost breakdown for payment certification) is to be agreed within 4 weeks from the date of project commencement.*
>
> [emphasis in original]

12.55 The High Court held that the Preliminaries Sum referred to in cl 1.0 of the LOI is a fixed sum of $12.3m. Consistent with the principles set out by the Court of Appeal in *CIFG*, its approach was to first consider the text that the parties had used. In this regard, the court found that the parties had stated unambiguously under cl 1.0 that the contract sum was to be $95,870,000, of which the "Preliminaries (Fixed Sum)" was stated to be $12.3m (which was $13,602,500 less $1,302,500). Further, the contract sum was stated to be a fixed sum and not a provisional figure. Therefore, the Preliminaries Sum, which was a component of the contract sum, had to likewise be a fixed sum.

12.56 Secondly, the court further held that the second paragraph of cl 7.1 of the LOI related to the terms of payment of the Preliminaries Sum, rather than conferred a right on the parties to renegotiate its quantum. This was because cl 7.1 pertained quite clearly to the payment terms. As such, if the parties had intended to render the Preliminaries Sum subject to further renegotiation, they would have altered cl 1.0 rather than cl 7.1. Alternatively, it might be said that the second paragraph of cl 7.1 was ambiguous as to its meaning when read in isolation.

12.57 So far discussed, the High Court's approach placed importance on the text which the parties had used. However, beyond the text, the court also considered the *internal* context of the LOI, which was consistent with the second of the principles of contractual interpretation spelt out in *CIFG*.[55] Indeed, it should be noted that the reference to "context" can refer to the internal context of the contract and the external context. The court reasoned that, when considered against the overall contractual framework, the parties always spelt it out expressly if sums were intended to be provisional. For example, the parties expressly labelled as "provisional" "landscape works" and "art/sculptures". Given this overall context, the court concluded that because the parties had not labelled the Preliminaries Sum as provisional, that reinforced the court's view that it was not meant to be.

12.58 Finally, the High Court then considered the *external* context to the LOI. This is, as mentioned above, consistent with the second of the principles of contractual interpretation spelt out in *CIFG*. The court considered that the evidence preceding to the signing of the LOI showed that the plaintiff intended to pay the defendant $12.3m for the provision of the latter's preliminaries. The plaintiff never disputed this sum and indeed had relied on the figure for its own cost estimate.

55 See para 12.51 above.

12.59 Overall, the High Court's approach in *Crescendas Bionics*[56] therefore illustrates the application of the general principles of contractual interpretation laid down by the Court of Appeal in *CIFG*.

F. Commercial sense

12.60 In *YES F&B Group Pte Ltd v Soup Restaurant Singapore Pte Ltd*,[57] ("*YES F&B*") the Court of Appeal made clear that while courts will strive to avoid a commercially absurd result as parties are assumed to act sensibly, they will have to give effect to such a result if that is what the parties objectively intended. Thus, commercial sensibility of the outcome remains one of the factors that courts consider in interpreting the terms of the contract, but it is not determinative, particularly if the parties objectively intended for a commercially absurd outcome.

12.61 The Court of Appeal had occasion to consider this principle in *Singapore Shooting Association v Singapore Rifle Association*[58] ("*Singapore Shooting Association (CA)*"). In that case, the Singapore Rifle Association ("SRA") claimed that a resolution passed by the council of the Singapore Shooting Association ("SSA"), purporting to suspend the SRA's privileges at the National Shooting Centre ("NSC"), was *ultra vires* and ought to be declared null and void. In response, SSA brought a counterclaim and claimed for an indemnity for the cost that it had incurred in demolishing a range which it alleged SRA had illegally built at the NSC.

12.62 This therefore required the Court of Appeal to consider cl 10 of the agreement between the parties, which provided as follows:

> **10. INDEMNITY**
>
> The Club shall indemnify and keep indemnified the SSA from and against all claims, demands, writs, summonses, actions, suits, proceedings, judgments, orders, decrees, damages, penalties, costs (including repair costs to reinstate the Club Range), losses and expenses of any nature whatsoever which the SSA may suffer or incur for any death, injury, loss and/or damage caused directly or indirectly by its activities, including the activities of its members, employees, independent contractors, agents, invitees or other permitted occupier at the Property, including all losses and expenses which the SSA may incur arising from the Insurance Policy not being in force for any reason, or if in force, if inadequate to cover all losses and expenses.

12.63 The crucial question was which party, SSA or SRA, the word "its" in cl 10 referred to. The Court of Appeal held that "its" referred to SRA.

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56 See para 12.51 above.
57 [2015] 5 SLR 1187.
58 [2020] 1 SLR 395.

Thus, the effect of cl 10 was that SRA would indemnify SSA in respect of all liability and/or loss that SSA might suffer or incur as a result of SRA's activities. This the court regarded as a commercially sensible outcome. In contrast, if "its" had referred to the SSA, then it meant that SRA would have to indemnify SSA for liabilities that SSA had suffered or incurred as a result of SSA's own activities. This would be a commercially absurd result as it meant that SRA would have agreed to indemnify SSA for activities outside of SRA's own control. In reaching this conclusion, the court acknowledged that, consistent with its holding in *YES F&B*,[59] the parties could have intended such a commercially absurd result and that the court would have had to give effect to it. However, on the facts, there was simply no evidence offered by either party that they had intended such an absurd outcome.

12.64 The Court of Appeal in *MCH International Pte Ltd v YG Group Pte Ltd*[60] ("*MCH International*") also stressed that in interpreting a contract, due consideration should be given to the commercial purpose of the transaction or provision. The commercial purpose should not be approached too technically, rigidly or formalistically, which might lead to commercially insensible results. However, similar to its sentiments expressed elsewhere, the commercial purpose is not to be pursued at all costs, but there would be no reason to disregard it when it accorded with the objective intentions of the parties. In the end, avoiding a commercially insensible outcome is only one factor that the court might consider in its task of contractual interpretation.

G. Admissibility of extrinsic evidence to aid in the process of interpretation

12.65 In *The Enterprise Fund II Ltd v Jong Hee Sen*,[61] the plaintiff, EFII, sued Jong Hee Sen for breaching his obligation as a warrantor under a deed of undertaking. By this deed, Jong and two other warrantors undertook to purchase shares which EFII bought from International Healthway Corporation Limited ("IHC"), should the sale of those shares not reach a stipulated target figure. This required the High Court to interpret cl 2.1(b) of the deed, which EFII argued gave rise to Jong's obligation to purchase the shares. Clause 2.1(b) provided as follows:

> (b) in so far as the aggregate consideration received by [EFII] pursuant to the sale of any Sale Shares effected during the Sale Period (the "**Aggregate Consideration**") pursuant to **Clause 2.1(a)** above or **Clause 2.2** below is less than the Sale Proceeds Target, [the Warrantors] shall, within no later than

59 See para 12.60 above.
60 [2019] 2 SLR 837.
61 [2020] 3 SLR 419.

> seven (7) Business Days of the expiry of the Sale Period, either purchase or procure the purchase from [EFII] of such portion of the remaining Sale Shares held by [EFII] (the "**Balance Sale Shares**") at … no less than the Minimum Sale Price, such that [EFII] receives, in aggregate, the full amount of the Sale Proceeds Target …
>
> [emphasis in original in bold]

12.66 In aid of its interpretation of cl 2.1(b), EFII relied on four pre-contractual e-mails, one of which Jong objected to. Jong's specific objection was that he was not copied in the e-mail concerned and hence lacked knowledge of it. EFII in turn contended that the e-mail was sent by one of Jong's fellow warrantors, and copied to the other. The High Court therefore had to consider whether the said e-mail passed the specific requirement of being reasonably available to all contracting parties, following the requirements laid down by the Court of Appeal in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd*[62] ("*Zurich Insurance*").

12.67 In the event, the High Court regarded it as determinative that Jong had a close working relationship with his two fellow warrantors. Given this, the court found it likely that Jong had a working knowledge of the essential features of the agreement with EFII and its purpose. Jong was not copied in the e-mail because he had been busy with administrative work in the listing of IHC and had been content to let the other warrantors deal with EFII. This was consistent with how the parties dealt with each other in the past. Thus, the court held that the e-mail was reasonably available to Jong and hence admissible.

12.68 This case therefore illustrates how a court is to apply the "reasonable availability" requirement in *Zurich Insurance*. Two comments might be made. First, as is clear from the High Court's decision, whether a document is "reasonably available" is objectively discerned. There need not be actual availability, as was the case here, so long as it is reasonably open to a party to obtain the document concerned. Thus, the relationship between the party concerned and the others who were directly availed of the document would be important. Similar to *The Star Quest*,[63] it is open to a court to infer that a document is reasonably available to a party, even if that party never actually saw the document, so long as he had reasonable access to that document via his business partners who had direct access.

62 [2008] 3 SLR(R) 1029.
63 [2016] 3 SLR 1280.

12.69 Second, it is noteworthy that the High Court did not deal with the e-mail as a piece of extrinsic evidence necessitating the application of different admissibility rules. It certainly was alive to the fact that it was a pre-contractual document – which would potentially have warranted the application of such rules – having alluded to it as such on several occasions. Yet, the court simply applied the *Zurich Insurance* requirements, just as one would to any other extrinsic evidence. This therefore further "normalises" the treatment of pre-contractual negotiations as any other type of extrinsic evidence. Indeed, there is no need to treat prior negotiations any differently and subject them to any heightened scrutiny, which may give rise to unnecessary confusion as to their admissibility. Despite this, it should be noted that the Court of Appeal has steadfastly maintained an open position on the admissibility of such evidence without stating conclusively that they are *only* subject to the *Zurich Insurance* requirements.

H. Admissibility of subsequent conduct

12.70 The Court of Appeal had to deal with whether evidence of subsequent conduct can be admitted to interpret contracts in *Simpson Marine (SEA) Pte Ltd v Jiacipto Jiaravanon*[64] ("*Simpson Marine*"), a question which it had expressly left open on previous occasions. In *Simpson Marine*, the respondent negotiated with the appellant, a luxury yacht dealer, for the purchase of yachts from the Italian yacht maker Azimut. The respondent agreed to pay a deposit of €1m to secure until 15 May 2013 two yachts identifiable by their model and hull numbers, *ie*, "100L#15" and "100G#12". After that date, the €1m deposit would be allocated to either yacht to become the initial down payment. While the respondent had paid the deposit to the appellant on 29 April 2013, Azimut had by then sold "100G#12" to someone else. The next available yacht from the 100G model was hull number 15, *ie*, "100G#15".

12.71 The respondent met with representatives from the appellant and Azimut on 8 May 2013. The appellant claimed that the respondent agreed then to use the €1m deposit to secure "100L#15" and "100G#15" until 31 May 2013, upon which the €1m deposit would be applied towards the purchase price of his chosen yacht. The respondent denied the existence of such an agreement. On 9 May 2013, the appellant remitted the deposit to Azimut.

12.72 Eventually, the respondent declined to purchase a yacht in the 100 series. On 31 July 2013, the parties reached a compromise whereby

64 [2019] 1 SLR 696.

half of the €1m deposit would be applied to the purchase price of another Azimut yacht that the respondent had previously contracted to purchase. However, the parties remained in dispute about the leftover €500,000.

12.73 The High Court held for the respondent on the basis that consideration for the deposit failed when Azimut sold "100G#12" to another buyer. The court also found that there was no further agreement between the parties on 8 May 2013. As such, it awarded restitution of the leftover €500,000 to the respondent on grounds, essentially, that there had been a total failure of consideration and there had been no further contractual provision for this sum.

12.74 The Court of Appeal disagreed with the High Court because it found that the evidence showed that the parties had reached an agreement on 8 May 2013 that the €1m deposit was to be used to hold both "100L#15" and "100G#15" until 31 May 2013. As such, the basis of the deposit did not fail since both yachts were in fact kept off the market until 31 May 2013. In other words, there had been no total failure of consideration. Consequently, when the respondent eventually decided against purchasing any yacht, the appellant was entitled to keep the deposit given that it had provided a part of that which had been bargained for under the contract – the holding or "reservation" of "100L#15" and "100G#15" until 31 May 2013.

12.75 In concluding that the parties had reached an agreement on 8 May 2013, the Court of Appeal, as did the High Court, referred to the parties' correspondence after that date. These included e-mails which shed light on the alleged agreement on 8 May 2013, as well as other e-mails that in turn explained the purpose of the compromise of 31 July 2013. The court acknowledged that, strictly speaking, such evidence pertained to the parties' subsequent conduct, which it defined as the parties' conduct after the formation of the agreement on 8 May 2013. Because neither party had objected to the admissibility of such evidence, the court did not have to discuss the legal question of whether they could in fact be so admitted. However, it did take the trouble to address this issue.

12.76 In this regard, the Court of Appeal recognised that it had left the question of whether such evidence can be admitted to interpret contracts open, even as it had opined that there is no absolute prohibition against such conduct being so used. Nonetheless, the court stated that it regarded it unlikely that such evidence would be admissible because it does not elucidate the parties' objective intentions or relate to a clear and obvious context. Thus, the position which the Court of Appeal had taken in previous cases still stands, that is, while subsequent conduct can in theory be admitted to interpret contracts, it is unlikely in practice that they will be considered by the courts, being in most cases, inadmissible.

12.77 Interestingly, the Court of Appeal acknowledged an apparent inconsistency between the courts' more liberal use of subsequent conduct to infer the formation of contract and the more restrictive use of such evidence to interpret the contract's terms. Indeed, commentators have argued that this inconsistency should be resolved one way or the other since, in both cases, the courts are concerned with inferring the parties' intentions.[65] However, because it did not hear full arguments on the issue, the court declined to express a definitive view in *Simpson Marine*.[66] It remains to be seen how a future Court of Appeal will address the vexed question of whether subsequent conduct can be admitted liberally to interpret contracts, given that the same is being done in respect of the same evidence for inferring the formation of contracts.

12.78 The Court of Appeal reiterated this same approach towards the use of subsequent conduct in the later case of *MCH International Pte Ltd v YG Group Pte Ltd*[67] ("*MCH International*"). It cautioned that subsequent conduct had to be treated with caution because such evidence was generally either inadmissible for failing certain criteria, or was superfluous because it would affirm the contextual evidence at the time of the contract. Again, as with previous years, we await a further decision from the Court of Appeal that will lay down the definitive statement on the status of subsequent conduct in the interpretation of contracts.

IV. Implication of terms

A. Effect of entire agreement clause on implied terms

12.79 In *Singapore Rifle Association v Singapore Shooting Association*[68] ("*Singapore Shooting Association (HC)*"), the High Court held that an implied term in fact that SSA would use reasonable efforts to allow and/or assist SRA to obtain the necessary regulatory approval could be successfully implied into the contract between the parties, as all the requirements set out by the Court of Appeal in *Sembcorp Marine*[69] had been satisfied. However, an interesting issue arose as to whether this would be impacted by the presence of an entire agreement clause in the contract. In the earlier case of *Ng Giap Hon v Westcomb Securities Pte Ltd*,[70]

65 See, *eg*, Goh Yihan, "Towards a Consistent Use of Subsequent Conduct in Singapore Contract Law" [2007] JBL 387 and D W McLauchlan, "Contract Formation, Contract Interpretation, and Subsequent Conduct" (2006) 25 U Queensland LJ 77.
66 See para 12.70 above.
67 [2019] 2 SLR 837.
68 [2019] SGHC 13.
69 See para 12.51 above.
70 [2019] 4 SLR 17.

the Court of Appeal ruled that entire agreement clauses cannot generally exclude the implication of terms. This was because, among other reasons, an implied term, by its nature as a term implied after the contract was concluded, would not have been in the parties' contemplation when they drafted the contract containing the entire agreement clause in the first place. Also, referring to the English High Court decision of *Exxonmobil Sales and Supply Corp v Texaco Ltd*[71] ("*Exxonmobil*"), the court accepted that it was:[72]

> … arguable that where it is necessary to imply a term in order to make the express terms work such an implied term may not be excluded by [an] entire agreement clause because it could be said that such a term is to be found in the document or documents forming part of the contract.

12.80 The High Court in *Singapore Shooting Association (HC)* analysed the Court of Appeal's reference to *Exxonmobil* in some detail. It regarded that certain implied terms should be regarded as terms found *in* the contract and thus can never be excluded by entire agreement clauses. These are terms implied by the business efficacy test and can be regarded as "intrinsic" to the contract. Indeed, if such terms are *necessary* for the contract to even work, then it might be said that they were *always* in the contract to begin with. As such, an entire agreement clause, which purports to exclude terms implied after the contract was formed, can never be effected against such terms implied to render the contract workable. In contrast, terms implied based on usage or custom are "extrinsic" to the agreement. These terms can be excluded by entire agreement clauses because such clauses are indeed meant to exclude matters extrinsic to the agreement. However, the court did not rule out the possibility of a clearly drafted entire agreement clause to also exclude such intrinsic implied terms.

12.81 Ultimately, the High Court was drawing a useful distinction between terms implied in fact and terms implied by usage or custom. Whereas terms implied in fact are justified by the notion of necessity, terms implied by usage or custom are implied, for instance, if the party concerned is able to prove that a certain custom was so notorious that the parties would obviously have intended it to be part of their agreement. As such, it is understandable why, if a term were regarded as necessary for the very contract to work in the first place, it cannot be excluded by an entire agreement clause that is designed to exclude terms extrinsic to the original agreement. In contrast, terms implied by usage or custom are implied to add on something "extra" to the contract, by virtue of

71 [2004] 1 All ER (Comm) 435 at [27].

72 *Singapore Rifle Association v Singapore Shooting Association* [2019] SGHC 13 at [136].

the parties' past dealings or an established custom, but are otherwise *unnecessary* for the contract to work. Thus, it is not surprising that, if the parties are found to agree to their exclusion by an entire agreement clause, they can do so. However, in the end, as the High Court held in *Singapore Shooting Association (HC)*, the court is guided by the parties' objectively ascertained intention, such that a properly crafted entire agreement clause may still exclude a term implied in fact.

12.82 While the High Court seemed to equate terms implied by usage or custom with terms implied by law,[73] the two are, strictly speaking, not the same. Terms are implied by law where there is a policy reason which the courts seek to advance. In most cases, parties will not be allowed to contract out of terms implied by law because doing so would defeat the very purpose of imposing those terms to begin with. Thus, it may well be that an entire agreement clause may not be effective to exclude terms that are implied by law. The suggestion by the High Court that terms implied by usage or custom are terms implied in law is, therefore, open to question.

V. Vitiating factors

A. Mistake

12.83 Although high frequency trading is now an established phenomenon, the legal effects of such trades have rarely been the subject of judicial scrutiny. In *B2C2 (SICC)*,[74] the SICC had the unusual opportunity to consider how the doctrine of unilateral mistake should apply in this context, where the contracts in question were formed entirely by automated processes with no human intervention. The facts of the case have been summarised above. For present purposes, Quoine argued, *inter alia*, that the reversals were justified as the contracts in question were either void at common law or voidable in equity by reason of unilateral mistake. At trial, Simon Thorley IJ rejected these defences, holding that Quoine had breached the contract, which provided for the trades to be "irreversible".[75]

12.84 In Singapore, the doctrine of unilateral mistake was authoritatively reviewed by the Court of Appeal in *Chwee Kin Keong v*

73 *Singapore Rifle Association v Singapore Shooting Association* [2019] SGHC 13 at [141].
74 See para 12.36 above.
75 *B2C2 Ltd v Quoine Pte Ltd* [2019] 4 SLR 17 at [136]–[137].

Diglandmall.com Pte Ltd[76] ("*Digilandmall*"). This decision affirmed the existence of a jurisdiction to vitiate a contract for unilateral mistake both at common law and in equity. A unilateral mistake as to a fundamental term would render the contract void at common law if the non-mistaken party had actual knowledge of the other party's error. In contrast, the equitable jurisdiction requires only proof of constructive knowledge though an additional element of impropriety or unconscionability must be present to render the contract voidable. However, the application of these principles to the context of high frequency trades raised novel and difficult questions. Given that all trades are concluded by computers acting as programmed with no human intervention, in what sense is it meaningful to say, first, that one (or both) party(ies) was "mistaken", and second, that the other party "knew" or "ought to have known" of the mistake?

12.85 On the first question, Quoine submitted[77] that the court should first ask what the parties would have agreed to had they, *hypothetically*, met on the "floor of exchange". This theoretical exchange should then be compared with the actual transaction to decide if one or both parties had laboured under a mistake. Rejecting this submission, Thorley IJ thought it "wholly artificial to work on the basis of what might have happened if a human element was involved"[78] when the parties had deliberately opted to transact through computers *sans* any human involvement. The learned judge held,[79] instead, that the existence of a mistake is a question of fact to be ascertained by considering the belief(s) of the person on whose behalf the computer was trading as regards the terms of the trades. The mistake must have been operative at the time of the contract though it could have been formed on an earlier date. Applying this approach, Thorley IJ found that the Counterparties had contracted on the mistaken belief that the Platform would always operate as intended so that the trades would only be executed at prices that reflect the true market price as at the date of the contract ("the Mistaken Belief").[80] This was, in his Honour's view, a fundamental mistake as to a term of the trading contracts.

12.86 For the mistake to vitiate the Disputed Trades, it must be shown that B2C2 had either actual or constructive knowledge of the Mistaken Belief at the time of contract. This raises the second and more troubling question as to how knowledge was to be assessed when the contracts were made entirely by computers so no human agent actually knew of the

76 [2005] 1 SLR(R) 502.
77 *B2C2 Ltd v Quoine Pte Ltd* [2019] 4 SLR 17 at [200].
78 *B2C2 Ltd v Quoine Pte Ltd* [2019] 4 SLR 17 at [204].
79 *B2C2 Ltd v Quoine Pte Ltd* [2019] 4 SLR 17 at [205].
80 *B2C2 Ltd v Quoine Pte Ltd* [2019] 4 SLR 17 at [224]–[228].

errors until *after* their occurrence.[81] Thorley IJ resolved this difficulty by locating the relevant state of mind in the *programmer* of trading software *at the time of its writing*.[82] The learned judge thought this approach logical taking into account the "deterministic" nature of B2C2's trading software, in that "they do and only do what they have been programmed to do" and therefore had "no mind of their own".[83]

12.87 So far as the common law doctrine is concerned, this meant that B2C2's programmer (Boonen) had to be shown to have designed the trading software with the *intention* to exploit the errors of the Counterparties. However, Thorley IJ found that this was not established on the facts.[84] To understand this aspect of the judgment, it is necessary to recapitulate some features of B2C2's trading software. As a market maker, B2C2 employed a trading software that was designed to quote prices by evaluating the price levels available on the Platform. The software's function was therefore dependent on there being sufficient input from the Platform's order book. If the order book were empty, or populated by low volume trades that the software would exclude from evaluation, the software would stop working. To prevent such failures, Boonen added two "deep prices" into the software's internal order book to ensure that the system would always have a price input to draw on. At the time of the Disputed Trades, the deep price programmed for the sale of ETH was 10 BTC:1 ETH. These features were relevant to Quoine's defence because it had argued that Boonen had inserted the deep prices with the intention to exploit illiquidity on the Platform. That would constitute actual knowledge for purposes of unilateral mistake at common law since Boonen must then have known that no trader would have bought ETH at the programmed deep price unless it was acting under a mistake.[85] However, Thorley IJ found that Boonen had no such motive.[86] Although he (Boonen) knew that the deep prices *could* be executed if the order book on the Platform became empty, he did not in fact consider it in any detail because he also knew it to be a highly unlikely occurrence. As such, the insertion of the deep prices was not a sinister attempt to manipulate the market but simply a rational decision to protect B2C2 against the risks of illiquidity. That being the case, Boonen (and B2C2) could not be said to have known of the Counterparties' Mistaken Belief.[87] It followed, then, that the disputed trades were not vitiated on the ground of unilateral mistake at common law.

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81 *B2C2 Ltd v Quoine Pte Ltd* [2019] 4 SLR 17 at [194].
82 *B2C2 Ltd v Quoine Pte Ltd* [2019] 4 SLR 17 at [106] and [210]–[211].
83 *B2C2 Ltd v Quoine Pte Ltd* [2019] 4 SLR 17 at [208].
84 *B2C2 Ltd v Quoine Pte Ltd* [2019] 4 SLR 17 at [108] and [194].
85 *B2C2 Ltd v Quoine Pte Ltd* [2019] 4 SLR 17 at [109].
86 *B2C2 Ltd v Quoine Pte Ltd* [2019] 4 SLR 17 at [118]–[125].
87 *B2C2 Ltd v Quoine Pte Ltd* [2019] 4 SLR 17 at [230].

12.88 Turning to the position in equity, Thorley IJ likewise found that Boonen did not have constructive knowledge of the Counterparties' mistake. Having found that Boonen had a rational reason for including the deep prices in the programme, the learned judge was satisfied that he had not turned a blind eye to what must have been obvious to everyone else in his position. Indeed, this was a case where "once actual knowledge has been rejected there is no place for a finding of constructive knowledge".[88] But even if constructive knowledge had been established, the defence would still have failed in equity. This was because there was no "impropriety" in B2C2's conduct. In seeking to generate a profit rather than a loss on the occurrence of an unlikely event, B2C2's conduct was at most opportunistic but was neither unconscionable nor unethical.[89]

12.89 For completeness, it should be noted that Quoine had also pleaded mutual mistake as a ground for reversing the disputed trades. Thorley IJ gave short shrift to this argument. The defence could not succeed because even if Quoine had been mistaken as to the price of the trades, this was not a belief shared by Boonen (and hence B2C2).[90]

12.90 As technology transforms commercial practices, courts are increasingly asked to apply or adapt extant legal doctrines and principles to new factual paradigms. In each case, it is incumbent on the court to devise a response that would develop the law without undermining its coherence. In *B2C2 (SICC)*,[91] Thorley IJ confronted this challenge by altering both the content and the time at which "knowledge" is assessed, substituting the traditional requirement for knowledge of mistake at the point of contract with intention to exploit an error at the point of design. Low and Mik have criticised this approach for transmuting the doctrine of unilateral mistake into "an attenuated version of deceit".[92] The same authors also observed that this approach would "[restrict] the doctrine's practical operation to a vanishing point" because it would be practically very difficult to show that a party has designed a system solely to leverage on anticipated errors. As the reasoning in *B2C2 (SICC)* demonstrates, the opportunistic features of an algorithmic trading system are invariably

88 *B2C2 Ltd v Quoine Pte Ltd* [2019] 4 SLR 17 at [233].

89 *B2C2 Ltd v Quoine Pte Ltd* [2019] 4 SLR 17 at [236].

90 *B2C2 Ltd v Quoine Pte Ltd* [2019] 4 SLR 17 at [239]. Here, Thorley IJ made reference to Quoine's belief but it may be queried whether the more pertinent state of mind was that of the counterparties.

91 See para 12.36 above.

92 Kelvin Low & Eliza Mik, "Unpicking a Fin(e)Tech Mess: Can Old Doctrines Cope in the 21st Century?" *Oxford Business Law Blog* (8 November 2019). It may not be accurate to describe Thorley IJ's approach as one of deceit since a party is not making a dishonest representation merely by programming a software to behave in a certain way. Rather, it seems that the novel approach has altered the doctrine by now requiring a kind of premediated intention.

legitimate since they are part and parcel of a general strategy to optimise profits (and minimise risks). By wholly discounting the possibility that a party could be attributed with knowledge of the error gained *after* the point of contract, the court appears to have immunised a contracting party against the vitiating effects of unilateral mistakes only because it had automated its contracting functions. Whether or not this would lead to fair outcomes is open to debate, but its place in Singapore law has now been affirmed by the Court of Appeal.

12.91 In *Quoine Ptd Ltd v B2C2 Ltd*[93] ("*B2C2 (CA)*") the Court of Appeal largely affirmed Thorley IJ's exposition of the law concerning unilateral mistakes but took a different view of their application to the facts. Delivering the majority judgment, Sundaresh Menon CJ first highlighted the significance of the rule well established in *Smith v Hughes*[94] that the mistake in question is – at least at common law – operative only if it relates to a *term* of the contract. Here, the Court of Appeal departed from Thorley IJ's finding and held that the Mistaken Belief did not relate to a term of the disputed contracts but concerned only a *fact* or *circumstance* upon which the contracts were formed. Menon CJ explained the distinction between these concepts in the following terms:[95]

> It is helpful to pause here and examine the position a little more closely. Because the Trading Contracts had been entered into pursuant to deterministic algorithmic programs that had acted exactly as they had been programmed to act, it is not clear what mistake can be said to have affected the formation of the contracts. The mistake, if anything, was in the way the Platform had operated as a result of Quoine's failure to make certain necessary changes to several critical operating systems, which led to a series of steps that force-closed the Counterparties' positions and triggered buy orders for ETH being placed on their behalf. *This might conceivably be seen as a mistake as to the premise on which the buy orders were placed, but it can in no way be said to be a mistake as to the terms on which the contracts could or would be formed.* If a party A is told a falsehood by B which causes A to accept C's offer to transact at a price A would not otherwise have transacted at, in circumstances where C was neither aware of nor involved in B's falsehood, we are unable to see how that falsehood can be said to be a mistake that vitiates the contract. *Here, the problems with the Quoter Program and the subsequent force-closure of the Counterparties' positions are akin to a 'falsehood' told by Quoine to the Counterparties. This cannot be a mistake that vitiates the Trading Contracts between B2C2 and the Counterparties.* [emphasis added]

93 [2020] 2 SLR 20. In the interest of full disclosure, one of the co-authors of this chapter, Goh Yihan, acted as *amicus curiae* in this case. Because of his involvement as such, he took no part in crafting the comments on the case in this section.

94 (1871) LR 6 QB 597.

95 *Quoine Pte Ltd v B2C2 Ltd* [2020] 2 SLR 20 at [114].

12.92 Accordingly, while the Counterparties may have mistakenly assumed that the Platform would not fail or would have sufficient safeguards to prevent execution at prices that deviate sharply from fair market rates, this was really a mistaken assumption about the Platform's operations rather than a term of the affected contracts. This effectively disposed of the defence based on unilateral mistake at common law. However, a majority of the judges (comprising Menon CJ, Andrew Phang JA, Judith Prakash JA and Robert French IJ) left open the question whether a unilateral mistake in equity is similarly confined to contractual terms or may extend beyond that to include assumptions fundamental to the contract.[96] Assuming that a broader jurisdiction may indeed exist in equity, Menon CJ went on to consider how "knowledge" of the mistake was to be assessed.

12.93 Concurring with Thorley IJ, the majority judges held that in cases where contracts are made by deterministic algorithms, it is the knowledge of the *programmer* of the algorithm that is relevant for assessing whether a party knew or ought to have known of a mistake.[97] This follows logically from the fact that once the contracting functions have been delegated to the computer programmes, there would usually be no personal knowledge or involvement on the part of the contracting party. Like Thorley IJ, the majority categorically rejected the hypothetical "floor of exchange" analysis as wholly artificial since that would be completely counterfactual.[98] Importantly, however, Menon CJ clarified that the relevant time for assessment is not confined to the point of programming but extends beyond that to the time of the contract.[99] On this view, a party who discovers a mistake only *after* the programme has been put in place may still be found to have actual or constructive knowledge of the mistake if, for instance, it had continued to let the algorithm run in order to exploit the error.

12.94 In affirming this analytical framework, Menon CJ sought to respond to Low's and Mik's criticisms by clarifying that the relevant test does not require the programmer to have actually foreseen the *particular* manifestation of error that is the subject of dispute. Rather, the inquiry is concerned with knowledge at a more general level, *ie*, whether the programmer had, at the time of programming the algorithm, known or ought to have known "that the relevant offer would *only ever* be accepted by a party operating under a mistake and was the programmer acting to take

96 *Quoine Pte Ltd v B2C2 Ltd* [2020] 2 SLR 20 at [92].
97 *Quoine Pte Ltd v B2C2 Ltd* [2020] 2 SLR 20 at [97]–[98].
98 *Quoine Pte Ltd v B2C2 Ltd* [2020] 2 SLR 20 at [97].
99 *Quoine Pte Ltd v B2C2 Ltd* [2020] 2 SLR 20 at [99].

advantage of such a mistake?"[100] Moreover, the fact that the assessment is made *up to the point of the contract* addresses the objection that the test is ineffective since programmers can never be expected to foresee particular incidents of errors. With respect, however, these responses do not go to the thrust of Low's and Mik's criticism – which is that it would rarely be possible to prove that an algorithm is designed only to take advantage of a mistake since it is generally legitimate for a programmer to "plan for the unforeseeable".[101] It is surmised that the unforeseeable would include technical failures. And if it were legitimate to protect against unexpected risks in the first place, it would surely make no difference if the trader should discover *after* the programme has become operative that it also has the capacity to exploit counterparty or third party errors. By focusing on the programmer's intention *prior* to the occurrence of the mistaken contract, the courts have therefore fundamentally altered the function of the doctrine of unilateral mistake. While previously it was aimed at redressing opportunistic behaviour, the threshold is raised in the context of automated contracts to deter only *premeditated* exploitation of errors.

12.95 Unsurprisingly, the approach of the majority judges led them to the same conclusion as that reached by Thorley IJ as regards B2C2's state of mind. Since it was established that Boonen had no sinister motive in programming the deep prices to take advantage of mistaken bids by counterparties, and there was nothing to suggest he had become aware of the errors at any time prior to the execution of the disputed trades, Boonen (and B2C2) could not be said to have had actual or constructive knowledge of the Counterparties' Mistaken Belief. It follows that Quoine's defences premised on mutual and unilateral mistake (at both common law and in equity) must fail.[102]

12.96 In the minority judgment, Jonathan Mance IJ took the contrary view that Quoine ought to succeed in its defence. The contracts could justifiably be reversed as they were vitiated by unilateral mistake in equity. Mance IJ's reasoning diverged from the majority's analysis in four critical aspects:

> (a) First, the learned judge contended that the equitable doctrine ought to be conceived broadly to apply even to mistakes not relating to terms. It should, in his Honour's words, be:[103]

100 *Quoine Pte Ltd v B2C2 Ltd* [2020] 2 SLR 20 at [103].
101 Kelvin Low & Eliza Mik, "Unpicking a Fin(e)Tech Mess: Can Old Doctrines Cope in the 21st Century?" *Oxford Business Law Blog* (8 November 2019).
102 *Quoine Pte Ltd v B2C2 Ltd* [2020] 2 SLR 20 at [117]–[127].
103 *Quoine Pte Ltd v B2C2 Ltd* [2020] 2 SLR 20 at [170].

> … capable of covering situations of unilateral mistake, where the mistake, although not strictly as to subject matter or a term, is sufficiently 'fundamental' to justify equitable intervention.

(b) Second, relief in equity is subject to the prerequisite of unconscionability which, for this purpose, must be understood as *the injustice that would arise if a non-mistaken party were to retain the benefit or advantage of the mistake*. As Mance IJ put it, "[equity's] conscience must be capable of being affected by behaviour in seeking to retain the benefit of the mistake, once it is discovered".[104] This understanding of unconscionability is contrasted with the unconscionable behaviour of a non-mistaken party "conducing to the mistaken party remaining mistaken"[105] by either "snapping up" a mistaken offer or knowingly and silently standing by such an offer. Unconscionability in this latter sense is inappropriate because it presupposes that the non-mistaken party would have actual (including Nelsonian) knowledge of the mistake, and that would leave no room for the doctrine to apply in cases where the non-mistaken party is imputed only with constructive notice. In a further contrast to the majority's analysis,[106] Mance IJ also distinguished the role and content of "unconscionability" in this context from that which the Court of Appeal expounded for purposes of undue influence in *BOM v BOK*.[107] Here, it is the *mistake* that is the primary basis for relief though unconscionability is overlaid as a control mechanism. In the context of undue influence, however, unconscionability in the form of abuse of power constitutes the essential criterion for liability. That being the case, there is no reason why conscionability should bear the same narrow meaning in these materially different contexts. Specifically, there is no reason why unconscionability should not be applied on a flexible basis to achieve a just outcome in cases where a contractual party is mistaken and the counterparty has at least constructive notice of the mistake.[108]

(c) Third, Mance IJ disagreed that the knowledge of the non-mistaken party should be determined by reference to the programmer's state of mind. The better approach, in his view, was to consider:[109]

104 *Quoine Pte Ltd v B2C2 Ltd* [2020] 2 SLR 20 at [173].
105 *Quoine Pte Ltd v B2C2 Ltd* [2020] 2 SLR 20 at [170].
106 *Quoine Pte Ltd v B2C2 Ltd* [2020] 2 SLR 20 at [109].
107 [2019] 1 SLR 349.
108 *Quoine Pte Ltd v B2C2 Ltd* [2020] 2 SLR 20 at [170].
109 *Quoine Pte Ltd v B2C2 Ltd* [2020] 2 SLR 20 at [178].

> … what [the non-mistaken party's] actual state of mind *would have been*, given knowledge of the circumstances of the transactions as and when they occurred. [emphasis added]

The test is objective as it is not dependent on what the party actually knew[110] but what a reasonable trader would have thought, had he known the circumstances at the time of contract.[111] In effect, this approximates the hypothetical, "floor of exchange" approach that was rejected at trial and on appeal by the majority judges. For Mance IJ, this is the preferred approach because it retains the enquiry that is central to the doctrine's application, which is to ask:[112]

> … whether there was anything drastically unusual about the surrounding circumstances or the state of the market to explain on a rational basis why such abnormal prices should occur, or whether the only possible conclusion was that some fundamental error had taken place, giving rise to transactions which the other party could never rationally have contemplated or intended.

In contrast, the majority's approach significantly alters the doctrine as conventionally understood because it:[113]

> … looks at the position in the abstract and in advance, without any regard for the actual transactions or the market circumstances surrounding them

There is, in Mance IJ's view, greater artificiality in this approach since it excludes from consideration the actual circumstances of the transactions and what reasonable parties would have known had they been aware of those circumstances.[114]

(d) Finally, it is important to note that the absence of consensus on how "knowledge" should be assessed is ultimately reflective of a more fundamental disagreement as to the doctrine's rationale. In the majority judgment, particular emphasis was placed on the conception of the doctrine of unilateral mistake (at least in common law) as a principle governing offer and acceptance.[115] Reasoning from this starting point (and keeping in mind the absence of any human participation in the act of contractual formation), Menon CJ then sought to locate the human state of mind that had the closest link to the act

110 *Quoine Pte Ltd v B2C2 Ltd* [2020] 2 SLR 20 at [194].
111 *Quoine Pte Ltd v B2C2 Ltd* [2020] 2 SLR 20 at [201].
112 *Quoine Pte Ltd v B2C2 Ltd* [2020] 2 SLR 20 at [192].
113 *Quoine Pte Ltd v B2C2 Ltd* [2020] 2 SLR 20 at [192].
114 *Quoine Pte Ltd v B2C2 Ltd* [2020] 2 SLR 20 at [200].
115 *Quoine Pte Ltd v B2C2 Ltd* [2020] 2 SLR 20 at [81].

> of contractual *formation*.[116] This led, quite naturally, to the identification of the programmer as the relevant human agent. For Mance IJ, however, the doctrine is not primarily concerned with ascertaining whether contracting parties were *ad idem*. Instead, it is an *exception* to the general objective approach to contractual formation justified by the recognition that it would not serve the ends of justice to bind a mistaken party to a contract when the other was well aware of the mistake. As such, the "underlying rationale is not a lack of correspondence between offer and acceptance, but a principle of justice".[117]

12.97 Applying these principles, Mance IJ would conclude that the contracts ought to be vitiated by unilateral mistake in equity. Like the majority, Mance IJ did not think the Mistaken Belief was a mistake as to a term of the contracts.[118] That being the case, there was no room for application of the common law doctrine. However, the mistake was, in his view, unquestionably fundamental so equity's intervention was clearly justified.[119] The requirement for knowledge as explicated by Mance IJ was satisfied since Boonen did realise – once the transactions were brought to his attention – that a serious error had occurred. This was amply evidenced by an e-mail entitled "Major Quoine database breakdown" that he sent to Quoine soon after discovering the unusual trades.[120] Given the evidence, Mance IJ would regard this as an instance where Boonen's knowledge was closer to that of actual knowledge than constructive notice.[121] That being the case, it was strictly unnecessary to consider if the element of unconscionability was also satisfied. Nevertheless, the learned judge thought that the requirement was plainly satisfied – for it was:[122]

> … clearly unconscionable … for a trader to retain the benefit of transactions which he would – and did – at once recognise as due to some major error as soon as he came to learn of them.

12.98 As one of the first Commonwealth decisions examining the effects of mistakes on automated contracts, this difficult and interesting decision will no doubt be the subject of further scrutiny by judges and commentators. Whilst more developments are anticipated in this fascinating area of law, this part of the review will be concluded with three observations. First, it is noted that while there are now two authoritative

116 *Quoine Pte Ltd v B2C2 Ltd* [2020] 2 SLR 20 at [93].
117 *Quoine Pte Ltd v B2C2 Ltd* [2020] 2 SLR 20 at [181].
118 *Quoine Pte Ltd v B2C2 Ltd* [2020] 2 SLR 20 at [182].
119 *Quoine Pte Ltd v B2C2 Ltd* [2020] 2 SLR 20 at [182].
120 *Quoine Pte Ltd v B2C2 Ltd* [2020] 2 SLR 20 at [201]–[203].
121 *Quoine Pte Ltd v B2C2 Ltd* [2020] 2 SLR 20 at [178] and [204].
122 *Quoine Pte Ltd v B2C2 Ltd* [2020] 2 SLR 20 at [205].

decisions (*Digilandmall*[123] and *B2C2 (CA)*)[124] affirming the existence of an equitable doctrine of unilateral mistake, the ambit of this jurisdiction remains unsettled. As noted above, the majority judges in *B2C2 (CA)* had left open the question whether the jurisdiction could be extended beyond fundamental mistakes of contractual terms. This may signify a willingness to endorse a more expansive doctrine in the future. On the other hand, the majority's actual reasoning in *B2C2 (CA)* was decidedly restrictive. In limiting the operation of the doctrine to intentionally exploitative conduct in the context of automated trading, that has the effect of narrowing the doctrine considerably. Second, this decision raises a more general question as to how the law ought to adapt to changes in commercial behaviour brought about by the adoption of technology. For the majority judges, it was significant that the parties have *committed* to a mode of trading that precluded their actual knowledge at the time of contract.[125] This consideration had, in their view, the effect of precluding the common law's intervention in reallocating the risks of loss. Yet this is by no means the law's only possible response. The question, as Mance IJ intimated, is whether the computers are "outworkers" or "overlords".[126] The question whether a party had assumed a particular risk ought, perhaps, to be determined not merely by the fact of automation but also with reference to other relevant factors such as market expectations. This may entail, in each case, a closer examination of the intention of the contracting parties in the light of the larger environment in which they operate. Finally, the majority's approach is no doubt informed by the proverbial concern for legal certainty. Upholding the trading contracts conduces to legal certainty even if it may lead to a windfall for B2C2. If such an outcome is thought to be unjust, that is perhaps a concern better addressed via legislation.[127]

I. Non est factum

12.99 In *Mahidon Nichiar bte Mohd Ali v Dawood Sultan Kamaldin*[128] ("*Mahidon*"), the Court of Appeal applied the doctrine of *non est factum* in the unusual context where the plaintiffs were literate persons of normal capacity. There, the court found that the plaintiffs had signed a deed that was radically different from what they thought it was because their lawyer had failed to advise them of its legal effects. As they were unsophisticated, lay clients entering into a complex transaction, they were not negligent

123 See para 12.84 above.
124 See para 12.91 above.
125 *Quoine Pte Ltd v B2C2 Ltd* [2020] 2 SLR 20 at [104].
126 *Quoine Pte Ltd v B2C2 Ltd* [2020] 2 SLR 20 at [193].
127 As Menon CJ intimated at *Quoine Pte Ltd v B2C2 Ltd* [2020] 2 SLR 20 at [79].
128 [2015] 5 SLR 62.

in placing reliance on their lawyers. The court did, however, stress that the facts of the case were exceptional so it should not be understood to mean that clients are always justified in relying on lawyers rather than exercise personal judgment. Much would depend on the particular facts, such as:[129]

> … the nature of the transaction, the level of sophistication of the client, the extent of the solicitor's duty to explain the document, and the actual advice rendered by the solicitor.

As will be seen, these factors were at play in the more recent case of *Overseas-Chinese Banking Corp Ltd v Yeo Hui Keng*[130] ("*Yeo Hui Keng*") but to a contrary outcome.

12.100 In *Yeo Hui Keng*, the defendant and her late husband ("Kung") executed an all-moneys mortgage ("the Mortgage") in favour of the plaintiff ("the Bank") to secure credit facilities extended by the bank to a company ("the Company") owned and controlled by Kung. The (all-moneys) Mortgage protected the Bank's interests by, first, creating a mortgage over the residential property ("the Property") jointly owned by the defendant and, secondly, granting the Bank direct recourse to them *personally* should the Company default on the facilities. Unfortunately, Kung then passed away and the Company failed to make payments when due. After repossessing and liquidating the Property, the Bank sued the defendant for the balance of the outstanding liabilities. The defendant pleaded *non est factum* in defence – arguing that she had signed the Mortgage in the belief that it was a mere mortgage over the Property (and not an all-moneys mortgage) so she would have no liability beyond the value of the Property. What she had in mind was therefore radically different from an all-moneys mortgage.

12.101 Tan Siong Thye J rejected the plea of *non est factum* as its elements were not satisfied. First, the learned judge found that the document that the defendant had in mind was *not* radically different from an all-moneys mortgage.[131] Both documents were commercial instruments intended to secure banking facilities. Where they differed was in the extent of the mortgagor's liability. As such, the defendant could not be said to have signed something radically different from what she thought it was. Second, Tan J found that the defendant had, in any event, known that she was signing an all-moneys mortgage.[132] This was because she had received correspondence that clearly explained her obligations under the

129 *Mahidon Nichiar bte Mohd Ali v Dawood Sultan Kamaldin* [2015] 5 SLR 62 at [123].
130 [2019] 5 SLR 172.
131 *Overseas-Chinese Banking Corp Ltd v Yeo Hui Keng* [2019] 5 SLR 172 at [69] and [72].
132 *Overseas-Chinese Banking Corp Ltd v Yeo Hui Keng* [2019] 5 SLR 172 at [80] and [82].

Mortgage. Third and finally, even if it were accepted that the defendant did not know the effects of the document, the plea of *non est factum* would still have failed because it was her own negligence that brought about the mistake.[133] In making these findings, Tan J emphasised that a person with the defendant's educational qualifications and experience would not only have been able to understand the documents signed but would also have raised questions of their legal effects had they not been properly explained to her.[134] Had she failed to do so, her conduct would have been negligent and even irresponsible. This was thus a situation distinguishable from *Mahidon*, where the plaintiffs justifiably relied on their lawyer as they had lower educational qualifications and the transaction was such that it would not have been comprehensible to them without proper advice.

12.102 A further interesting (though *obiter*) question that arose in *Yeo Hui Keng*[135] was whether, assuming the defence of *non est factum* was made out, the defendant could still have been estopped by her representations or conduct from invoking the defence. Tan J confirmed that this was indeed so and that the plaintiff bore the burden of proving the elements of the estoppel.[136] In this case, the evidence was that the defendant had signed two documents: the letter of confirmation and the form of confirmation, both of which contained unequivocal confirmation that she had understood the terms of the Mortgage and agreed to be bound by them. These forms were required by the plaintiff bank precisely to secure assurance of the defendant's knowledge and agreement. As such, it was reasonable for the plaintiff to rely on the defendant's representations as expressed in the forms. And it follows that the representations would have estopped the defendant from invoking *non est factum*.

J. Restraint of trade

12.103 In *Stratech Systems Ltd v Nyam Chiu Shin*,[137] the Court of Appeal held that where trade secrets or confidential information are protected by an express provision in an employment agreement, the employer will have to demonstrate a legitimate interest "over and above" the protection of trade secrets or confidential information in order to justify a restrictive covenant. In *Man Financial (S) Pte Ltd v Wong Bark Chuan David*[138] ("*Man Financial*"), the Court of Appeal affirmed this as a general

133 *Overseas-Chinese Banking Corp Ltd v Yeo Hui Keng* [2019] 5 SLR 172 at [97], [102]–[106].
134 *Overseas-Chinese Banking Corp Ltd v Yeo Hui Keng* [2019] 5 SLR 172 at [80], [104]–[105].
135 See para 12.99 above.
136 *Overseas-Chinese Banking Corp Ltd v Yeo Hui Keng* [2019] 5 SLR 172 at [116].
137 [2005] 2 SLR(R) 579 at [48]–[49].
138 [2008] 1 SLR(R) 663 at [92].

proposition that would also apply to legitimate proprietary interests other than trade secrets and confidential information. However, the High Court has since urged, on more than one occasion, the reconsideration of this proposition. In *Centre for Creative Leadership (CCL) Pte Ltd v Byrne Roger Peter*,[139] Woo Bih Li J considered English authorities that suggest that restrictive covenants may be justified notwithstanding that there already exist confidentiality or non-solicitation clauses in the employment contract. This is because it is often difficult to police the disclosure of confidential information, and there are practical difficulties in distinguishing between information that is confidential or those that are not, or who has or has not been a customer of the employer during the employee's period of employment. As such, imposing a restrictive covenant against competition may often be the most effective way of securing an employer's interests. In Woo J's view, this line of reasoning merits reconsideration by the Court of Appeal. Likewise, in *Lek Gwee Noi v Humming Flowers & Gifts Pte Ltd*,[140] Vinodh Coomaraswamy J expressed sympathy with this view. Unfortunately, this development has yet to occur and the proposition has continued to bind lower courts as we shall see in the following decision.

12.104 In *HT SRL v Wee Shuo Woon*,[141] the High Court held that a non-competition clause was void in restraint of trade. In this case, the plaintiff ("HT") is a company that provides "offensive" security technology to government and intelligence agencies worldwide. Such technology enables the user to surreptitiously access, use and/or alter data on a targeted device. The defendant, Woon, was employed by HT as its "Security Specialist". In January 2015, Woon resigned from HT to join ReaQta Ltd ("ReaQta"), a company that provides "defensive" security technology. This form of technology seeks to detect and neutralise malware. Subsequently, HT discovered that Woon had in fact worked for ReaQta even while he was still in HT's employment. HT then commenced suit against Woon for breach of employment contract, *viz*, by working for an unrelated business without HT's consent *during* the employment, and in joining a competing business *after* the termination of his employment in breach of a restrictive covenant.

12.105 Hoo Sheau Peng J held that Woon had in fact breached his duty of good faith and fidelity to HT as he had, in working for ReaQta, harmed HT's interests. However, the learned judge struck down the restrictive covenant as an unlawful restraint of trade. Citing *Man Financial*, Hoo J doubted whether HT had any legitimate proprietary interests to protect

139 [2013] 2 SLR 193 at [87]–[92].
140 [2014] 3 SLR 27 at [71].
141 [2019] 5 SLR 245.

under the restrictive covenant.[142] This was because the employment contract contained specific confidentiality and non-solicitation clauses. That being the case, HT had no proprietary interest "over and above" those of confidential information and trade connections that could be protected by the restrictive covenant. As observed, this approach assumes that provisions protecting trade information and connections are a satisfactory and sufficient means of protecting the employer's interests but this may often not be the case.

12.106 In any event, Hoo J also found that the scope of the restrictive covenant was unreasonable. First, the business and activities prohibited by the clause was too wide as it could potentially include the entire cybersecurity and intelligence industry, including companies involved in both offensive and defensive intelligence technologies. Since HT supplied offensive technology while ReaQta supplied defensive technology, they were not direct competitors and their clientele were also different. As such, there was not such a "close connection" between the business of HT and that of ReaQta, and the latter could not reasonably be regarded as a "competitor" of the former.[143] Secondly, the clause did not only prohibit Woon from providing services to its competitor but also from engaging it in business. The restriction on employment was also not limited to roles that might affect HT's trade connection.[144] Finally, the restriction was also too broad as its prohibition was worldwide even though Woon operated primarily in the Asia Pacific region.[145] This decision is interesting as it illustrates the challenge of drafting an effective non-compete clause in the technology sector. Even though it was true that ReaQta was not a direct competitor, it was clear that its business could be harmed if Woon should divulge its trade and technical information to ReaQta post-termination.[146] Interpreting "competitor" restrictively to mean direct competitors effectively leaves employers with no recourse other than confidentiality clauses which, as noted, are difficult to enforce in practice.

VI. Remedies

12.107 The award of damages is probably the most commonly sought judicial remedy following a contract breach. Its purpose is to compensate the claimant for losses sustained by the claimant[147] caused by the

142 *HT SRL v Wee Shuo Woon* [2019] 5 SLR 245 at [74]–[77].
143 *HT SRL v Wee Shuo Woon* [2019] 5 SLR 245 at [81].
144 *HT SRL v Wee Shuo Woon* [2019] 5 SLR 245 at [82].
145 *HT SRL v Wee Shuo Woon* [2019] 5 SLR 245 at [83].
146 As the court established in *HT SRL v Wee Shuo Woon* [2019] 5 SLR 245 at [67].
147 In a third-party beneficiary contract, the contractual promisee's "loss" would include its "performance interest" in the due performance of the contract, and such loss may

(cont'd on the next page)

defendant's breach of contract, although no unliquidated[148] damages may be awarded for losses which are "too remote", and in respect of any losses (a) that the claimant could have avoided through the taking of "reasonable mitigatory steps"; and (b) that had actually been avoided through the taking of "reasonable mitigatory steps" by the claimant; but (c) damages may be awarded in respect of any losses which arose by reason of the claimant taking reasonable steps in an attempt to mitigate the consequences of the defendant's breach (even if such attempts were ultimately unsuccessful).[149] Subject to these qualifications, the primary aim is to place the claimant in the position she would be in had the breach not occurred, so far as a money award by way of damages can do so. The corollary of this is that the claimant is not to be put in any *better* position by the award of damages, either.

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be quantified by reference to the loss sustained by the third-party beneficiary: see *Sun Electric Pte Ltd v Menrva Solutions Pte Ltd* [2019] SGCA 51 at [4] (applying and reiterating points made in *Chia Kok Leong v Prosperland Pte Ltd* [2005] 2 SLR(R) 484 and *Family Food Court v Seah Boon Lock* [2008] 4 SLR(R) 272).

148 Where liquidated damages have been provided for by the parties as compensation for the contractual promisee's losses upon breach by the promisor, there is no need to consider issues of remoteness of loss. As to the rules on mitigation, there is some English authority suggesting that mitigation issues may still be relevant even when liquidated damages are sought: see *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* [2015] EWHC 283 (Comm) at [71]. The issue was raised in *Seraya Energy Pte Ltd v Denka Advantech Pte Ltd* [2019] SGHC 2, where Woo J held that it was not necessary to decide the point. However, at [147], Woo J suggested in *dicta* that in a case where the liquidated damages were set in terms of a daily rate for delays in completion caused by the breach of the contractual promisor, there might well be a "duty" on the victim of the breach to "mitigate" by taking reasonable steps to complete the work, instead of allowing the delay to continue, and so, increasing the total quantum of liquidated damages to be paid.

149 "Reasonableness" for the purposes of mitigation is assessed as at the time of the contractual breach: *The Enterprise Fund II Ltd v Jong Hee Sen* [2020] 3 SLR 419 at [88]; and the standard of "reasonableness" for purposes of mitigation is "not a high one, because he is not the wrongdoer", nor should it be assessed "with the full benefit of hindsight": *The Enterprise Fund II Ltd v Jong Hee Sen* [87] and [88], following the authority of *OCBC Securities Pte Ltd v Phang Yul Cher Yeow* [1997] 3 SLR(R) 906. Further (see *Banco de Portugal v Waterlow & Sons Ltd* [1932] AC 452 at 506, cited with approval in *China Resources Purchasing Co Ltd v Yue Xiu Enterprises (S) Pte Ltd* [1996] 1 SLR(R) 397 at [24]):

> [T]he measures which [the innocent party] may be driven to adopt in order to extricate himself ought not to be weighed in nice scales at the instance of the party whose breach of contract has occasioned the difficulty. … the law is satisfied if the party placed in a difficult situation by reason of the breach of duty has acted reasonably in the adoption of remedial measures, and he will not be held disentitled to recover the costs of such measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken.

12.108 One point that is sometimes obscured is that the process of quantifying the claimant's various heads of loss in monetary units is, in itself, an exercise in judgment. This is obvious where the loss is "non-pecuniary" – *ie*, where the loss is not already denominated in currency units. This would be the case when, for example, a claim is made for the "loss of a chance",[150] or for *Wrotham Park* damages[151] to compensate the loss of the claimant's performance interest. Though these kinds of losses can be quantified in currency units, it is obvious that there is no *equivalence* between these kinds of loss, and the currency units they are expressed in. It is just that, in order to award money damages, the court needs to carry out this process since damages can only be awarded in units of currency and we accept their equivalence, essentially because the court adjudges that they are equivalents. But even in these cases, the overriding principle is the same: to place the claimant, so far as money damages can do so, in the position she would be in if the breach had not occurred.

12.109 Where the losses are pecuniary in nature, the process of assessment of damages and quantification of loss can sometimes be thought of as being merely an exercise in computation and arithmetic since the loss is already denominated in units of currency. Suppose *A*, a manufacturer of widgets, enters into a contract with *B*, an online influencer, in which *A* agrees to pay *B* a fee of $1,000 in exchange for B's services in marketing *A*'s widgets on Facebook and Instagram. The agreement requires payment to be made after *B* has made ten promotional posts on these two platforms, commencing from a start date of 1 December 2020. However, *B* anticipatorily repudiates the contract prior to the start date. *A* accepts the breach and tries (but fails) to appoint a replacement influencer within the short time frame.

12.110 Suppose *A* was able to prove, on a balance of probabilities, that her sales revenue would have grown by an additional $100,000 but for *B*'s breach of contract. That figure would be a starting point to compute *A*'s position in the counterfactual world where *B* had not repudiated the contract. We would then compare it with *A*'s actual position where no

150 For a recent application of the approach set out in *Asia Hotel Investments Ltd v Starwood Asia Pacific Management Pte Ltd* [2005] 1 SLR(R) 661 when assessing damages for loss of a chance, see *MCH International Pte Ltd v YG Group Pte Ltd* [2019] 2 SLR 837 at [212]–[227].

151 In *HT SRL v Wee Shuo Woon* [2019] 5 SLR 245 at [118]–[121], Hoo J applied the approach set out in *Turf Club Auto Emporium v Yeo Boong Hua* [2018] 2 SLR 655 ("*Turf Club*") and concluded that *Wrotham Park* damages could not be awarded because the first requirement in *Turf Club*, that orthodox contract damages be unavailable, was not satisfied.

such revenue was earned: there would seem to be a shortfall of $100,000. But it cannot be right for damages to be awarded in that sum.

12.111 Had there been no breach by *B*, *A* would have become duty-bound to pay B $1,000. So *A*'s end-position, had there been no breach, would be that she would be in credit by $100,000 *less* $1,000, that is, $99,000. In reality, given *A*'s election to discharge her contract with *B*, *A* would have been freed from her own obligation to pay *B* the $1,000. So *A* would have retained this $1,000 following *B*'s repudiation of the contract. An award of damages of $100,000 which failed to take *A*'s retention of this $1,000 into consideration would leave *A* in a position *better* than she would have been in, had there been no breach. Hence, this "saving" by *A* must be deducted from the quantification of *A*'s loss, which, in turn, reduces the quantum of damages as might be awarded (leaving aside remoteness and mitigation concerns).

12.112 Unlike the difficulties with quantification of non-pecuniary loss, the computation of pecuniary loss can seem little different from an exercise in computation or arithmetic. But one should be careful not to lose sight of the purpose which such computational or arithmetical tools are employed to achieve. As to this, the difficult case of *Smile Inc Dental Surgeons v OP3 International Pte Ltd*[152] may serve as a useful reminder.

12.113 In this case, the plaintiff ("Smile Inc") had engaged the defendant ("OP3") to renovate premises at Suntec City Mall which the plaintiff had leased to enable it to be used for the purposes of the plaintiff's business of providing dental services. However, the plaintiff's clinic had to be closed for three periods due to deficiencies on the defendant's part.

12.114 First, due to the defendant's delays in completing the "fitting-out" of the premises, the clinic was closed for 50 days in 2013. Second, the clinic was closed for 51 days between January to March 2014 due to flooding arising from the defendant's failure to design and install a plumbing system which was fit for purpose. Third, the clinic was closed for 220 days between July 2014 to March 2015 again as a result of flooding caused by the defective plumbing system (collectively, "the Blackout Periods").

12.115 Having previously held the defendant to be liable for the plaintiff's losses due to these closures ("the Liability judgment"),[153] the present proceedings concerned the question of assessment of damages for such losses.

152 [2020] 3 SLR 1234; [2019] SGHC 265.
153 *Smile Inc Dental Surgeons Pte Ltd v OP3 International Pte Ltd* [2017] SGHC 246.

12.116 The plaintiff set out its claim under four categories:[154]

(a) sums already awarded in the Liability judgment ("Category 1");

(b) losses incurred due to the defendant's late completion of fitting-out ("Category 2");

(c) losses due to the floods ("Category 3"), comprising:

(i) flood investigation and remediation costs in the aftermath of the second flood ("Category 3a"); and

(ii) loss of manage time and expense due to both floods ("Category 3b"); and

(d) losses arising from the closure of the clinic and the permanent repossession of the premises by the landlord ("Category 4"), comprising:

(i) wasted operation costs ("Category 4a");

(ii) loss of profits ("Category 4b");

(iii) wasted capital expenses ("Category 4c"); and

(iv) losses arising from the premature termination of the lease ("Category 4d").

12.117 In the interest of space, discussion of the learned judge's exemplary treatment of the claims in Categories 1 to 3 will be left aside. However, the court's treatment of the Category 4 claims merit slightly greater scrutiny.

12.118 Aiming to improve clarity, the learned judge began by reclassifying the Category 4 claims in the following way:[155]

(i) Categories 4a *and* 4b: Loss of revenue minus variable expenses that were saved during the Blackout Periods;

(ii) Category 4c: Wasted capital expenses, comprising (A) wasted depreciation expenses from 6 March 2015 to the end date of the lease on 21 September 2016; and (B) wasted rent in arrears paid to the landlord from 6 March 2015 to 29 March 2015, the day before the landlord's termination of the lease; and

154 *Smile Inc Dental Surgeons Pte Ltd v OP3 International Pte Ltd* [2019] SGHC 265 at [11].

155 *Smile Inc Dental Surgeons Pte Ltd v OP3 International Pte Ltd* [2019] SGHC 265 at [13].

(iii) Category 4d: other damages in connection with the early termination of the lease and the repossession by the landlord on 30 March 2015.

12.119 The learned judge took the view that the Category 4 claims were potentially complicated by the following:[156]

> 52 Preliminarily, under Category 4, the plaintiff claims for wasted operating costs, loss of profit, wasted capital expenses, and other damages in connection with the early termination of the Lease. This appears to offend the general principle that a plaintiff must elect between expectation losses and reliance losses which flow from the defendant's breach(es) (*Alvin Nicholas Nathan v Raffles Assets (Singapore) Ptd Ltd* [2016] 2 SLR 1056 ('Alvin Nicholas') at [24]–[25]:
>
> …
>
> 53 As seen in the passage in *Alvin Nicholas*, the reason for the general principle of requiring a plaintiff to elect between expectation and reliance losses is to ensure that the plaintiff is not put in a better position than it would have been in if the contract is fully performed but for the defendant's breach. This is to avoid double compensation to the plaintiff. As a result, generally, a claim for both loss of profits and wasted expenditure, as the plaintiff has done in this case, would be impermissible.
>
> 54 However, such general principles as espoused in *Alvin Nicholas* are only applicable when the loss of profits are claimed on a *gross* basis, and do not apply in cases where the loss of profits are claimed on a *net* basis. As observed in Andrew Phang Boon Leong, *The Law of Contract in Singapore* (Academy Publishing, 2012) ('*The Law of Contract*') at para 21.038:
>
> > These observations [that a plaintiff cannot claim wasted expenditure *and* loss of profits at the same time] are unobjectionable and perfectly in keeping with the desire to avoid double compensation of the claimant, but only where the "loss of profits" has been ascertained on a *gross* basis, without taking into account the expenditures and costs that would have had to be spent in order to generate those "profits". However, **where the claim as to "loss of profits" has been made on a *net* basis, and a separate claim is then made as to the "reliance losses" in terms of the expenses and costs that had been incurred and which would have had to be incurred to enable the claimant to earn the *net* profits, there would be *no* double-counting**. Hence, there is nothing to bar a claim for both "expectation" as well as "reliance" losses. **In such a case, a claim on the reliance basis for wasted expenditure is *complementary* and not duplicative**. Thus, there ought to be no issue as to election between a claim on the

156 *Smile Inc Dental Surgeons Pte Ltd v OP3 International Pte Ltd* [2020] 3 SLR 1234 at [52]–[55].

> expectation basis for the loss of **net** profit, and a claim on the reliance basis for wasted expenditure.
>
> 55 Similarly, the author of *Chitty on Contracts* at para 26-032:
>
> In principle, the claimant should be entitled to claim damages **both for his wasted expenditure** incurred up to the date of his terminating the contract **and also for the *net* loss of profit** which he would have made but for the breach. There can be no valid objection to this, provided the calculations show that there is no overlapping in the claimant's recovery …
>
> [emphasis in original]

12.120 These passages were making the fairly obvious point that, if "gross profit" is defined to mean the sum of "net profit" and "expenses incurred", a claim for the sum of "gross profit" *and* "expenses incurred" would lead to over-compensation: it would mean result in an award of "net profit", and *twice* the "expenses incurred". Hence, assuming the law permitted recovery of "gross profit", one ought *not* to be permitted to recover "gross profit" *plus* "expenses incurred" as that would entail an overlap.

12.121 However, if one is not mindful, one could take the learned judge to have applied these observations to support his reasoning as to how Smile Inc's losses arising from the closure of the clinic were to be computed (that is, the Categories 4a and 4b claims):[157]

> (a) **Basis (a):** 'Revenue' minus 'Variable Expenses':
>
> (i) 'Revenue' refers to the dental fees that could have been charged to the patients of the Suntec Clinic, assuming that the clinic was fully operational.
>
> (ii) 'Variable Expenses' refers to expenses that would not be incurred if the clinic is not operational but would necessarily be incurred had the clinic been operational in order to earn that 'Revenue'. Examples of 'Variable Expenses' are the cost of consumables like anaesthesia, cotton wool, dental amalgam and X-Ray films used up for the dental treatment of patients, the cost of medication issued to patients and the cost of engaging locum dentists (*ie*, dentists who work on a part-time basis, dentists who are not paid fixed monthly wages but are paid based on the amount of patient revenue generated).
>
> (b) **Basis (b):** 'Net Profit' plus 'Fixed Expenses':
>
> (i) 'Net Profit' refers to the total 'Revenue' minus 'Total Expenses', which comprises 'Fixed Expenses' *and* 'Variable Expenses'.

157 *Smile Inc Dental Surgeons Pte Ltd v OP3 International Pte Ltd* [2020] 3 SLR 1234 at [58].

> Its value is hence contingent on the 'Revenue', 'Fixed Expenses' and 'Variable Expenses' of the company.
>
> (ii) 'Fixed Expenses' refers to expenses which would necessarily be incurred whether or not the clinic was in operation. Examples of 'Fixed Expenses' are the rent for the clinic, salaries of permanent staff which are generally fixed in nature and independent of the amount of the patient revenue generated, and depreciation expenses arising from the capital expenditure or setting-up costs which would generally be depreciated over the term of the Lease.
>
> [emphasis in original in italics and in bold]

12.122 In the learned judge's analysis, "Basis (a)" and "Basis (b)" were held by the learned judge to be alternatives to each other, and for the following reasons:[158]

> 59 The plaintiff cannot claim for both Basis (a) and Basis (b) above as that would amount to a double claim for Categories 4a and 4b combined. The business equations from which I derive Basis (a) and Basis (b) are as follows:
>
> Revenue – Total Expenses = Net Profit
>
> Total Expenses = Fixed Expenses + Variable Expenses
>
> Revenue – Fixed Expenses – Variable Expenses = Net Profit
>
> Revenue = Net Profit + Fixed Expenses + Variable Expenses
>
> Revenue – Variable Expenses = Net Profit + Fixed Expenses
>
> Basis (a) = Basis (b)
>
> [In the above equations, the ***depreciation*** of the 'Capital Cost' in setting up the new Suntec Clinic over the duration of the Lease (ie '**Depreciation Expense**') is to be treated as part of the 'Fixed Expenses'.]
>
> 60 As demonstrated by the equations above, for a fully operational business, the 'Revenue' received *minus* the 'Variable Expenses' spent in earning the 'Revenue' is *exactly equal* to the 'Net Profit' earned *plus* the 'Fixed Expenses' (inclusive of 'Depreciation Expense').
>
> 61 For the converse situation when the business is non-operational because of a breach of a contract, the 'Revenue' lost *minus* the 'Variable Expenses' saved is *exactly equal* to the 'Net Profit' lost *plus* the 'Fixed Expenses' (inclusive of 'Depreciation Expense') wasted. This is also equal to the total losses under Categories 4a and 4b combined.
>
> 62 Expressing the plaintiff's claim in such equations, it can be seen that Category 4a, which comprises wasted fixed expenses such as wasted rent and season parking, relates to claims for wasted 'Fixed Expenses'. Category 4b is

158 *Smile Inc Dental Surgeons Pte Ltd v OP3 International Pte Ltd* [2020] 3 SLR 1234 at [59]–[63].

> then a claim for the loss of 'Net Profits'. Hence, Category 4a + Category 4b = 'Net Profit' + 'Fixed Expenses' = Basis (b) = Basis (a).
>
> 63 As a matter of principle, the plaintiff is entitled to choose *either* to claim under Basis (b) for *both* the loss of *net* profits and the wasted *fixed* expenses (inclusive of Depreciation Expense) that it had incurred during the Blackout Periods *or* to claim under Basis (a) for the patient revenue it lost during the Blackout Periods less the variable costs that are saved during the closure of the Suntec Clinic. Proceeding under either basis should yield the same answer or result. There will be no double counting so long as aspects of Basis (a) are not claimed under Basis (b) and *vice versa*.
>
> [emphasis in original in italics and bold italics]

12.123 Given the above, and given the nature of the evidence that had been put before the court, the learned judge held that:[159]

> … proceeding on Basis (a) will be far easier and more likely to give a more reliable estimate for the total losses under both Categories 4a and 4b combined than proceeding on the more complicated Basis (b), which the plaintiff has done.

12.124 The question which is left unanswered, is this: *why* might Smile Inc only be limited to recover "Revenue" *less* "variable expense" (Basis (a)), on the one hand, or "Net profit"[160] *plus* "fixed expense", on the other?

12.125 The evidence was that, had the contract not been breached, Smile Inc would have earned an additional 321 days of client fees. Based on the evidence that was tendered to the court, the learned judge held that the "estimated average patient revenue (without GST) for the new Suntec Clinic [came up to] $454,843.44 ÷ 219 = $2,076.91 per operational day."[161] Hence, the total patient revenue lost by reason of OP3's breaches of contract would be "321 days × $2,076.91 per day = $666.688.33".[162]

12.126 Given this finding, and leaving aside concerns as to remoteness and mitigation of loss, it might appear that damages ought to be awarded by reference to Smile Inc's loss of such "gross revenue". And yet, the court took it as a given that Smile Inc's recoverable loss was to be reckoned on

159 *Smile Inc Dental Surgeons Pte Ltd v OP3 International Pte Ltd* [2019] SGHC 265 at [65].

160 Being "profit" or more properly, gross revenue, less variable expenses and fixed expenses.

161 *Smile Inc Dental Surgeons Pte Ltd v OP3 International Pte Ltd* [2019] SGHC 265 at [74].

162 *Smile Inc Dental Surgeons Pte Ltd v OP3 International Pte Ltd* [2019] SGHC 265 at [76].

either Basis (a) (that is, Revenue *less* variable expenses), or Basis (b) (that is, Net Profit *plus* fixed expenses).

12.127 The rationale for deducting the variable expenses from the Revenue figure (Basis (a)) arises not because of the points made in the paragraphs immediately preceding [58] of the judgment. The points made there deal with a different problem entirely, one involving the permissibility of combining a claim for "*incurred* expenses" together with "net profit". Rather, the rationale for the deduction lies in the fundamental principle for awarding contract damages: they are to place the claimant in the position she would be in had there been no breach – *and no better*.

12.128 The reason for deducting the "variable expenses" which Smile Inc would have had to pay, but did not, is because without such deduction, an award of the full Revenue figure would place Smile Inc in a *better* position than it would have been in had there been no breach since it would recover the Revenue figure, whilst also retaining the sums that would have had to be paid had there been no breach. The reasoning underlying the deduction thus mirrors the reasoning applied in connection with the simpler problem involving *A* and *B* outlined above.[163]

12.129 In that example, an award of $100,000 in damages made solely by reference to *A*'s gross revenue, without taking into account what *A* would have had to pay *B* to "earn" that revenue, would lead to a form of over-compensation as it would not take into account the fact that *A* would have retained the $1,000 having been excused from having to pay it to *B*. Therefore, to avoid *this* form of over-compensation, it would be necessary to discount *A*'s loss, by reference to such expenses as *A* had been saved from incurring. But the reason for this has nothing to do with the "double-compensation" point arising from the overlap between "gross" and "net" profit.

12.130 This, then, is the principle which underpins the court's acceptance of the proposition that Smile Inc ought not to be permitted to recover damages by reference to the full sum of the revenue it would have earned from its patients, but for the clinic's closure for 321 days. The reality of the matter is that, the clinic's closure also enabled it to avoid having to pay certain expenses which it would otherwise have had to do, in order to earn that gross revenue. Failing to take that into account would lead to over-compensation in that Smile Inc would then be put into a *better* position than if the contract had been fully performed, and it is to avoid this result that Smile Inc would have had to be restricted to recovering the revenue it could have earned, but less all variable expenses which it

163 See paras 12.109–12.111 above.

would otherwise have had to incur. Notwithstanding the complexity of the case, this was what lay at the heart of this part of the decision.