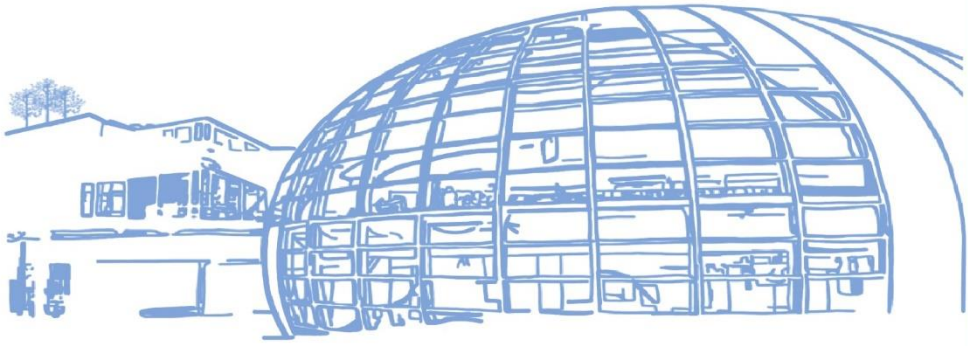
SINGAPORE LAW JOURNAL

LEXICON



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SINGAPORE LAW JOURNAL (LEXICON)
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FOREWORD

Professor Goh Yihan, SC
Dean, School of Law, Singapore Management University

The editorial team of the Singapore Law Journal must be one of the bravest group of people around. I say this because it takes much effort to start a law journal and then sustain it thereafter. Despite knowing the immense challenges ahead, the editorial team decided to go ahead with the journal, convinced that it will be a welcome addition to academic legal literature. With their enthusiasm and energy, I have every confidence that they will succeed and that the Singapore Law Journal will become an important addition to the academic landscape.

The Singapore Law Journal is born out of Lexicon, a student-run online publication that was started with the aim of promoting academic discourse amongst SMU students. In the three years since Lexicon has been set up, it has grown from strength to strength, gaining much visibility in the process. The team at Lexicon – which is now the editorial team of the Singapore Law Journal – wanted to take their ambitions to the next level, and that is the genesis of the Singapore Law Journal.

As is clear, the Singapore Law Journal is a student-run journal. The concept of such a journal is not new. Indeed, many law schools have their own student-run journal. For example, our sister law school, the National University of Singapore's Faculty of Law, publishes the Singapore Law Review. Our other sister law school, the Singapore University of Social Sciences School of Law has Legal Scribes. All told, the local space appears to be quite crowded. But despite that, I believe that there is always scope for another student-run law journal (or a law journal, for that matter). The diversity of academic discourse has always been its lifeblood; it is through constructive debates found in the pages of academic journals that big ideas in the law get developed, leading ultimately to practical ideas that shape the law as it is practised. The articles in the Singapore Law Journal will no doubt contribute to that discourse, and provide a new avenue for academics, lawyers and students alike to share their thoughts through its pages.

But more than simply a platform for academic discourse, the Singapore Law Journal is a labour of love borne out of passion and enthusiasm found in the next generation of lawyers we have at SMU School of Law. We should never underestimate the enthusiasm of youth, and the impact that desire to make a difference can make. I have every confidence that, under the able leadership of the editorial team, the Singapore Law

Journal will become SMU's flagship law journal and encourage students to write and participate in the debates within its pages. Indeed, the very first issue of the journal contains some thought-provoking articles and commentaries that will surely add to the richness of academic discourse about Singapore law.

This journal also exemplifies the strong support that SMU faculty has for its student endeavours. Thanks are due to Professor Gary Chan, Associate Professors Alvin See and Chen Siyuan, as well as Assistant Professors Kenny Chng and Benjamin Ong for their support for the journal. I would also like to thank the Supreme Court for allowing the journal to republish three student case briefs previously published as part of SMU Lexicon's collaboration with the Supreme Court, where SMU law students report on selected Court of Appeal judgments.

I would like to extend my heartiest congratulations to the editorial team, as well as the team's faculty advisor, Senior Lecturer Ong Ee Ing, for working so hard to bring the Singapore Law Journal to fruition. Their bravery will no doubt be rewarded with every success in this new journal.

ACKNOWLEDGEMENTS

Ong Ee Ing
Senior Lecturer, Faculty Advisor (Lexicon)
School of Law, Singapore Management University

I am extremely proud of our students for realising their dream of establishing an SMU law journal. This was a two-year long journey by the members of Lexicon, a student-run platform for all SMU students to express their opinions on Singapore's ever progressing legal landscape.

In this respect, I wanted to recognize the Lexicon 2019-20 Editorial Board, particularly: Emily Tan Shu Min, Joel Tay Wei Jie, Rennie Whang, and Soh Kian Peng, for initiating the concept of, and commencing work on the journal.

But of course, final credit for the Singapore Law Journal must go to the 2020-21 Editorial Board, particularly: Soh Kian Peng, Chai Wen Min, Victoria Ang Ser Ning, and Su Jin Chandran. Their efforts brought the journal to fruition.

Echoing Professor Goh Yihan, SC and Dean of the SMU School of Law: with our students' enthusiasm and energy, I believe that the Singapore Law Journal will grow from strength to strength, and form part of Singapore's legal landscape.

ACCRUAL OF CAUSE OF ACTION IN NEGLIGENCE

Case Comment: IPP Financial Advisers Pte Ltd v Saimee bin Jumaat

[2020] 2 SLR 272 / [2020] SGCA 47
Court of Appeal of Singapore
Steven Chong JA, Belinda Ang Saw Ean J, Woo Bih Li J
13 May 2020

Gary **CHAN** Kok Yew

Professor of Law, School of Law, Singapore Management University

I. Introduction

1 Damage is the gist of the action in negligence. An action in negligence is said to accrue only when damage arises. The precise timing of the damage is an important factor in an application to strike out a claim in negligence on the ground that it was filed out of time contrary to the Limitation Act. Consequently, the lawsuit may have to be initiated within a specified period from the accrual of the cause of action.

2 Cases of parties entering into transactions based on professional advice or representations are quite common. When a person purchases a property that is below the contracted value or enters into a loss-making contract due to the negligent advice of professionals, has he suffered damage as at the time of the purchase or contract? For example, the purchaser may not have sold the property at a loss or, with respect to the loss-making contract, the counterparty may not have made a demand for payment under the contract. In such instances, can we say that given that the risks of damage or the contingencies have not materialised, there is no damage and therefore the cause of action had not accrued? This was the central issue in *IPP Financial Advisers Pte Ltd v Saimee bin Jumaat*.[1]

3 The case involved Moi and Quek, two financial services consultants from IPP Financial Advisers Pte Ltd ("IPP"), who had advised a client (Saimee) to invest in the foreign exchange market through a trading account with a company known as SMLG Inc. Saimee alleged that Moi and Quek made representations that within a year from

[1] [2020] 2 SLR 272.

the date of investment, SMLG would pay Saimee the principal amount invested with a profit of 40%, the SMLG Investment was safe and capital guaranteed and that Moi and Quek had recommended the same to all of their clients.[2]

4 The plaintiff's case proceeded on the basis that Saimee, relying on those representations, opened a trading account with FX Primus Ltd for the purpose of the SMLG investment and transferred a total of US$620,900 into the bank account held by FX Primus. Later, due to certain glitches in the trading account, Moi and Quek informed Saimee that SMLG required a loan of US$200,000 before SMLG could resume trading and make the repayment to Saimee. However, the loan was not repaid. Moi and Quek then advised Saimee to enter into three separate settlement agreements with SMLG in which the latter would repay Saimee in full and final settlement of all claims relating to the SMLG investment.[3]

5 On 21 July 2018, Saimee commenced the lawsuit to claim the settlement sum from Moi and Quek for fraudulent or negligent representation and against IPP based on vicarious liability. The High Court judge – Choo Han Teck J – ordered Moi and Quek to compensate Saimee the sum of US$620,900 under the tort of negligence.[4]

6 On appeal by the defendants (appellants), the Court of Appeal dismissed the plaintiff's (respondent's) claim on the basis that it was time-barred. This decision was reached based on Chong JA's extensive treatment of case precedents primarily from England, Australia and Singapore on the accrual of an action in negligence under the Limitation Act.[5] It concluded that the cause of action did not accrue from the time of the investment entered into by the respondent but only when SMLG failed to repay the respondent.

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2 [2020] 2 SLR 272, [11].
3 [2020] 2 SLR 272, [18].
4 Choo J dismissed the allegation based on fraudulent representation.
5 (Cap 163, Rev Ed 1996).

II. Burden of Proof in Cases Involving Limitation Periods

7 Before examining the issue of actual versus contingent losses and transactions induced by negligent representations, the court had to first tackle a preliminary point pertaining to the burden of proof. Chong JA put the question succinctly:[6]

> "Once a limitation defence is pleaded, is the burden on the defendant to prove that the claims are time-barred as pleaded or is the burden always on the plaintiff to prove that the claims were brought within the applicable limitation period?"

8 The court held that it was for the plaintiff to prove that the date of accrual of action was within the six-year limitation period.[7] Chong JA cited[8] McGee on Limitation Periods:[9] when the plea of limitation period is made by the defendant, "*the burden of proof on this point will then normally be transferred to the claimant to show that the action is not time-barred*." This position was also supported by two English Court of Appeal decisions: *London Congregational Union Inc v Harriss & Harriss*[10] and *Cartledge v E Jopling & Sons Ltd*.[11] The House of Lords in *Cartledge v E Jopling & Sons Limited* also stated that when the plaintiff has proved an accrual of action within six years, "*the burden passes to the defendants to show that the apparent accrual of a cause of action is misleading and that in reality the causes of action accrued at an earlier date*."[12]

9 The practical effect of placing the burden of proof on the plaintiff is that if the plaintiff is not able to adduce evidence to show on a balance of probabilities that damage (or a particular category of damage) has occurred within the limitation period, he will be prevented from recovering that (category of) damage.[13]

10 That the plaintiff bears the legal burden of showing that the claim has been made within the limitation period is, in my view, justifiable. The Limitation Act states that an action "shall not be brought

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6 [2020] 2 SLR 272, [4].
7 [2020] 2 SLR 272, [41].
8 [2020] 2 SLR 272, [37].
9 (Sweet & Maxwell, 8th Ed, 2018), [21-002] and [21-014].
10 [1988] 1 All ER 15, 29 – 30, *per* Ralph-Gibson LJ.
11 [1962] 1 QB 189, 202, *per* Harman LJ and 208, *per* Pearson LJ.
12 [1963] AC 758, 784, *per* Lord Pearce.
13 See *London Congregational Union Inc* [1988] 1 All ER 15.

after the expiration of" the specified limitation period.[14] Just as the plaintiff has to file and serve a writ of summons to initiate his claim, he also has to observe the procedural time limits under the Act for making his claim. The latter requirement, albeit procedural in nature, forms part of the plaintiff's overall case for which he shoulders the burden of proof. More specifically, in cases involving the accrual of action in negligence based on damage, placing the burden on the plaintiff to show damage coming into existence within the limitation period is aligned with his overall legal burden of proving the legal elements in negligence (comprising duty of care, breach, causation and remoteness requirements for damage). Though a plea of limitation period specifically made under the Rules of Court[15] is referred to as a defence in the Limitation Act,[16] it is not a substantive defence in negligence to be determined on the merits. Rather, it is a matter of civil procedure in contrast to legal defences such as *ex turpi causa*, *volenti non fit injuria* or contributory negligence where the burden of proof falls on the defendant.

11 It would also be useful to differentiate the plaintiff's *legal* burden to prove accrual of action within the limitation period, from the defendant's *evidential* burden[17] to show the opposite. The legal burden should be treated as remaining with the plaintiff; thus, there is no need to speak of the legal burden being "transferred" to the defendant. In practice, however, once the plaintiff has submitted his case on limitation periods, the court would look to the defendant to discharge his evidential burden by providing evidence that the plaintiff's case on limitation period is misplaced or incorrect.

[14] Section 24A (3).
[15] Order 18 rule 8.
[16] Section 4.
[17] The term "evidential burden" was used by Ralph-Gibson LJ in *London Congregational Union Inc* [1988] 1 All ER 15.

III. Accrual of Cause of Action in Tort of Negligence: Actual vs Contingent Loss and the "Transaction" Approach

12 The relevant provision for tort claims in respect of damages (in this case, financial losses) is section 24(3)(a) of the Limitation Act, which refers to a period of six years from the date on which the cause of action accrued (*i.e.*, when damage occurs).[18] On this point, four possible dates of accrual of action were explored by the Court of Appeal:

(a) 21 September 2012, being the date on which the settlement sum was due but not paid;
(b) 24 June 2012, being the date on which the US$200,000 loan was due but not repaid;
(c) 27 April 2011, 17 June 2011 and 3 February 2012, being the dates on which the SMLG investment was made via three tranches of payment; and
(d) 27 April 2012, 17 June 2012 and 3 February 2013, being the dates on which each of the SMLG investment sums became due for repayment.

13 In the lower court, Choo J had held that time only started to run upon default of the settlement agreements indicated in option (a), and accordingly decided that the claims were not time-barred.

14 However, the Court of Appeal instead decided on option (d): that Saimee's cause of action against the appellants accrued on 27 April 2012 when he suffered actual loss on his first tranche of payment. As Saimee failed to file the writ of summons by 27 April 2018, his claim was time-barred.[19]

15 The Court of Appeal rejected the other three options. First, Choo J's decision to base the computation of the limitation period on the settlement agreements did not cohere with the pleaded loss of the claimants. The pleaded loss was allegedly caused by Moi and Quek's negligent misrepresentations regarding the SMLG investment, and was not in connection with the settlement agreements.[20] Thus, option (a) was rejected.

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18 *Lian Kok Hong v Ow Wah Foong* [2008] 4 SLR(R) 165, [24].
19 [2020] 2 SLR 272, [103].
20 [2020] 2 SLR 272, [53].

16 Second, Moi and Quek relied on option (b) based on Saimee's knowledge that SMLG's investment was in jeopardy, or that "something was seriously wrong" with it.[21] The plaintiff's knowledge, however, is irrelevant to the issue of when a cause of action accrued under s 24(3)(a).

17 Third, and this is the most important point, option (c) was rejected on the ground that at the time of the SMLG investment, the loss in question was purely contingent and had not crystallised as actual damage.[22]

18 This distinction between contingent and actual losses generated much controversy. The case precedents generally agree on the need to show actual damage for the purpose of determining the date of accrual of action, but differ on what would be considered as contingent loss in specific situations and/or the precise point in time when actual damage has occurred. In this regard, there are material differences between an English precedent: *Forster v Outred & Co* ("***Forster***"),[23] and an Australian decision: *Wardley Australia Ltd v State of Western Australia* ("***Wardley***").[24] As we will see below, the Court of Appeal in *IPP* ultimately preferred the approach in *Wardley*.

A. Actual versus (Purely) Contingent Losses

19 *Forster* held that the plaintiff's action in negligence against her solicitors accrued from the date she entered into a mortgage deed in 1973, to secure a loan taken out by her son following the solicitors' negligent advice. This was despite the fact that the bank made the demand for her to repay the loan only in 1975. The court therefore dismissed her action, which she commenced in 1980, due to the time-bar. Dunn LJ stated that for economic losses, the damage crystallised and the action accrued at the date on which the plaintiff, in reliance on the negligent advice, acted to her "detriment".[25] According to the learned judge, the difference between holding the property free of encumbrances and holding the property subject to a mortgage constituted a quantifiable loss, and that the action accrued when the mortgage was executed

[21] [2020] 2 SLR 272, [60].
[22] [2020] 2 SLR 272, [95].
[23] [1982] 1 WLR 86.
[24] (1992) 109 ALR 247 (28 October 1992).
[25] [1982] 1 WLR 86, 99 – 100.

without proof of special damages. The *Forster* approach has been followed by English courts.[26]

20 The Singapore High Court in *People's Parkway Development Pte Ltd v Akitek Tenggara*[27] also applied *Forster*. When the plaintiff relied on an erroneous layout plan drawn up by the defendant architects, and the piling works that were carried out encroached on government land, the court stated "the plaintiffs had incurred a contingent liability which was capable of monetary assessment".[28] It also considered a later date when the encroachment had been discovered and the plaintiff chose to accept the requirement of the government authorities to acquire an additional portion of land at a cost.[29] The High Court held that [his/her] claim was time-barred based on either of the two possible dates. However, the High Court did not have the benefit of the *Wardley* decision, which was decided shortly after.

21 The Australian precedent *Wardley* took a rather different approach. It concerned an indemnity executed in 1987 by the respondent in favour of a bank against a facility granted by the bank to a company (Rothwell). The respondent executed the indemnity due to the appellant's misleading and deceptive conduct under the Trade Practices Act 1974. The Australian High Court ruled that the cause of action under the statute did not accrue at the time the indemnity was executed by the respondent, as it was construed as creating a liability on the part of the respondent to the bank to make payment *if and when* the bank's net loss was ascertained and quantified, and provided the bank made a demand for payment.[30] This meant the respondent's liability to pay under the indemnity was contingent upon the bank ascertaining it had incurred a

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[26] *D W Moore & Co Ltd and others v Ferrier and others* [1988] 1 All ER 400 (action accrued upon the execution of an agreement containing a limited restrictive covenant against competition since at the moment of execution, the plaintiffs obtained a valueless invalid covenant, as opposed to a valuable valid restrictive covenant); *Bell v Peter Browne & Co* [1990] 3 WLR 510 (action in negligence against solicitors accrued at the time of the transfer of property by the claimant to his wife without the benefit of protection via a trust deed or mortgage); and *Knapp v Ecclesiastical Insurance Group Plc* [1998] PNLR 172 (where the defendant brokers negligently omitted to disclose material facts to insurers when making arrangements for the renewal of insurance for the claimants' outbuildings).

[27] [1992] 2 SLR(R) 469 (4 August 1992). This was not cited by the Court of Appeal in *IPP*.

[28] [1992] 2 SLR(R) 469, [5].

[29] [1992] 2 SLR(R) 469, [15].

[30] (1992) 109 ALR 247, 252, *per* Mason CJ, Dawson, Gaudron and McHugh JJ.

loss and making a demand for repayment. Even the "likelihood, perhaps the virtual certainty, that there would be a loss"[31] did not render it an actual liability.

22 According to the majority in *Wardley*, the plaintiff may have sustained a "detriment" upon entering into the agreement induced by the defendant in that the agreement "subject[ed] the plaintiff to obligations and liabilities which exceed[ed] the value or worth of the rights and benefits which it confer[ed] upon the plaintiff". However, this detriment is not the same as actual loss or damage.[32] Another judge, Deane J, described the "detriment" as "the risk or (in view of the falseness of the representations) greater risk that [the plaintiff] would come under an actual liability to make a payment of money if a possible or (in view of the falseness of the representations) probable factual situation came about."[33] Hence, mere detriment and risks of liability were distinguished from actual liability. The Australian approach in *Wardley* has since been endorsed in subsequent English cases.[34]

23 As mentioned above, the Singapore Court of Appeal in *IPP* preferred the stance in *Wardley*. It also endorsed the approach in the Singapore High Court decision of *Wiltopps (Asia) Ltd v Emmanuel & Barker* ("***Wiltopps***"):[35] that the yardstick is "*actual loss or damage, not future loss or damage, however likely it was that that would occur*". In *Wiltopps*, the defendant lawyers assisted the plaintiff (client) in arresting the vessel of a third party (a corporate entity) which then put up a bail bond in respect of the vessel. The plaintiff alleged that the defendant

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31 (1992) 109 ALR 247, 252, *per* Mason CJ, Dawson, Gaudron and McHugh JJ.

32 (1992) 109 ALR 247, 254, *per* Mason CJ, Dawson, Gaudron and McHugh JJ.

33 (1992) 109 ALR 247, 267.

34 *UBAF Ltd v European American Banking Corporation* [1984] 2 All ER 226 (plaintiff did not necessarily suffer damage by merely entering into the contract); *First National Commercial Bank plc v Humberts (a firm)* [1995] 2 All ER 673 (value of property was sufficient to secure the loan and hence no damage at the point of loan transaction); *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd (No 2)* [1998] 1 All ER 305 ("*Nykredit*") (accrual date, for the purpose of determining interest payments on damages awarded, was the date on which the lender actually suffered the loss attributable to the valuer's breach of duty in overvaluing the properties); and *Law Society v Sephton & Co (a firm) and others* [2006] UKHL 22 (the Law Society's liability, before it claimed for compensation from the Solicitor's Compensation Fund a sum of money that was paid to the victims of a solicitor's fraud, was purely contingent and did not amount to damage).

35 [1998] 2 SLR(R) 778, [10], citing *Hopkins v Mackenzie* [1994] TLR 546, *per* Saville LJ.

lawyers had negligently[36] advised the plaintiff to accept the bail bond for an inadequate sum for the release of the vessel. After accepting the bail bond and releasing the vessel, the plaintiff could not subsequently obtain repayment from the third party which had been wound up. Chao J in *Wiltopps* held that the bond could be invoked only if two contingencies materialised, namely: (i) the plaintiff obtained a judgment or settlement in its favour, and (ii) the third party was not able to satisfy it.

24 Thus, to the Singapore Court of Appeal in *IPP*, the crucial enquiry was when the claimant suffered actual loss. Its view was that a purely contingent loss was not in itself damage until, and not before, the contingency occurred.[37] The decision was rationalised on the ground that "to compel a plaintiff to institute proceedings before the ascertainable existence of at least some of his loss is unjust".[38] In this regard, the Court of Appeal also endorsed Chao J's test in *Wiltopps*:[39]

> "… as an indicative litmus test to ascertain whether loss has occurred such that a cause of action has accrued – to determine whether a cause of action in tort has accrued is to ask whether a plaintiff would have succeeded if he had sued at any time after the occurrence of the negligent act complained of."

25 We should briefly note two other recent Singapore decisions mentioned by the Singapore Court of Appeal in *IPP*. The first – *Liew Soon Fook Michael v Yi Kai Development Pte Ltd* ("***Liew***")[40] – decided that in relation to the tort of negligent misrepresentation, damage would occur at the point when the purchaser entered into the sale and purchase agreement due to misrepresentations by the defendant developers. In the second case, *Koh Kim Teck v Credit Suisse AG, Singapore Branch*,[41] the limitation period for the plaintiff's claims started to run from the time that the plaintiff purchased financial products, and not when the risks materialised. The approach in these cases, as we shall see in the discussion below, presents problems when attempting to reconcile *IPP* with the previous decisions.

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36 The High Court decided that in any event, the defendant lawyers were not negligent: [54] – [55] and [64].
37 [2020] 2 SLR 272, [90].
38 [2020] 2 SLR 272, [91].
39 [2020] 2 SLR 272, [91] referring to *Wiltopps (Asia) Ltd v Emmanuel & Barker* [1998] 2 SLR(R) 778, [27].
40 [2017] SGHC 88.
41 [2019] SGHC 82.

B. The Transaction Approach

26 In addition to the issue of actual versus contingent losses, *IPP* discussed an alternative approach which relied on the effect of the *transaction* entered into by the plaintiff. To quote Lord Hoffmann in *Sephton*,[42] transaction cases refer to those where the "plaintiff had paid money, transferred property, incurred liabilities or suffered diminution in the value of an asset and in return obtained less than he should have got". An example of a transaction case was *Shore v Sedgwick Financial Services Ltd* ("***Shore***")[43] where the plaintiff was advised to transfer his pension from a particular type of pension scheme to another pension income withdrawal scheme that was inferior due to higher risks. The court held that the plaintiff suffered loss when he invested in the second scheme, thus exposing him to the risk of financial harm.

27 Another case – *Maharaj v Johnson* ("***Maharaj***")[44] – concerned the distinction between the concepts of "flawed transaction" and "no transaction". The defendants did not warn the purchaser concerning the proper signatory of the deed of conveyance, which meant the legal interest in the land was not transferred to the purchaser. It was regarded as a "flawed transaction" case,[45] as in the absence of the defendants' breach of duty, the claimants would have entered into an analogous transaction in which the land would be conveyed to them. Conversely, in the "no transaction" cases, in the absence of the defendant's breach of duty, the plaintiff would not have entered into any transaction at all. On the facts, the majority[46] decided that the claimants suffered actual damage upon their execution of the deed of conveyance in 1986.[47] This was due to the risks that the rightful vendor could not be located or had died and the additional costs needed to procure the vendor's execution of the deed. The Privy Council regarded the risks as having generated "immediate and (no doubt with difficulty) a quantifiable reduction from the value of the asset which the claimants should have received" rendering their losses not purely contingent.[48]

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[42] [2006] 2 AC 543, [22].
[43] [2008] EWCA Civ 863.
[44] [2015] UKPC 28, [35].
[45] [2015] UKPC 28, [22].
[46] Lord Wilson (with whom Lady Hale, Lord Carnwath and Lord Hodge agreed).
[47] [2015] UKPC 28, [27].
[48] [2015] UKPC 28, [28].

28 The Singapore Court of Appeal did not endorse the "transaction" approach, in particular the distinction between "flawed transaction" and "no transaction," due to the different interpretations in *Maharaj*.[49] However, it acknowledged that *Maharaj* was "an obvious "flawed transaction" case since the defendants' duty was to take all reasonable care to ensure that legal and equitable ownership of the land became vested in the plaintiffs".[50]

C. Analysis

(1) Strength of IPP's approach

29 The Court of Appeal's decision in *IPP* has significantly clarified the approach for ascertaining the date when financial damage arises in negligence. Its approach, which is based on whether the loss in question is purely contingent or not, is indeed preferable to the transaction approach.

30 In addition to the ambiguous treatment of "flawed transaction" and "no transaction" cases in *Maharaj*, there are two other reasons for rejecting the transaction approach to determine the existence of damage. First, transaction cases did not always involve contingent liability. Lord Walker in *Sephton*[51] referred to transaction cases where the "claimant has as a result of professional negligence suffered a diminution (sometimes immediately quantifiable, often not yet quantifiable) in the value of an existing asset". Identifying a "transaction case" *per se* does not therefore yield concrete outcomes on the issue of limitation periods. Second, as admitted in *Maharaj*[52] itself, "[t]he fact that the transaction was flawed does not by itself mean that the claimant suffered actual damage on entry into it." Hence, a closer analysis based on the factual matrix is needed.

31 A few remarks may be briefly made regarding the inter-related concepts employed in determining damage for the purpose of limitation periods, namely: equity of redemption; the distinction between actual loss and risks of loss; and the concept of "worse off" for determining when financial damage arises.

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49 [2020] 2 SLR 272, [93].
50 [2020] 2 SLR 272, [93].
51 [2006] 2 AC 543, [48].
52 [2015] UKPC 28, [26].

32 The first concerns the equity of redemption.[53] *Forster* stated that, upon the plaintiff's execution of the mortgage, there was an immediate effect on the value of the plaintiff's equity of redemption. On this point, the Singapore Court of Appeal in *IPP*[54] noted that the House of Lords in *Sephton*[55] treated the effect as "a contingent liability" to be distinguished from damage, and that Chao J in *Wiltopps*[56] considered it "quite artificial" to say that the execution of the mortgage constituted actual loss.

33 In practical terms, the mortgage gave rise to an encumbrance on the mortgagor's property at the time of execution. This may be explained by reference to the detriment versus actual damage distinction, as discussed in *Wardley* above and which was cited by the Court of Appeal in *IPP*.[57] Arguably, the encumbrances on the property at the time of the execution of the mortgage in *Forster* involved the additional obligation to ensure the loan was repaid by the borrower or the mortgagor herself (*i.e.*, mere detriment) that would not have materialised into actual damage unless and until the loan defaulted and the bank made a demand for repayment.

34 This brings us to the second conceptual point on the distinction between actual loss and risks of loss. Cases that concerned the plaintiff's mere exposure to risks that have not materialised (*i.e.*, purely contingent liability) such as in *Shore* and *Koh Kim Teck* should not be construed as constituting actual damage; hence, according to the Court of Appeal, they were wrongly decided.[58]

35 Relatedly, how relevant is the third concept of "worse off" for determining when financial damage arises? It has been applied, for instance, in *Wardley*, *Nykredit*,[59] and a recent English case *Holt v*

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53 This refers to the right of the mortgagor to redeem the property when the debt is fully repaid in a classic legal mortgage: Alvin See, Yip Man and Goh Yihan, *Property and Trust Law in Singapore* (Wolters Kluwer, 2019), [580]. The authors preferred to describe it as the "mortgagor's power to discharge the mortgage" for both registered and equitable mortgages in Singapore which only operate as encumbrances on the property.

54 [2020] 2 SLR 272, [69] and [90].

55 [2006] UKHL 22, [30], *per* Lord Hoffmann.

56 [1998] 2 SLR(R) 778, [25].

57 [2020] 2 SLR 272, [69].

58 [2020] 2 SLR 272, [92]. There was, however, no analysis of *Liew*.

59 Damage arises when the lender is financially worse off by reason of a breach of the duty of care than he would otherwise have been: [1998] 1 All ER 305, 312 and 317.

Holley.[60] The Court of Appeal in *IPP*, in reference to *Shore* and *Koh Kim Teck*, stated that the plaintiffs could not be said to be "worse off" at the time they entered into the respective transactions induced by the defendant's negligent representation or advice, "given the advantages enjoyed at that point in time".[61] This suggests that the question of whether and when damage has come into existence requires a balancing between costs or disadvantages and the benefits or advantages at the relevant time. This concept would allow for a nuanced analysis depending on the factual matrices.

(2) Further clarification still required

36 While the *IPP* decision has certainly enhanced our understanding about the concept of damage coming into existence for determining accrual of actions in negligence, the decision has indirectly raised three issues which may require further clarification.

37 First, one might question whether the *Wiltopps* test (*i.e.*, whether a plaintiff would have *succeeded*[62] if he had sued at any time after the occurrence of the negligent act complained of) is too demanding. The compliance with limitation periods is about the procedural, rather than substantive rights of the plaintiff on the merits of the case. Establishing the element of damage, and the task of proving damage for the purpose of successful recovery of substantial damages in the negligence action based on causation and remoteness requirements, are separate matters. The plaintiff may show that damage has taken place but fail to show the damage had occurred but for the defendant's breach or that the type of loss suffered was reasonably foreseeable. Indeed, a narrower test, for example, "whether the plaintiff *would be able to establish that actionable damage as pleaded had occurred for the purpose of the claim in negligence* if he had sued at any time after the occurrence of the negligent act complained of", might be more appropriate.

[60] [2020] EWCA Civ 851 (7 July 2020).
[61] [2020] 2 SLR 272, [92].
[62] Emphasis added by author.

38 Second, can the decision in *IPP* be reconciled with the 2008 case of *Lian Kok Hong v Ow Wah Foong* ("***Lian Kok Hong***")?[63] The Singapore Court of Appeal in *Lian Kok Hong* treated the actual damage as having taken place when the owner of a project (plaintiff/appellant) relied on the termination certificate issued by the architect (defendant/respondent) and terminated the contract with the contractor on 19 March 1999. It stated explicitly that the appellant "suffered injury immediately".[64] On the facts, the contractor had disputed the validity of the termination certificate and wanted to send the dispute for arbitration. The interim award was made in 2003 and the final award in 2006. As the writ was filed shortly after the final award in 2006, the appellant's claim was time-barred under s 24A(3)(a). The Court of Appeal rejected the appellant's argument that the damage occurred only when the arbitral award was made.

39 *Prima facie*, it would appear that *IPP* and *Lian Kok Hong* are not consistent. Moreover, the Court of Appeal in *Lian Kok Hong* did not cite *Wiltopps*. If we were to now apply the test in *Wiltopps*, can it be said that the appellant in *Lian Kok Hong* "would have succeeded if he had sued at any time after the occurrence of the negligent act complained of" (*i.e.*, at any time after the respondent negligently issued the termination certificate)? What damage if any did the appellant suffer when he terminated the contract based on the respondent's termination certificate? After all, if the contractor had duly accepted the termination certificate without protest, there would have been no damage to be claimed.

40 However, as the contractor had in fact disputed the validity of the termination certificate, one consideration is whether the appellant had already suffered damage in having to incur time costs and expenses to meet the contractor's legal challenge via arbitration proceedings. The Court of Appeal in *Lian Kok Hong* did not mention this point. One question here is whether such time costs and expenses in connection with the arbitration can form part of the pleaded damage flowing from the respondent's wrongful advice on the termination certificate.

[63] [2008] 4 SLR(R) 165, [25].
[64] [2008] 4 SLR(R) 165, [25].

41 Further, it was a possibility then that the arbitration might ultimately favour the appellant.[65] If so, could the appellant's loss at that time not be regarded as contingent upon the arbitral award against him? If the appellant had sued the respondent based on the termination of contract in reliance of the respondent's negligent advice on the termination certificate, the respondent could have legitimately countered that the claim was premature since the merits of the dispute between the appellant and contractor had not been determined. If so, can the plaintiff's position at that time be analysed as importing a mere risk of liability or that he was not as yet financially worse off as a result of the respondent's negligence? None of the case precedents examined in *IPP*, however, concerned a contingency that is dependent on the resolution of a legal dispute.

42 Thirdly, the decision in *IPP* raises a side question as to how we should treat other types of claims for financial losses,[66] for example, those arising from the purchase of a property with inherent defects due to the architect's negligent design or the builder's negligent construction. It has been said that where a house is designed or built with defects, the purchaser takes the property that is already damaged and suffers pure economic loss (as opposed to property damage) based on the reduced value of the property.[67] This statement may give rise to the notion that financial damage would already have occurred at the time of purchase of the defective property.

43 If we were to apply the *Wiltopps* test, we could counter that there is only a "paper loss" at the time of the transaction based on the reduced market value of property and the plaintiff would not be entitled to recover any damages if he had sued immediately after the purchase. This is distinct from actual damage that may arise only when the purchaser has sold the defective property at a loss or incurred costs to remedy the defects. This would ensure consistency with the approach in *IPP* and *Wiltopps*. Of course, whether such an argument would be accepted remains to be seen.

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65 We now have the benefit of hindsight that the arbitrator ruled against the appellant, but such an outcome would not have been apparent to the appellant at the time of the contract termination.

66 See Andrew McGee, "Economic loss and the problem of the running of time" (2000) 19 *Civil Justice Quarterly* 39 – 55.

67 Simon Deakin, Angus Johnston & Basil Markesinis, *Markesinis and Deakin's Tort Law* (Clarendon Press, 6th Ed, 2008), 126.

IV. Concluding Remarks

44 The *IPP* decision is certainly welcomed for its clarification on a controversial issue as to when damage has come into existence for the purpose of ascertaining limitation periods. By distinguishing actual damage from purely contingent liability, mere detriment or risk of damage, the focus on actual damage provides a clearer benchmark for ascertaining accrual of actions in negligence as compared to the more ambiguous "transaction" approach. However, there remain a few questions relating to the relatively stringent *Wiltopps* test endorsed in *IPP*, the apparently inconsistent *Lian Kok Hong* decision in light of *IPP*, and the applicability of *IPP* to cases of negligent construction or design resulting in defective property purchased by the plaintiff.

TWO STEPS FORWARD, ONE STEP BACK?
AN ATTEMPT TO CURE DUE PROCESS PARANOIA

Case Comment: China Machine New Energy Corp v Jaguar Energy

[2020] 1 SLR 695 / [2020] SGCA 12
Court of Appeal of Singapore
Sundaresh Menon CJ, Tay Yong Kwang JA, Quentin Loh J
28 February 2020

Louis **LAU** Yi Hang[*]

Class of 2021 (LLB), School of Law, Singapore Management University

I. Introduction

1 Time, cost and quality. These are the qualities that an efficient arbitration must have.[1] In recent times, however, the arbitral process has struggled to maintain this balance, with the efficiency of the arbitral process rated among the top five worst characteristics of international arbitration.[2] The fact that parties may resort to a curial review of arbitral awards in an annulment or refusal of enforcement action[3] merely adds on to this delay.

2 Notably, while strict adherence to the "rules of natural justice"[4] is crucial for limiting absolute party autonomy[5] and preserving the

[*] The author would like to thank his friends and colleagues for taking their time to read the article, in particular Devathas Satianathan for his thorough review and feedback on the content. The author also wishes to express his gratitude to Professor Darius Chan, who has provided invaluable guidance. All errors remain my own.

1 Jennifer Kirby, "Efficiency in International Arbitration: Whose Duty Is It?" (2015) 32(6) J.I.A. 689, 689.

2 Queen Mary University, White & Case, "2018 International Arbitration Survey: The Evolution of International Arbitration" (2018) http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF (accessed 30 March 2020), 8, Chart 5.

3 See Articles 34 of the UNCITRAL Model Law ("**ML**") and Article V of the New York Convention (1959) 330 U.N.T.S. 38. See also s 24 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("**IAA**"). See generally Andrew Tuck, "The Finality Question: Appellate Rights and Review of Arbitral Awards in the Americas" (2008) 14 *Law and Business Review of the Americas* 569, 569.

4 See *Soh Beng Tee v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86, [43]. The two rules of natural justice are: *nemo judex in causa sua* (no one shall be judge in his own cause) and *audi alteram partem* (each party is to have an opportunity to be heard).

5 Judith Prakash, "Challenging Arbitration Awards for Breach of the Rules of Natural Justice", speech delivered at the CIArb 2013 International Arbitration Conference in

legitimacy of arbitral proceedings,[6] such rules are often misused in challenging an award, as parties frequently (and often frivolously) take a "creative" approach towards repackaging routine procedural decisions as a breach of their due process rights.[7] No wonder then, that the due process/natural justice ground[8] is most commonly invoked,[9] notwithstanding the supposedly narrow grounds of review. Nevertheless, it may be observed that tribunals have succumbed to "due process paranoia",[10] as they are increasingly willing to grant procedural requests to "bullet-proof" their awards against being annulled or refused enforcement on due process grounds, thereby transforming international commercial arbitration into an inefficient, "highly legalistic, litigious, and … costly affair".[11]

3 In restating the applicable legal principles and threshold for finding a breach of natural justice, the Court of Appeal's ("**CA**") decision in *China Machine New Energy Corp v Jaguar Energy* ("***CMNC***

Penang, Malaysia (24 August 2013), 15; see also Michael Pryles, "Limits to Party Autonomy in Arbitral Procedure" (2007) 24(3) J.I.A. 327, 337.

6 Austin Ignatius Pulle, "Securing natural justice in arbitration proceedings" (2012) 20(1) A.P.L.R. 63, 64; Klaus Peter Berger, Ole Jansen, "Due process paranoia and the procedural judgment rule: a safe harbour for procedural management decisions by international arbitrators" (2016) 32 Arbitration International 415, 422.

7 *Coal & Oil Co LLC v GHCL Ltd* [2015] 3 SLR 154, [3]; see also Lucy Reed, "Ab(use) of due process: sword vs shield", speech delivered at the 2016 Queen Mary School of International Arbitration-Freshfields Lecture (27 October 2016) in 33(3) Arbitration International 361, 365, 375 <https://academic.oup.com/arbitration/article-abstract/33/3/361/4344824> (accessed 23 March 2020); Judith Prakash, "Challenging Arbitration Awards for Breach of the Rules of Natural Justice", speech delivered at the CIArb 2013 International Arbitration Conference in Penang, Malaysia (24 August 2013), [3].

8 See Frederick Shauer, "English Natural Justice and American Due Process: An Analytical Comparison" (1976) 18(1) W.M.L.R. 47, 47. The terms "due process" and "natural justice" will be used interchangeably in this article because they are different labels used to describe what are essentially procedural rights.

9 See Judith Prakash, "Challenging Arbitration Awards for Breach of the Rules of Natural Justice", speech delivered at the CIArb 2013 International Arbitration Conference in Penang, Malaysia (24 August 2013), [1]; Simon Sloane, Daniel Hayward and Rebecca McKee, "Due Process and Procedural Irregularities: Challenges" (2019) *Global Arbitration Review* <https://globalarbitrationreview.com/chapter/1178537/due-process-and-procedural-irregularities-challenges> (accessed 20 March 2020).

10 Klaus Peter Berger, Ole Jansen, "Due process paranoia and the procedural judgment rule: a safe harbour for procedural management decisions by international arbitrators" (2016) 32 Arbitration International 415, 420. See below at [24] for definition.

11 Steven Chong, "The Singapore International Commercial Court: A New Opening In A Forked Path", Speech delivered at British Maritime Law Association Lecture and Dinner in London (21 October 2015), [22(b)], <https://www.supremecourt.gov.sg/Data/Editor/Documents/J%20Steven%20Chong%20Speeches/The%20SICC%20-%20A%20New%20Opening%20in%20a%20Forked%20Parth%20-%20London%20(21.10.15).pdf> (accessed 22 March 2020).

v Jaguar")[12] attempts to alleviate this due process paranoia and restore the efficiency of arbitral processes. It does so by clarifying a common misconception underlining due process paranoia, and also by re-emphasising the high threshold for the review of awards rendered allegedly in breach of the fair-hearing rule. Nevertheless, the CA's decision is not without its difficulties. In particular, there is the question of whether the notice requirement imposed by the CA leads to additional conceptual and practical difficulties. To that end, this article proposes subsuming the notice requirement within the inquiry of prejudice.

4 We will begin the analysis with a summary of the facts and holdings in *CMNC v Jaguar*, including China Machine New Energy Corp ("**CMNC**")'s concerns with the hearing tribunal's management of the case, which allegedly prevented it from receiving a fair hearing, before discussing the above matters.

II. Background Facts

5 The appellant, CMNC, entered into an Engineering, Procurement and Construction Contract (the "**EPC Contract**") with one of the respondents, Jaguar Energy Guatemala LLC ("**Jaguar**"), to construct a power plant (the "**Plant**" and the "**Project**"). However, following CMNC's delay in construction, Jaguar decided to bar CMNC's employees from accessing the construction site office. It also denied CMNC access to documents relating to the Project (the "**Construction Documents**")[13] and terminated the EPC Contract.[14] Jaguar then engaged other contractors to complete the Plant's construction.

A. Arbitral Proceedings and the High Court's Decision

6 While construction of the Plant was ongoing, Jaguar commenced arbitration against CMNC, claiming, *inter alia*, the actual and estimated cost of completing construction of the Plant (the "**ETC Claim**").[15] Notably, cl 20.2 of the EPC Contract provided for disputes to be referred to an *expedited* Singapore-seated arbitration, thus requiring an award to be issued within, at most, 180 days from the

12 [2020] 1 SLR 695.
13 [2020] 1 SLR 695, [10], [11].
14 [2020] 1 SLR 695, [9], [10].
15 [2020] 1 SLR 695, [15(c)], [41].

appointment of the third arbitrator.[16] Upon constitution of the arbitral Tribunal, the evidentiary hearing date was scheduled for early 2015 to meet the deadline for issuing the award.[17] Parties subsequently agreed to reschedule this to July 2015.[18]

7 The Tribunal then ordered several documentary disclosures which CMNC claimed it needed for assessment of the ETC Claim.[19] Jaguar was concerned, however, that CMNC would misuse sensitive information – which identified its post-termination contractors – to interfere with the ongoing construction of the Plant.[20] It therefore applied for an Attorneys' Eyes-Only Order (the "**AEO Order**").

8 The order was granted on the following terms. First, any AEO-designated documents would be disclosed to CMNC's external counsel and expert witnesses, but not to CMNC's employees. Second, CMNC could apply to the Tribunal for its employees to access the AEO-designated documents.[21]

9 Thereafter, the AEO Order was substituted with a regime where documents containing sensitive information were redacted before disclosure to CMNC (the "**Redaction Ruling**").[22] The Redaction Ruling was then modified to exclude Jaguar from redacting and disclosing documents with claims less than US$100,000, with the AEO Order applying instead.[23] At the same time the Redaction Ruling was modified, the Tribunal approved the rolling production of documents evidencing the costs incurred by Jaguar in hiring post-termination contractors (the "**Cost Documents**").[24]

10 CMNC subsequently filed its expert evidence reports belatedly and the Tribunal formally excluded one of them while giving Jaguar the

16 [2020] 1 SLR 695, [5], [12].
17 [2020] 1 SLR 695, [17].
18 [2020] 1 SLR 695, [35], [40].
19 [2020] 1 SLR 695, [14], [15].
20 [2020] 1 SLR 695, [19], [21].
21 [2020] 1 SLR 695, [19], [25].
22 [2020] 1 SLR 695, [29], [32]. Further explanation was not provided on this point.
23 [2020] 1 SLR 695, [38(c)]. Further explanation was not provided on this point.
24 [2020] 1 SLR 695, [38(b)], [41]. This was due to the simultaneous occurrence of both the post-termination construction works and the arbitration.

option not to respond to the other two.[25] The Tribunal subsequently rendered an award (the "**Award**") allowing Jaguar's ETC Claim.[26]

11 CMNC applied to the High Court ("**HC**") to set aside the Award under Article 34 of the UNCITRAL Model Law ("**ML**") and s 24 of the International Arbitration Act ("**IAA**"). It claimed, *inter alia*, that the AEO Order and Redaction Ruling denied CMNC an opportunity to present its case (the "**fair-hearing rule**")[27] and, further, that the failure to investigate Jaguar's alleged "guerrilla tactics" (such as its seizure of the Construction Documents) was induced or affected by corruption in breach of public policy.[28] The HC dismissed CMNC's application as it found no breaches of the fair-hearing rule nor any breaches of public policy in rendering the Award.[29] CMNC then filed an appeal to the CA.

B. The Court of Appeal's Decision

12 On appeal, CMNC confined its challenge to its claim of breach of natural justice, specifically the fair-hearing rule, under Article 34(2)(a)(ii) ML and s 24 IAA.[30] CMNC stated that three issues evinced the "real difficulties" it faced in dealing with Jaguar's ETC Claim, thus explaining its belated filing of expert evidence reports which were then excluded by the Tribunal, all three of which constituted a breach of the fair-hearing rule.[31] These were that the Tribunal's management of the disclosure of sensitive documents had affected CMNC's review of the documents produced by Jaguar; the Tribunal had failed to appreciate CMNC's handicap arising from its lack of access to the Construction Documents; and the Tribunal had failed also in managing Jaguar's

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25 [2020] 1 SLR 695, [70], [71].

26 [2020] 1 SLR 695, [73].

27 See *Government of the Republic of the Philippines v Philippine International Air Terminals Co, Inc* [2007] 1 SLR(R) 278, [18], [25]. A party may apply to set aside an award on the ground that it is unable to present its case. This is derived from the rule of natural justice, *i.e.*, that parties are given a fair opportunity to be heard.

28 [2020] 1 SLR 695, [74]. See also *China Machine New Energy Corp v Jaguar Energy Guatemala LLC* [2018] SGHC 101, [110].

29 [2020] 1 SLR 695, [76] – [78]; see also *China Machine New Energy Corp v Jaguar Energy Guatemala LLC* [2018] SGHC 101, [169], [230].

30 [2020] 1 SLR 695, [81], [105]. Both Art 34(2)(a)(ii) ML and s 24(*b*) IAA involve an inquiry as to whether the party was denied a reasonable opportunity to be heard. There is no distinction between either provision insofar as the fair-hearing rule is concerned.

31 [2020] 1 SLR 695, [82], [83].

rolling production of large quantities of documents.[32] CMNC argued that by failing to cumulatively assess the impact of the Tribunal's alleged mismanagement, the HC had underestimated the "irreparable prejudice" CMNC had suffered.[33]

(1) Disclosure of sensitive documents

13 With respect to the first issue, CMNC argued that the Tribunal's management of the disclosure of sensitive documents resulted in a breach of natural justice, as the AEO Order was made without any basis. The AEO Order also operated asymmetrically against CMNC, since Jaguar could withhold documents whereas CMNC would unfairly bear the burden of applying for disclosure.[34] Moreover, any relief afforded to CMNC (with the lifting of the AEO Regime by the modified Reduction Ruling) was short-lived, as Jaguar's production and over-redaction of documents still impeded CMNC's preparations.[35]

14 The CA, however, rejected both arguments. First, the CA held that the Tribunal had considered both Jaguar's and CMNC's arguments and reasonably satisfied itself that the possibility of misuse of the sensitive documents gave rise to "serious concern", which formed a sufficient basis for the Tribunal to grant the AEO Order.[36] Additionally, the Tribunal was clearly aware of the need to balance the parties' competing interests,[37] and therefore crafted the AEO Order appropriately to safeguard both Jaguar's confidentiality concerns and CMNC's interest in accessing the relevant documents to prepare its case. In any event, CMNC failed to show that its burden of applying for disclosure was improper since CMNC had never made such applications.[38]

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32 Given the simultaneous occurrence of the post-termination construction works and the arbitration, the Tribunal directed the Costs Documents to be produced on a rolling basis (see [2020] 1 SLR 695, [38(b)]).

33 [2020] 1 SLR 695, [83].

34 [2020] 1 SLR 695, [109].

35 [2020] 1 SLR 695, [117], [118].

36 [2020] 1 SLR 695, [111].

37 [2020] 1 SLR 695, [23] – [25], [113].

38 [2020] 1 SLR 695, [27], [114(b)].

15 Second, as regards the modification of the Redaction Ruling, CMNC had initially agreed to the relevant modifications. Thus, its subsequent retraction of the agreement was unjustified.[39] Moreover, CMNC did not immediately raise its complaints regarding Jaguar's alleged unsatisfactory document production methods to the Tribunal, and only did so four months after the modified Redaction Ruling.[40] It was therefore precluded from complaining that the modified Redaction Ruling was unfair.[41]

16 The CA thus held that the AEO Order and modified Redaction Ruling were not made in breach of the rules of natural justice. Even if they had been, the CA held that CMNC had failed to show that the Tribunal's orders had prejudiced its preparation of the expert evidence dealing with the ETC Claim.[42] The CA therefore concluded that a reasonable and fair-minded tribunal would have made the AEO Order.[43]

(2) The Construction Documents Claim

17 CMNC's second argument was that it suffered prejudice due to the Tribunal's failure to order Jaguar to disclose the Construction Documents (which CMNC deemed necessary in calculating the ETC Claim),[44] thereby affecting its evaluation of the ETC Claim.[45] The CA also rejected this argument.

18 The CA held that since CMNC had failed to highlight the relevance of the Construction Documents to the Tribunal and never once requested the Tribunal to order Jaguar to produce these documents, it could not be prejudiced by something that it had never sought from the Tribunal.[46] Furthermore, CMNC was able to assess the value of its pre-termination work with reasonable accuracy without those documents.[47]

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39 [2020] 1 SLR 695, [117(a)].
40 [2020] 1 SLR 695, [118(b)].
41 See also [2020] 1 SLR 695, [116], [120].
42 [2020] 1 SLR 695, [120], [121].
43 [2020] 1 SLR 695, [115].
44 [2020] 1 SLR 695, [14(a)], [15(a)]. CMNC claimed that the documents would assist CMNC by comparing its pre-termination work value against the post-termination work value charged by the post-termination contractors.
45 [2020] 1 SLR 695, [122].
46 [2020] 1 SLR 695, [123], [124], [126].
47 [2020] 1 SLR 695, [125].

(3) Rolling production of the Cost Documents

19 Finally, CMNC argued that the Tribunal's management of the arbitration had resulted in CMNC's delayed preparation and belated filing of, *inter alia*, its quantum expert witness' report (the "**Gurnham Report**") and supporting evidence (the "**Aspinall Report**"). This was apparently because of the Tribunal's failure to (a) set a cut-off date for production of the Cost Documents; (b) grant CMNC time extensions in filing its evidence; and (c) consider Jaguar's "disorganized and haphazard" rolling production of the Costs Documents.[48] CMNC also argued that the Tribunal's purported exclusion of both reports compromised CMNC's ability to respond to Jaguar's ETC Claim.[49]

20 These arguments were also rejected by the CA. First, in granting CMNC's time extension to 18 June 2015 and revising the cut-off date to 5 June 2015 (over CMNC's *alternative* pleaded relief of excluding Cost Documents produced after 3 April 2015), the Tribunal had reasonably balanced both CMNC's and Jaguar's interests.[50] Furthermore, the fact that CMNC had suggested other alternatives meant that it had deemed either choice to be fair.[51] Hence, the Tribunal's failure to grant CMNC its alternative choice was held to be not so unfair as to amount to a breach of the rules of natural justice.[52]

21 Second, the Tribunal's rejection of CMNC's request for further time extension one day before the 18 June deadline[53] was neither unfair nor unreasonable. The volume of documents disclosed on 5 June 2015 was not unusually large such that CMNC's quantum expert needed additional time to review them.[54] Furthermore, the Tribunal's denial of CMNC's request for the time extension was justified given the short timeline leading up to the main hearing and CMNC's repeated disregard of the Tribunal's countless reminders to promptly apply for time

48 [2020] 1 SLR 695, [127], [128].
49 [2020] 1 SLR 695, [127].
50 [2020] 1 SLR 695, [59], [60], [132], [133]. Specifically, Jaguar's interest in presenting evidence for its claim and CMNC's interest in having a reasonable opportunity to meet Jaguar's case.
51 [2020] 1 SLR 695, [133].
52 [2020] 1 SLR 695, [131]. The court also found it significant that CMNC did not then object to the Tribunal's decision to set the cut-off date of 5 June 2015.
53 [2020] 1 SLR 695, [64].
54 [2020] 1 SLR 695, [63], [141].

extensions (in this case, immediately after the documents were produced on 5 June 2015).[55]

22 Third, CMNC's failure to raise Jaguar's allegedly disorganized and haphazard rolling production of the Costs Documents to the Tribunal meant that it was precluded from advancing any complaints on this ground.[56] Finally, the Tribunal's exercise of direction in relation to the Gurnham Report and Aspinall Report was reasonable and fair on the facts.[57] The Tribunal had not excluded the Gurnham Report as it allowed Jaguar the option to deal with it and if so, to then ascribe an appropriate weight.[58] Even if the Tribunal did, such exclusion was fair since CMNC was given a *reasonable* opportunity to present its case.[59] The Aspinall Report was also justifiably excluded as CMNC's decision to file it without seeking leave from the Tribunal was made in disregard of the Tribunal's authority and mandate to ensure fair proceedings.[60]

(4) Cumulative Effect

23 CMNC's final argument was that the cumulative effect of the above issues vis-à-vis the Tribunal's management of the arbitration resulted in the arbitration becoming a "thoroughly defective … procedure". It argued that by the time of the main evidentiary hearing by the Tribunal, the prospects of a fair arbitration hearing had been "irretrievably" lost.[61] This was also rejected by the HC. Since CMNC chose to proceed with the arbitration without taking remedial steps, such as requesting the Tribunal to vacate the main evidentiary hearing dates or notifying them that it deemed the arbitration as irretrievably lost,[62] it could not argue *ex post facto* that the arbitration was tainted with a breach of natural justice.[63] It therefore dismissed CMNC's appeal.[64]

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55 [2020] 1 SLR 695, [142], [144].
56 [2020] 1 SLR 695, [159].
57 [2020] 1 SLR 695, [150] – [151], [156].
58 [2020] 1 SLR 695, [148].
59 [2020] 1 SLR 695, [149].
60 [2020] 1 SLR 695, [155], [156].
61 [2020] 1 SLR 695, [161] – [163].
62 [2020] 1 SLR 695, [165], [166], [168], [170] – [171].
63 [2020] 1 SLR 695, [165].
64 [2020] 1 SLR 695, [173].

III. Commentary

A. Mitigating Due Process Paranoia

24 The decision in *CMNC v Jaguar* is to be welcomed for one main reason – it mitigates what some may term as "due process paranoia. "Due process paranoia" refers to an arbitrator's belief that granting parties every opportunity to present their case, even if it results in delay or increased costs, is *still* preferable to running the risk of the ultimate award being successfully challenged.[65] This is a common, and real problem that hinders the efficiency of arbitration.[66]

25 Of course, one can understand why arbitrators would take such a position. After all, besides time and costs, the quality of arbitration is often measured by the correctness and enforceability of an award.[67] Ultimately, this may result in needlessly cautious procedural decisions and the lack of "effective" sanctions during the arbitral process,[68] which also indirectly encourages dilatory tactics. This may unduly lengthen the duration and increase the costs of arbitration.[69]

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65 Remy Gerbay, "Due Process Paranoia" (2016) *Kluwer Arbitration Blog* <http://arbitrationblog.kluwerarbitration.com/2016/06/06/due-process-paranoia/> (accessed 30 March 2020); see also Klaus Peter Berger, Ole Jansen, "Due process paranoia and the procedural judgment rule: a safe harbour for procedural management decisions by international arbitrators" (2016) 32 Arbitration International 415, 420, citing Queen Mary University, White & Case, "2015 International Arbitration Survey: Improvements and Innovations in International Arbitration" (2015), 10 <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2015 International Arbitration Survey.pdf> (accessed 30 March 2020).

66 Queen Mary University, White & Case, "2018 International Arbitration Survey: The Evolution of International Arbitration" (2018) <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF> (accessed 30 March 2020), 27.

67 Jennifer Kirby, "Efficiency in International Arbitration: Whose Duty Is It?" (2015) 32(6) J.I.A. 689, 692.

68 Queen Mary University, White & Case, "2018 International Arbitration Survey: The Evolution of International Arbitration" (2018) <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF> (accessed 30 March 2020), 8, 27; see also Remy Gerbay, "Due Process Paranoia" (2016) Kluwer Arbitration Blog <http://arbitrationblog.kluwerarbitration.com/2016/06/06/due-process-paranoia/> (accessed 30 March 2020).

69 Simon Sloane, Daniel Hayward and Rebecca McKee, "Due Process and Procedural Irregularities: Challenges" (2019) Global Arbitration Review <https://globalarbitrationreview.com/chapter/1178537/due-process-and-procedural-irregularities-challenges> (accessed 20 March 2020).

26 More specifically however, the CA's decision is helpful for arbitrators presiding over a Singapore-seated arbitration in two aspects. First, it re-emphasises the high threshold for reviewing awards rendered allegedly in breach of the fair-hearing rule, thereby encouraging arbitrators to "adopt a bolder approach" in conducting proceedings with "the requisite mix of fairness and firmness".[70] Second, it clarifies a common misconception that underlines due process paranoia (which is that giving the parties a full opportunity to present their case necessarily means giving them *all* opportunities).[71] This is elaborated on below.

(1) Affirming the Standard of Review

27 The decision in *CMNC v Jaguar* reiterates the high standard of review for awards allegedly in breach of the rules of natural justice. As noted by the CA, a four-stage test is to be applied in setting aside an arbitral award on grounds of natural justice under s 24(*b*) IAA.[72] The applicable standard of review is whether the tribunal's case management decision could have been contemplated by a reasonable and fair-minded tribunal in all the circumstances.[73] Due deference will be accorded to the tribunal and the courts will not intervene simply because it might have done things differently.[74]

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70 Queen Mary University, White & Case, "2018 International Arbitration Survey: The Evolution of International Arbitration" (2018) <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF> (accessed 30 March 2020), 27; Klaus Peter Berger, Ole Jansen, "Due process paranoia and the procedural judgment rule: a safe harbour for procedural management decisions by international arbitrators" (2016) 32 Arbitration International, 435, citing Robert Merkin and Louis Flannery, Arbitration Act 1996 (Informa Law, 5th edn, 2014), 132.

71 Klaus Peter Berger, Ole Jansen, "Due process paranoia and the procedural judgment rule: a safe harbour for procedural management decisions by international arbitrators" (2016) 32 Arbitration International, 420.

72 [2020] 1 SLR 695, [86], citing *Soh Beng Tee v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86, [29]; see also *John Holland Pty Ltd v Toyo Engineering Corp (Japan)* [2001] 1 SLR(R) 443, [18]. To successfully set aside an arbitral award for breaching the rules of natural justice, the applicant must establish: (a) which rule of natural justice was breached; (b) how it was breached; (c) in what way the breach was connected to the making of the award; and (d) how the breach prejudiced its right.

73 [2020] 1 SLR 695, [98], [104(c)].

74 [2020] 1 SLR 695, [103], citing *Soh Beng Tee v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86, [58].

28 This high threshold reflects the policy of minimal curial intervention by respecting and preserving the autonomy of the arbitral process.[75] It is also consistent with the approaches of many national courts in recognising a wide margin of procedural discretion. So long as a "just, expeditious, economical and final determination of the dispute" can be reached, substantial deference will be accorded to the arbitrator's procedural decisions.[76]

29 The high threshold also ensures that parties do not abuse curial review as an opportunity to unduly scrutinise the arbitral process, and is meant to discourage the parties from tactically frustrating and delaying the award's enforcement.[77] Specifically, in endorsing the four-stage test, the CA implicitly affirmed that any breach of natural justice must be so grave to amount to "prejudice" for the court to set aside an award.[78] Indeed, as noted by the CA, the court (or more precisely, the possibility of review) is not "a stage where a dissatisfied party can have a second bite of the cherry" by raising "a multitude of arid technical challenges".[79]

30 Finally, by directing the legal inquiry from the tribunal's perspective and couching the standard in terms of reasonableness, the test is a nod towards recognising an arbitrator's expertise in managing the arbitration, especially since an arbitrator is seen as a "master of his own procedure".[80] Arbitrators can thus be assured that their management

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75 *AKN v ALC* [2015] 3 SLR 488, [37], [38]; *AJU v AJT* [2011] SGCA 41, [66]; *Soh Beng Tee v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86, [59] – [65]; see also Gary Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014), 162.

76 See, *e.g.*, *On Call Internet Services Ltd v Telus Communications Co* [2013] BCAA 366, [18]; *Pacific China Holdings Ltd (In Liquidation) v Grand Pacific Holdings Ltd* [2012] 4 HKLRD 1, [68]; *Brandeis (Brokers) Ltd v Black* [2001] 2 All ER (Comm) 980, [56]; *Margulead Ltd v Exide Technologies* [2004] EWHC 1019, [33]; *Killam v Brander-Smith* [1997] BCJ No 456, [29]; *Iran Aircraft Industries v Avco Corp*, 980 F 2d 141, 145 – 146 (2d Cir 1992); *Sermalt Holdings SA v Nu-Life Upholstery Repairs Ltd* [1985] EGLR 14, 15; see also William Park, "Two Faces of Progress: Fairness and Flexibility in Arbitral Procedure" (2007) 23(3) Arbitration International, 499, 503; Klaus Peter Berger, Ole Jansen, "Due process paranoia and the procedural judgment rule: a safe harbour for procedural management decisions by international arbitrators" (2016) 32 Arbitration International, 425 – 428.

77 Timothy Cooke, *International Arbitration in Singapore: Legislation and Materials* (Sweet & Maxwell, 2018), 124.

78 *Soh Beng Tee v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86, [84]; see also Austin Ignatius Pulle, "Securing natural justice in arbitration proceedings" (2012) 20(1) A.P.L.R. 63, 77.

79 *Soh Beng Tee v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86, [65(b)].

80 *Anwar Siraj v Ting Kang Chung* [2003] 2 SLR(R) 287, [41]; *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305, [36]; Lucy Reed,

of the arbitral process, insofar as it is within their scope of power, will be fully respected by the Singapore courts.

(2) Clarifying the Scope of the Fair-Hearing Rule

31 The decision in *CMNC v Jaguar* also helped to clarify the scope of the fair-hearing rule. The CA stressed that the "full opportunity" for parties to present their case as mandated by the fair-hearing rule is not an absolute one,[81] and must be balanced against factors like ensuring the arbitration's efficiency and expediency. Any opportunity is therefore inherently *limited* by considerations of reasonableness and fairness.[82]

32 This is important because the fair-hearing rule is enshrined in multiple rules: under Article 18 ML;[83] various national legislation;[84] numerous institutional rules;[85] and also expressed under Article 34(2)(a)(ii) ML.[86]

33 The CA's interpretation of Article 18 ML is also consistent with both precedent authorities[87] and other Model Law jurisdictions.[88] Although Article 18 ML limits the broad autonomy provided to arbitrators to decide on the arbitral process by mandating the parties' right to be heard,[89] this right "must be seen in the context of the entire

"Ab(use) of due process: sword vs shield", speech delivered at the 2016 Queen Mary School of International Arbitration-Freshfields Lecture (27 October 2016) in 33(3) Arbitration International, 372 <https://academic.oup.com/arbitration/article-abstract/33/3/361/4344824> (accessed 23 March 2020).

81 [2020] 1 SLR 695, [94] – [97].

82 [2020] 1 SLR 695, [88] – [90], [104(b)].

83 UNCITRAL Model Law, Article 18.

84 See, *e.g.*, UK Arbitration Act 1996, s 33; Australian International Arbitration Act 1974 (Cth), s 8(7A); New Zealand Arbitration Act 1996, s 34(6) and Schedule 1, Article 18.

85 See, *e.g.*, International Chamber of Commerce Rules 2012, Article 22(4); UNCITRAL Arbitration Rules 2010, Art. 17(1); The London Court of International Arbitration Rules, Article 14; International Centre for Disputer Resolution Rules, Article 16; Singapore International Arbitration Centre, Rule 11.1.

86 Timothy Cooke, *International Arbitration in Singapore: Legislation and Materials* (Sweet & Maxwell, 2018), 124.

87 *JVL Agro Industries Ltd v Agritrade International Pte Ltd* [2016] 4 SLR 768, [145]; *Triulzi Cesare SRL v Xinyi Group (Glass) Co Ltd* [2015] 1 SLR 114, [112], [152]; *ADG v ADI* [2014] 3 SLR 481, [103] – [104]; *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86, [42].

88 See, *e.g.*, *Sino Dragon Trading v Noble Resources International* [2016] FCA 1131, [157]; *Pacific China Holdings Ltd (In Liquidation) v Grand Pacific Holdings Ltd* [2012] 4 HKLRD 1, [95], [96], [105]; *Trustees of Rotoaira Forest Trust v Attorney-General* [1999] 2 NZLR 452, 463.

89 "UNCITRAL Model Law, Chapter V, Article 18 [Equal treatment of parties]" in Howard Holtzmann and Joseph Neuhaus (ed), *A Guide to the UNCITRAL Model Law*

arbitral process and should be exercised by the parties in the spirit of efficiency" so as to not render the arbitrator's broad and flexible case management powers as "an empty shell".[90]

34 Insofar as the arbitrator's procedural decisions are guided by a balance between safeguarding the efficiency of proceedings and the parties' rights to present their case, and absent strong and unambiguous evidence of the tribunal's unreasonableness, aspersions should not be cast on the tribunal's procedural decisions which do not breach the fair-hearing rule.[91] This is *a fortiori* when the requests are unreasonable and amount to dilatory tactics. The tribunal's procedural decisions as a matter of case management must therefore be distinguished from those amounting to a breach of the fair-hearing rule.[92]

B. The Problems with Establishing a Breach of the Fair-Hearing Rule

35 Nevertheless, the decision leaves some room for improvement. In particular, as held by the CA, in considering whether the tribunal's management decisions amount to a breach of the fair-hearing rule, regard must be had to what it was informed about at the material time.[93] This means that where a breach of the fair-hearing rule is alleged, the aggrieved party must alert the tribunal to the breach and seek to suspend the proceedings to give the tribunal an opportunity to consider and possibly remedy the breach (the "**Notice Requirement**").[94]

36 The Notice Requirement, as held by the CA, is distinct from the doctrine of waiver which, simply put, is the rule that a party who (a) knows (or ought to have known) of the non-compliance but (b) does not state his objection without delay and instead proceeds with the

on International Commercial Arbitration: Legislative History and Commentary (Kluwer Law International, 1989) 550-563, 551.

90 Klaus Peter Berger, Ole Jansen, "Due process paranoia and the procedural judgment rule: a safe harbour for procedural management decisions by international arbitrators" (2016) 32 Arbitration International 415, 422; *Sino Dragon Trading v Noble Resources International* [2016] FCA 1131, [73]; c.f. *Gold Reserve Inc v Bolivarian Republic of Venezuela* 146 F Supp 3d 112, 128 – 129 (DDC, 2015). The US District Court of Columbia also observed that the right to fair hearing was enshrined under Article V(1)(b) of the New York Convention, and such a right must be construed narrowly.

91 *Luzo Hydro Corp v Transfield Philippines Inc* [2004] 4 SLR(R) 705, [18].

92 *Triulzi Cesare SRL v Xinyi Group (Glass) Co Ltd* [2015] 1 SLR 114, [126].

93 [2020] 1 SLR 695, [101].

94 [2020] 1 SLR 695, [102], [159], [170].

arbitration is deemed to have (c) waived his right to object.[95] Rather, the Notice Requirement goes to the anterior question of breach.[96] Hence, a breach of the fair-hearing rule is established only when the tribunal fails to remedy the breach despite it being brought to its attention. Conversely, a party that fails to notify the tribunal and instead proceeds with the arbitration will not be able to make out a breach of the fair-hearing rule.[97]

37 With respect, this requirement is problematic for three reasons. First, the requirement for notice has never been considered by precedent authorities when checking for compliance with the fair-hearing rule. Second, as a matter of conceptual coherence, it is also difficult to differentiate between the Notice Requirement and the requirements for establishing waiver laid out under Article 4 ML. Third, a strict approach to compliance with the Notice Requirement may also hinder the efficient conduct of arbitration. This is elaborated on below.

(1) Consistency with Previous Decisions

38 First, a notice requirement is inconsistent with the established requirements laid out in previous precedents for demonstrating the tribunal's breach of the fair-hearing rule. For instance, the CA in *LW Infrastructure v Lim Chin San* held that the Tribunal's failure to afford the plaintiff an opportunity to address the Tribunal on whether the defendant's application for awarding pre-award interest was appropriate amounted to a breach of the fair-hearing rule.[98] Notably, this conclusion was reached even though the plaintiff was aware of the defendant's

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95 United Nations Commission on International Trade Law, *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration: Report of the Secretary General* (A/CN.9/264, 25 March 1985), 17; see also UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration (United Nations Publications, 2012), 19; Nigel Blackaby *et al*., Redfern and Hunter on International Arbitration, (Oxford University Press, 6th edn, 2015), [4.143]-[4.148], [10.28] – [10.30].

96 [2020] 1 SLR 695, [102].

97 [2020] 1 SLR 695, [170].

98 *LW Infrastructure v Lim Chin San Contractors* [2013] 1 SLR 125, [75], [76]. Although this case dealt with challenging an arbitral award under the domestic Arbitration Act (Cap 10, 2002 Rev Ed) ("**AA**"), the court held that the same approach towards natural justice ought to be adopted for both international and domestic arbitrations in Singapore, given that parliament had intended the AA to be aligned with the Model Law to "narrow the differences between the two regimes (see [33] – [34]). Hence, the same line of reasoning pertaining to breach of natural justice under the AA ought to apply to the IAA.

application but failed to object.[99] In its subsequent protests, the plaintiff failed to clearly and unequivocally inform the Tribunal that it was mainly concerned with the lack of opportunity to present its case.[100]

39 In a similar vein, in *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK*, the CA found that the respondent was not given a reasonable opportunity to present its case, despite the respondent having not voiced its objections as regards the Tribunal's failure to observe the fair-hearing rule.[101] Absent any clear elucidation on its rationale and purpose, the Notice Requirement sits uncomfortably with precedent cases and appears to have set a requirement that is more stringent than what is commonly accepted before a claim for breach of natural justice is successfully established.

(2) An Overlap with the Doctrine of Waiver?

40 Second, despite the distinction drawn between the Notice Requirement and the doctrine of waiver under Article 4 ML, reference to the ML's 1985 *Analytical Commentary* ("***Analytical Commentary***")[102] evinces substantive similarities between these two principles. As noted in the *Analytical Commentary*, waiver is made out when the parties knew or ought to have known of non-compliance with any ML provision(s), and yet proceeds with arbitration without objecting to such non-compliance in a timely fashion. Similarly, by not fulfilling the Notice Requirement, the challenging party is precluded from bringing a claim founded on the tribunal's breach of natural justice.

41 The present position therefore creates uncertainty as to when waiver applies. Crucially, the CA might have effectively introduced the possibility of waiving a breach of natural justice. Given however that

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99 *LW Infrastructure v Lim Chin San Contractors* [2013] 1 SLR 125, [8], [9].

100 *LW Infrastructure v Lim Chin San Contractors* [2013] 1 SLR 125, [11] – [13].

101 See, *e.g.*, *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305, [92] – [96]. The court found that the respondent was not given a reasonable opportunity to present its case in a preliminary hearing as it was not able to prepare evidence to address the arbitrators' questions on the merits of the dispute. Notably, the respondent had not voiced its objections as regards the tribunal's failure to observe the fair-hearing rule. Even if it did, the CA had not taken this into consideration.

102 United Nations Commission on International Trade Law, *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration: Report of the Secretary General* (A/CN.9/264, 25 March 1985).

Article 18 ML is a mandatory provision,[103] one cannot waive non-compliance of a mandatory provision.[104] This is *a fortiori* when the *Analytical Commentary* noted that the doctrine of wavier cannot apply to mandatory provisions since it "would be too rigid".[105] Hence, a party's failure to object to non-compliance with the fair-hearing rule under Article 18 ML cannot constitute a waiver of its right to raise this ground in subsequently challenging the award.[106]

(3) Practical problems

42 There are also potential practical difficulties with the Notice Requirement. First, to hold that the Notice Requirement goes to the anterior question of breach renders it difficult to establish a breach of the fair-hearing rule. Since determining whether there is a breach involves a context-sensitive and objective inquiry that can only be effectively undertaken by an *ex post facto* analysis of the entire arbitral process,[107] save in clear instances of an egregious breach which are few and far between, it is a judgment call to make as to whether the tribunal's conduct should have been reported at the moment of breach.

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[103] United Nations Commission on International Trade Law, *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration: Report of the Secretary General* (A/CN.9/264, 25 March 1985), 44, 46, 47; UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration (United Nations Publications, 2012), 97; *Triulzi Cesare SRL v Xinyi Group (Glass) Co Ltd* [2015] 1 SLR 114, [46]; *LW Infrastructure v Lim Chin San Contractors* [2013] 1 SLR 125, [56]; *Sino Dragon Trading v Noble Resources International* [2016] FCA 1131, [157], [178]; "UNCITRAL Model Law, Chapter V, Article 18 [Equal treatment of parties]" in Howard Holtzmann and Joseph Neuhaus (ed), *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law International, 1989) 550-563, 563; "Part II: The Process of an Arbitration, Chapter 3: The Procedural Framework for International Arbitration" in Jeffrey Maurice Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International, 2012) 127, 183; Michael Pryles, "Limits to Party Autonomy in Arbitral Procedure" (2007) 24(3) J.I.A. 327, 329.

[104] United Nations Commission on International Trade Law, *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration: Report of the Secretary General* (A/CN.9/264, 25 March 1985), 17; *BAZ v BBA and others and other matters* [2018] SGHC 275, [67], [68]. Though the case dealt with raising the doctrine of waiver to preclude a public policy objection, the same reason applies *mutatis mutuandis*.

[105] United Nations Commission on International Trade Law, *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration: Report of the Secretary General* (A/CN.9/264, 25 March 1985), 17.

[106] *Cf Farrelly (M&E) Buildings Services Ltd v Byrne Brothers (Formwork) Ltd* [2013] EWHC 1186, [27]–[29]; *Canada v Taylor* [1990] 3 SCR 892m, [177]. These cases suggest that breaches of natural justice can be waived.

[107] See *Sino Dragon Trading v Noble Resources International* [2016] FCA 1131, [74].

43 Following this ruling however, out of an abundance of caution, parties may simply decide to barrage the tribunal with numerous objections whenever they deem the tribunal's procedural decisions to have breached the fair-hearing rule. Not only would unnecessary time and energy be expended by the tribunal to consider, and if necessary, issue reasoned decisions for each and every objection, dilatory tactics are also indirectly sanctioned as a result. Consequently, the arbitration process is prolonged and costs are driven up.[108] While one may argue that this simply calls for "strong" arbitrators who "firmly" manage their proceedings,[109] this does not solve the issue that parties are potentially encouraged to "blackmail" the tribunal in the name of due process. As a result, the integrity of the arbitral proceedings may be compromised.[110]

IV. Suggested Clarification of the Notice Requirement

44 It would seem that in referring to the Notice Requirement, the CA might have intended to endorse the general principle that a party who is unable to present his case by matters within his control cannot claim that he is then prejudiced by the tribunal's procedural mismanagement.[111] Specifically, the arbitrator is not denied the benefit of submissions that could reasonably have made a difference to his deliberations when a party fails to inform the arbitrator that his (or her) procedural decision has precluded the party from an opportunity to present its case.[112] Hence, the relevant party cannot show that it is prejudiced; the breach has not meaningfully altered the final outcome of

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108 Lucy Reed, "Ab(use) of due process: sword vs shield", speech delivered at the 2016 Queen Mary School of International Arbitration-Freshfields Lecture (27 October 2016) in 33(3) Arbitration International 361, 375, 376 <https://academic.oup.com/arbitration/article-abstract/33/3/361/4344824> (accessed 23 March 2020).

109 Leon Kopecky and Victoria Pernt, "A Bid for Strong Arbitrators" (15 April 2016) *Kluwer Arbitration Blog* <http://arbitrationblog.kluwerarbitration.com/2016/04/15/a-bid-for-strong-arbitrators/> (accessed 3 April 2020).

110 Lucy Reed, "Ab(use) of due process: sword vs shield", speech delivered at the 2016 Queen Mary School of International Arbitration-Freshfields Lecture (27 October 2016) in 33(3) Arbitration International 361, 376 <https://academic.oup.com/arbitration/article-abstract/33/3/361/4344824> (accessed 23 March 2020).

111 *Minmetals Germany GmbH v Ferco Steel Ltd* [1999] 1 All ER (Comm) 315, 327; *Sino Dragon Trading Ltd v Noble Resources International Pte Ltd* [2016] FCA 1131, [162]; *Corporacion Transnacional de Inversiones S.A. de C.V. v. Stet International S.p.A.* [1999] OJ No 3573, [73].

112 *LW Infrastructure v Lim Chin San Contractors* [2013] 1 SLR 125, [54].

the arbitral proceedings.[113] This was seen in *Cukurova v Sonera*,[114] where the Privy Council held that the appellant's lack of an opportunity to present its case was not due to reasons beyond its control, but rather, self-induced, because it failed to avail itself of opportunities granted by the tribunal to present its case.[115] Conversely, if the Notice Requirement is fulfilled and the breach remains un-remedied, actual prejudice that surpasses the boundaries of legitimate expectation and propriety[116] and meaningfully alters the outcome of the proceedings is likely established.

45 Accordingly, it may be more appropriate to subsume the Notice Requirement within the requirement of prejudice, as opposed to an element within establishing a breach of natural justice *per se*. This proposition will have to be revisited in a later case.

V. Conclusion

46 Ultimately, the CA's decision in *CMNC v Jaguar* is to be welcomed, as the deference to arbitrators encourages arbitrators to adopt a more "robust stance" in dissuading parties from needlessly challenging the arbitrator's decisions,[117] thereby tackling the issue of due process paranoia plaguing the arbitral process.

47 Nevertheless, as mentioned, there are several difficulties with the CA's stipulation of the Notice Requirement. Of course, it remains to be seen how arbitrating parties react to this requirement, but one thing is certain – the arbitral process will not fare well. If the notice requirement is strictly adhered to, frivolous objections will be encouraged. The result is only inefficiency.

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[113] *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305, [37], affirming *Soh Beng Tee v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86, [65(f)], [91].

[114] *Cukurova Holding AS v Sonera Holding BV* [2015] 2 All ER 1061, [31], [33]. This proposition was cited with approval and applied in *Eastern European Engineering Ltd v Vijay Construction (Proprietary) Ltd* [2018] EWHC 2713 (Comm), [87], [93] – [98].

[115] *Cukurova Holding AS v Sonera Holding BV* [2015] 2 All ER 1061, [51] – [54]. It was found that the arbitral tribunal had given the applicant every opportunity, but it chose not to avail itself of this opportunity by, *inter alia*, not seeking an adjournment of the hearing to present oral evidence and providing a further statement from a witness detailing points of fact which the oral evidence would have been decisive of their case.

[116] *Soh Beng Tee v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86, [98].

[117] Judith Prakash, "Challenging Arbitration Awards for Breach of the Rules of Natural Justice", speech delivered at the CIArb 2013 International Arbitration Conference in Penang, Malaysia (24 August 2013), 3.

ELECTIONS DURING COVID-19: WELCOME CLARIFICATIONS, UNANSWERED QUESTIONS

Case Comment: Daniel De Costa Augustin v Attorney-General

[2020] 2 SLR 621 / [2020] SGCA 60
Court of Appeal of Singapore
Sundaresh Menon CJ; Andrew Phang JA; Judith Prakash JA
30 June 2020

Joel **FUN** Wei Xuan*

Class of 2022 (LLB, BBM), School of Law, Lee Kong Chian School of Business, Singapore Management University

I. Introduction

1 On 10th July 2020, Singapore held its Parliamentary Elections, while in the midst of the COVID-19 pandemic. Elections have been similarly held elsewhere during this pandemic, and suffice to say that the pandemic, and its resulting implications, have raised various interesting legal questions in some of these jurisdictions.[1] To that end, a wide range of regulations and rules pertaining to elections have also been passed in response to the COVID-19 pandemic. In some jurisdictions, such as certain states in the United States, voting by mail was allowed with no excuse required, so as to prevent the further spread of COVID-19 via the polling stations.[2] In others, lockdown restrictions were completely eased to facilitate voting, to the extent that some voters were also allowed to choose whether to wear protective devices or not (*e.g.*, gloves and masks).[3]

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1 See, *e.g.*, *People First of Alabama v. Merrill* (2020) WL 320784, *Texas Democratic Party v Abbott* (2020) 961 F. 3d 389.

2 See *e.g.*, Massachusetts; An Act Relative to Voting Options in Response to COVID-19 (Cap 115 of 2020).

3 See, *e.g.*, Serbia; "Serbia holds parliamentary elections amidst COVID-19 risk" (22 June 2020) <http://www.xinhuanet.com/english/2020-06/22/c_139156328.htm> (accessed 9 July 2020). For an overview of the impact of the COVID-19 pandemic on

2 A middle ground was struck in Singapore's approach to elections. While voting by mail was still not allowed, measures were taken pursuant to the Parliamentary Elections (COVID-19 Special Arrangements) Act ("**PE(C19)A**")[4] to ensure that the entire voting process would be safe for voters. For instance, separate voting processes were instituted for persons who were serving mandatory stay-home notices, to ensure the safety of the wider community.[5] However, certain groups, such as COVID-19 patients and persons that were under quarantine orders, were not allowed to vote.[6] In addition, there have been concerns raised in Parliament that overseas voters might be unable to vote because of various lockdown measures and travel restrictions,[7] thereby preventing them from voting in one of the ten overseas polling stations worldwide.[8] This raised questions as to whether such election measures would threaten "the integrity of our democracy by taking away the voting rights of citizens".[9]

3 The COVID-19 pandemic and the resulting measures taken set the factual backdrop for the recent Court of Appeal case of *Daniel De Costa Augustin v Attorney-General* ("**Daniel De Costa**").[10] There, the applicant, De Costa, sought a prohibitory order to prevent the Returning Officer from holding any elections under s 3(1) of the Parliamentary Elections Act. The claim was dismissed by the High Court, which did not hand down a written judgment.[11] On appeal, the claim too, was similarly dismissed. Nevertheless, there were several important points of law which the Court of Appeal elaborated upon in reaching its decision. This essay will comment on the issues raised: first, the justiciability of the decision to dissolve Parliament; second, the

elections, see International IDEA website <https://www.idea.int/news-media/multimedia-reports/global-overview-covid-19-impact-elections> (accessed 10 July 2020).

4 Parliamentary Elections (COVID-19 Special Arrangements) Act.

5 Parliamentary Elections (COVID-19 Special Arrangements) Act s 4, 5, and 6.

6 Parliamentary Elections (COVID-19 Special Arrangements) Act s 3.

7 *Singapore Parliamentary Debates, Official Report* (4 May 2020) vol 94 (Anthea Ong, NMP).

8 Elections Department Singapore website <https://www.eld.gov.sg/voters_ops.html> (accessed 11 July 2020).

9 *Singapore Parliamentary Debates, Official Report* (4 May 2020) vol 94 (Anthea Ong, NMP).

10 [2020] SGCA 60.

11 Charmaine Ng, "Court dismisses challenge to stop polls from being held now", *The Straits Times* <https://www.singaporelawwatch.sg/Headlines/Court-dismisses-challenge-to-stop-polls-from-being-held-now> (accessed 10 July 2020).

existence of implied constitutional rights; and third, locus standi to bring judicial review proceedings.

II. Challenging the Dissolution of Parliament and its Non-Justiciability

4 In *Daniel De Costa*, the appellant sought to restrain the holding of the election, but did not contest the decision to dissolve Parliament.[12] As a preliminary point, the court had some difficulty with this position. The starting point of the following analysis begins with Article 66 of the Constitution, which provides:

> "There shall be a general election at such time, within 3 months after every dissolution of Parliament, as the President shall, by Proclamation in the Gazette, appoint."

This provision should be read together with Article 65(3) of the Constitution, which entails that the President is obliged to dissolve Parliament once the Prime Minister, who commands the confidence of the majority of Parliament, advises the President to do so.[13]

5 In *obiter*, the court suggested that the necessary consequence (elections) could not be restrained without first restraining the event triggering that consequence (*i.e.*, the dissolution of Parliament).[14] In this regard, the appellant noted that he was "not in a position to challenge" the fact of Parliament's dissolution, to which the court remarked that it thought that "that [was] correct".[15] However, due to the considerably vague terms used by the Court of Appeal, it is unclear as to what the court's position was on the justiciability of the dissolution of Parliament, and whether it would be open to review in appropriate circumstances.

6 The traditional common law position is that Parliament's dissolution is not justiciable.[16] However, as famously indicated by the court in *Chng Suan Tze v Minister for Home Affairs*,[17] all power has legal limits. That necessarily includes the power exercised by the Prime Minister to dissolve Parliament. As such, the courts should be able to

12 [2020] SGCA 60, [5].
13 [2020] SGCA 60, [5].
14 [2020] SGCA 60, [5].
15 [2020] SGCA 60, [5].
16 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 418.
17 *Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 525, [86].

examine any exercise of such discretionary power. Indeed, even if a case appears *prima facie* to be non-justiciable, the court may be able to isolate a pure question of law, which the court may then scrutinise.[18]

7 Recently, the UK Supreme Court, in *R (Miller) v Prime Minister* ("***R (Miller)***")[19] had the opportunity to consider the limits of the prerogative power to prorogue the Parliament of the United Kingdom. While the court recognised that it was possible for the power of prorogation to fall within the category of "non-justiciable" matters (similar to the dissolution of Parliament), the court thought that the issue of non-justiciability would only arise where the issue was properly characterised as one concerning the lawfulness of the exercise of a prerogative power within its lawful limits.[20] However, this issue of justiciability would not arise if the issue concerned the lawful limits of the power that was exercised, and whether the use of power would be properly recognised as the usage of a prerogative power (*i.e.*, whether the actor had the power to do what it did).[21]

8 Thus, it is arguable that even if the President's act of dissolving Parliament is not justiciable, it does not follow that the Prime Minister's use of his or her power in advising the President to dissolve Parliament is also not justiciable. In fact, in *R (Miller)*, the lack of any reasons given in advising the Queen to prorogue Parliament was a central factor in the Supreme Court's finding that the Prime Minister's advice was unlawful.[22]

9 Similarly, even if a challenge to the Returning Officer's holding of elections necessarily requires a challenge to the fact of Parliament's dissolution, that may not be an insurmountable hurdle, unlike what seems to have been suggested by the appellant and the court

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18 *Lee Hsien Loong v Review Publishing* [2007] 2 SLR(R) 453, [98].

19 *Regina (Miller) v Prime Minister (Lord Advocate and others intervening); Cherry and others v Advocate General for Scotland (Lord Advocate and others intervening)* [2020] AC 373.

20 *Regina (Miller) v Prime Minister (Lord Advocate and others intervening); Cherry and others v Advocate General for Scotland (Lord Advocate and others intervening)* [2020] AC 373, [36].

21 *Regina (Miller) v Prime Minister (Lord Advocate and others intervening); Cherry and others v Advocate General for Scotland (Lord Advocate and others intervening)* [2020] AC 373, [36].

22 *Regina (Miller) v Prime Minister (Lord Advocate and others intervening); Cherry and others v Advocate General for Scotland (Lord Advocate and others intervening)* [2020] AC 373, [61].

in *Daniel De Costa*. Notably, as this issue was not contested by the appellant, coupled with the fact that the statement made by the Court of Appeal on this point was *obiter*, perhaps the remark that the appellant was "correct" to not challenge the fact of Parliament's dissolution will have to be reviewed at the appropriate time.

III. A Constitutional Right to Vote and Implied Rights

A. The Right to Vote

10 In this case, the appellant did not seek to challenge the constitutionality of PE(C19)A. Instead, the main issue was whether conducting elections at the material time would deprive the electorate of a free and fair election.[23] In determining whether there was a right to a free and fair election, and whether this right was violated, the court first had to deal with the precedent question of whether there was a right to vote in Singapore.

11 The Constitution does not provide for an explicit right to vote, despite recommendations by the Constitutional Commission in 1966.[24] Prior to the court's decision in *Daniel De Costa*, there were various decisions which discussed the right to vote in Singapore law. The first time the court dealt with such an argument was the 1999 case of *Taw Cheng Kong v PP*.[25] There, the High Court characterised voting as a privilege instead of a constitutional right.[26] However, subsequent statements made by the then-Minister for Home Affairs and the Minister for Law in 2001 and 2009 respectively suggested that the right to vote was a constitutional right.[27] In 2015, the Court of Appeal, in the case of *Yong Vui Kong v PP* ("***Yong* (2015)**") referred to the Minister for Home Affairs' statements in 2001, suggesting that there may be a right to vote as "part of the basic structure of the Constitution."[28] However, this statement was made *obiter* as the case did not deal with the right to vote.

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23 [2020] SGCA 60, [3].

24 Wee Chong Jin, *Report of the Constitutional Commission* (Government Publications Bureau, 1966), 11 – 12.

25 *Taw Cheng Kong v Public Prosecutor* [1988] 1 SLR(R) 78.

26 *Taw Cheng Kong v Public Prosecutor* [1988] 1 SLR(R) 78, [56].

27 *Singapore Parliamentary Debates, Official Report* (16 March 2001) vol 73, col 1726 (Wong Kan Seng, Minister for Home Affairs), *Singapore Parliamentary Debates, Official Report* (13 February 2009) vol 85, col 3158 (K Shanmugam, Minister for Law).

28 *Yong Vui Kong v Public Prosecutor* [2015] 2 SLR 1129 ("***Yong* (2015)**"), [69].

12 What is clear, therefore, from these statements is that while the Government appears to have accepted the existence of a constitutional right to vote, it has never been explicitly accepted by the courts. Therefore, it was significant that the Court of Appeal clarified in *Daniel De Costa* that the right to vote is best understood as "a right that is found in the Constitution either as a matter of construing it in its entirety or as a matter of necessary implication in the light of the reference to elections contained in Art 66 and Art 39(1)."[29] The explicit acceptance of the right to vote as a constitutional right is to be highly welcomed. As famously remarked by Thomas Paine, voting is an indispensable cornerstone of the democratic process, and arguably the true and only basis of representative government.[30] By unambiguously enumerating the right to vote amongst the constitutional rights possessed by citizens, the court gave greater acknowledgement and legitimacy towards Singapore's system of representative democracy.

B. The Implication of Constitutional Rights

13 Nevertheless, some teething issues remain. For one, the method by which the court had implied these rights was not elucidated. Thus, while it is clear that constitutional rights may be implied, and the right to vote is one such right, it is unclear what standard should be applied.

14 In this regard, Goldsworthy notes that there are two possible standards to apply when implying constitutional rights: (a) the standard of practical necessity, or (b) the standard of determinative necessity.[31] The lower standard of implication is "practical necessity", as utilised by the High Court of Australia in *Lange v Australian Broadcasting Corporation*.[32] In deciding that there was a constitutional right to communicate, the court extended this implied right to vote only insofar as it was necessary to give effect to the related sections of the Constitution,[33] which provided for the system of government prescribed by the Constitution.[34] On the other hand, the higher standard of

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29 [2020] SGCA 60, [9].

30 Thomas Paine, "Dissertation on the First Principles of Government", *The Political Writings of Thomas Paine* (Boston: JP Mendum Investigator Office, 1859), 335 – 336.

31 Goldsworthy, "The Implicit and the Implied in a Written Constitution", *The Invisible Constitution in a Comparative Perspective* (Dixon & Stone gen ed) (Cambridge University Press, 2018), 137.

32 *Lange v Australian Broadcasting Corporation* [1997] HCA 25.

33 *Lange v Australian Broadcasting Corporation* [1997] HCA 25, [89].

34 *Lange v Australian Broadcasting Corporation* [1997] HCA 25, [90].

implication, namely, "determinative necessity", entails that the courts should only imply a term where it is so obvious that they do not need to be mentioned.

15 The higher standard of determinative necessity may perhaps be more appropriate in Singapore as it gives greater effect to an originalistic interpretation of the constitutional framers' intentions. In a similar vein, Goldsworthy argues that "practical necessity" is a dubious test for the genuine implication of a constitutional right, as it is possible for the constitution framers to have omitted the inclusion of the right due to a mistake.[35] In such cases, the appropriate recourse would not be to imply their existence, but a constitutional amendment to correct the deficiency.[36] One thing is, however, clear – the vagueness of the court's methodology in elucidating these rights is certainly regrettable. Perhaps, given that the judgement was given *ex tempore*, and that there was (on the facts) little time for the court to also consider the matter,[37] it may be more appropriate to flesh out these considerations in a future decision.

C. The Basic Structure Doctrine

16 The Court of Appeal in *Daniel De Costa* also touched upon the "basic structure" (or "basic features") doctrine. By way of background, as understood from the *locus classicus* of *Kesavananda Bharati v State of Kerala* ("***Kesavananda***"),[38] the "basic structure" or "basic features" doctrine is essentially a doctrine that stipulates that certain clauses in the Constitution are unamendable, since such clauses form part of the Constitution's basic structure. As it stands, however, there has not been any consensus as to whether this doctrine is applicable in Singapore law.[39] Notably, in *Ravi s/o Madasamy v Attorney-General* ("***Ravi***"),[40] the Singapore High Court seemed to interpret the "basic structure" doctrine as a "broad restatement of the truism that the Constitution rests on an overarching principled framework".[41] Moreover, in *Ravi*, it would

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35 Goldsworthy, "Constitutional Implications Revisited" (2010) 30(1) UQLJ 10, 20.

36 Goldsworthy, "Constitutional Implications Revisited" (2010) 30(1) UQLJ 10, 20.

37 Only 7 days elapsed between the application on 23 June 2020 and the judgement on 30 June 2020.

38 *Kesavananda Bharati v State of Kerala* (1973) 4 SCC 225.

39 [2020] SGCA 60, [11]. See *Yong Vui Kong v Public Prosecutor* [2015] 2 SLR 1129; *Mohammad Faizal Faizal bin Sabtu v Public Prosecutor* [2012] 4 SLR 947 cf. *Teo Soh Lung v Minister for Home Affairs* [1989] 1 SLR(R) 461; *Ravi s/o Madasamy v Attorney-General* [2017] 5 SLR 489.

40 *Ravi s/o Madasamy v Attorney-General* [2017] 5 SLR 489 ("***Ravi***").

41 *Ravi s/o Madasamy v Attorney-General* [2017] 5 SLR 489, [66].

appear that the court thought there were "valid distinctions"[42] between the "basic features" and "basic structure" of the Constitution, albeit it was content to proceed on the basis that the basic structure and features of the Constitution were the same.

17 If a distinction is to be drawn, it may be that the former refers to the contentious *Kesavananda* doctrine, whereas the latter refers to the uncontentious position that there is an "overarching structure" to the Constitution,[43] *vis-à-vis* which *only* certain amendments (*e.g.*, those that curtail judicial power) are precluded,[44] and more importantly, in respect of which certain rights can be implied to give effect to the Constitution's basic structure. Indeed, Goh has similarly noted that the "basic structure" doctrine might preclude the need to refer to whether there are any unamendable constitutional provisions in the Constitution.[45]

18 This brings us back to *Daniel De Costa*. There, the appellant argued that the right to vote was part of the "basic structure" and thus a "fundamental" right.[46] In doing so, it appears that the appellant was relying on the interpretation in *Ravi*. However, this argument was swiftly dismissed. The court thought that the appellant's argument was mistaken and unfounded, as the court was not dealing with the "validity or otherwise of any constitutional amendment" and thus, issues concerning the "basic structure" of the Constitution simply did not arise to be considered in this case."[47] In referring to the "basic structure" doctrine as relevant only to the issue of constitutional amendments, it is evident that the Court of Appeal thought that the phrase "basic structure" doctrine merely referred to the *Kesavananda* doctrine. However, as noted earlier, the "basic structure" doctrine as interpreted in *Ravi* is not just limited to the issue of constitutional amendments. To that end, if the term "basic structure" or "features" is to be read coterminously, then this should entail that, in interpreting past decisions where the term "basic

42 *Ravi s/o Madasamy v Attorney-General* [2017] 5 SLR 489, [56].
43 *Ravi s/o Madasamy v Attorney-General* [2017] 5 SLR 489, [66].
44 *Ravi s/o Madasamy v Attorney-General* [2017] 5 SLR 489, [66].
45 Yihan Goh, "The interpretation of the Singapore Constitution: Towards a unified approach in interpreting legal documents", *Constitutional Interpretation in Singapore: Theory and Practice* (gen ed Jacelyn L Neo) (Routledge, 2017), 260.
46 [2020] SGCA 60, [10].
47 [2020] SGCA 60, [11].

structure" was used (*e.g.*, *Yong* (2015)),[48] its meaning should not be watered down.

D. Free and Fair Elections: The Content Of The Right To Vote

19 The next point that the court considered was the right to free and fair elections. The court accepted that as a "statement of principle", elections must be free and fair.[49] Nevertheless, the more contentious matter, as the court noted, was whether the litigant could "establish the precise content of the right", and "show how that right [was] being violated".[50]

20 The appellant sought to argue that the elections would not be free and fair for several reasons. First, s 8 of the PE(C19)A provided that the Returning Officer or Director of Medical Services could lawfully advise voters against voting if they "exhibit acute respiratory symptoms or are febrile; or may have been exposed to the risk of becoming infected with, or a carrier of, the COVID-19". Second, many Singaporeans overseas could not vote due to travel restrictions. Third, holding elections may affect the health of the polling agents.[51]

21 The first reason was dismissed on the grounds that s 8 of the PE(C19)A was merely a provision designed to exempt certain public servants from the risk of prosecution (since it is prohibited for persons to dissuade voters from voting).[52] Furthermore, the Returning Officer or Director of Medical Services could only advise voters not to vote, and did not exclude the right of a voter from casting his/her ballot subject to appropriate public health precautions.

22 The second reason was dismissed on the basis that the appellant "was unable to identify the constitutional basis upon which it could be said that the Government had an obligation to provide a means for every Singaporean anywhere in the world to be able to cast their ballots".[53]

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48 *Yong Vui Kong v Public Prosecutor* [2015] 2 SLR 1129.
49 [2020] SGCA 60, [13].
50 [2020] SGCA 60, [13].
51 [2020] SGCA 60, [13].
52 [2020] SGCA 60, [13].
53 [2020] SGCA 60, [13].

23 Notably, however, the Court of Appeal did not specify what obligations (if any) the Government had to ensure that the electorate would be able to cast their votes. It is therefore unclear what the right to vote actually demands as a minimum standard. It may very well be that, notwithstanding Singapore's system of compulsory voting,[54] the right to vote in Singapore is a form of "negative liberty". As famously elucidated by Isaiah Berlin,[55] negative liberties generally entail the absence of interference in acting.[56] If so, one wonders how far this point can be stretched. Would a complete lack of means to vote overseas be constitutional? Would the lack of administrative measures to enable prisoners that are legally entitled to vote be also viewed as constitutional?[57]

24 This may boil down to the quintessential question that was highlighted at the start of this section – what is the precise content of the right to vote? Perhaps the clearest point of reference could be the political system which sets the backdrop to which the Constitution was drafted – representative democracy. In fact, the Court of Appeal highlighted the importance of this in the case of *Vellama v Attorney-General*, where the court held:

> "the form of government of the Republic of Singapore as reflected in the Constitution is the Westminster model of government, with the party commanding the majority support in Parliament having the mandate to form the government. The authority of the government emanates from the people."[58]

25 Further questions may yet arise, such as the particular type of representative democracy espoused in the Singapore constitution, which will undoubtedly shape the exact content of this right to vote. Unfortunately, the court did not give any indication here as to how the content of this constitutional right to vote should be delineated. Instead, the court simply found that the appellant failed to identify the specific

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54 Parliamentary Elections Act (Cap 218, 2011 Rev Ed) s 43.

55 Isaiah Berlin, *Two Concepts of Liberty*, (Clarendon Press, 1958).

56 Ian Carter, "Positive and Negative Liberty", *The Stanford Encyclopedia of Philosophy* (Winter 2019 Edition) <https://plato.stanford.edu/entries/liberty-positive-negative/#PosLibConNeu> (accessed 10 July 2020).

57 See, *e.g.*, *R (Chester) v Secretary of State* [2013] 3 WLR 1076, where it was noted that even where prisoners were eligible to vote, they could not do so in practice because of the lack of "administrative arrangements".

58 *Vellama d/o Marie Muthu v Attorney-General* [2013] 4 SLR 1, [79].

aspects of what the right to "free and fair elections" requires, and why it is a "constitutional right".[59]

26 As for the third ground, it was quickly dismissed on the basis that the health concerns of the voting agents were not relevant to the right to vote.[60] Thus, the appeal was dismissed.

IV. Locus Standi

27 In the last paragraph of the judgement, the Court of Appeal dealt with the standing of the appellant, albeit in *obiter*. By way of background, for an applicant to possess the requisite standing to bring about a claim for a prerogative order, three requirements must be met.[61] First, the subject matter must be susceptible to judicial review.[62] This was dealt with in brief in Part II. Second, the material must disclose an arguable case for the applicant.[63] Third, the applicant must have sufficient interest in the matter.[64]

28 The Court of Appeal held that the appellant did not have any standing to bring the action as the third requirement was not met. This was for two reasons. First, the appellant was not based overseas and so would not be affected by any difficulty faced by potential voters residing overseas. Second, insofar as the appellant relied on those who might be dissuaded by any public health advisory, the court held that not only was it "premature to say whether such an advisory [would] be issued", the appellant also did not suggest that he would be prevented from voting as adequate arrangements would not be made for him to vote.[65] In short, the appellant did not have standing because it was premature for him to bring the claim.

29 Notably, while prematurity is an established basis for refusing leave to litigants seeking a prerogative order, one wonders if it might be impractical for an appellant to be permitted to bring a claim only when such advisories are issued. After all, it is possible that any advisory

[59] [2020] SGCA 60, [14].
[60] [2020] SGCA 60, [13].
[61] *Jeyaretnam Kenneth Andrew v Attorney-General* [2014] 1 SLR 345, [5].
[62] *Jeyaretnam Kenneth Andrew v Attorney-General* [2014] 1 SLR 345, [5].
[63] *Jeyaretnam Kenneth Andrew v Attorney-General* [2014] 1 SLR 345, [5].
[64] *Jeyaretnam Kenneth Andrew v Attorney-General* [2014] 1 SLR 345, [5].
[65] [2020] SGCA 60, [15].

would only be released on Polling Day – by which, it may be too late to seek relief. By contrast, in *Vijaya Kumar s/o Rajendran v Attorney-General*, the High Court rejected an argument by the Attorney-General that the relief sought was premature, as the timeframe might have been too tight for the applicants to seek effective relief.[66] This was also seen in the earlier decision of *Wong Keng Leong Rayney v Law Society of Singapore*, where the High Court acknowledged that where there is a "real risk" of irreparable damage, then any requirement that the relief sought is not premature could be dispensed with.[67] Given the possible short timeframe between the issuance of any advisories and the election of the candidates, it is certainly questionable whether this was a sound basis for dismissing the appeal.

V. Conclusion

30 Ultimately, the short 13-page *ex tempore* judgement of *Daniel De Costa* leaves as much unanswered as it clarified the position on various aspects of the law. For instance, it leaves open the question as to whether the dissolution of Parliament is a justiciable issue, and what standard should be applied to assess the prematurity of claims. Nevertheless, despite these unanswered questions, the clarifications made in this case should be lauded. Notably, this is the first time in Singapore's history of constitutional jurisprudence that the right to vote been so explicitly and authoritatively affirmed as being a constitutional right. As earlier argued, this is a significant step forward in the constitutional protection of the system of representative democracy. Yet, this is unlikely to be the last word on the constitutional right to vote. As the Court of Appeal pointed out, the critical task is to establish the precise content of this right.[68] In the meantime, we await further decisions to elucidate the content of this constitutional right.

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66 *Vijaya Kumar s/o Rajendran v Attorney-General* [2015] SGHC 244, [25].

67 *Wong Keng Leong Rayney v Law Society of Singapore* [2006] 4 SLR(R) 934, [20] – [21].

68 [2020] SGCA 60, [13].

THE PRESUMPTION OF INNOCENCE: A GOLDEN THREAD ALWAYS TO BE SEEN

Although the presumption of innocence is fundamental to the modern criminal justice system, there is little clarity on what it is and how it applies. This essay argues that "innocence" in the criminal justice system should be confined to legal innocence and not factual innocence. Accordingly, the presumption of innocence should be confined to presuming the legal innocence of an accused. It follows then that the presumption of innocence cannot apply to any part of the criminal process apart from the trial itself. Further, jurisprudentially, given that the presumption of innocence is best understood as a procedural aspect of the right to a fair trial, the existing law needs to be reformed in some aspects so as to accommodate such a conception of the presumption. To that end, this essay proposes some possible reforms as a way to move forward.

Mark **CHIA** Zi Han[*]

Class of 2021 (LLB), School of Law, Singapore Management University

I. Introduction

1 For something supposedly as fundamental as the presumption of innocence, there is surprisingly little clarity as to what it actually is and entails in Singapore's criminal justice system.[1] There has to be a deeper understanding beyond the pithy summary, "innocent until proven guilty." The questions proceeding from such a confusion are not minor ones, but have significant impact on the way the legal system understands the presumption, both as a matter of practice, and as a matter of jurisprudence. To date, the presumption has largely been taken for granted, with the Singapore courts mentioning it and making references to the *Woolmington* conception, but without authoritatively setting out a

[*] This author is grateful to Associate Professor Chen Siyuan and Chai Wen Min in helping to produce a better manuscript than it could ever be, had it been done alone.

[1] Chen Siyuan, "A Preliminary Survey of the Right to Presumption of Innocence in Singapore" (2012) LAWASIA Journal 78, 79.

clear and undisputed definition of the presumption.[2] In this regard, while foreign jurisdictions have gone a little further in this aspect, the debate over its content continues, with prominent academics holding different views.[3]

2 The questions this essay answers are thus threefold. First, how should "innocence" be understood in the context of Singapore's criminal procedure and as a corollary, what should "presuming innocence" mean? Second, when should the presumption apply, and what should it apply to? Third, what sort of preliminary reforms should be undertaken so as to best give effect to and accommodate the presumption so defined?

3 To that end, the thesis of this essay is threefold. First, "innocence" in the criminal trial process should be confined to probatory innocence, as opposed to material innocence. Second, given that definition, it follows that the presumption does not applies to any point in the criminal process *outside* of trial. Nor should the presumption be used to adjudicate on the substance of the criminal law. Finally, possible reforms could be undertaken to accommodate this understanding of the presumption, including the recalibration of certain rules of evidence that reverse the burden of proof, *e.g.*, the presumption of trafficking in the Misuse of Drugs Act ("**MDA**"),[4] as well as reconceptualising the privilege against self-incrimination as a right. Ultimately, the presumption of innocence should be understood as more akin to a procedural right rather than as a substantive human right.

II. Woolmington and the Basis of the Presumption

4 Our discussion begins first with the presumption. Few paragraphs are more famous with regards to the presumption of innocence than Viscount Sankey LC's judgment in *Woolmington v Director of Public Prosecutions* ("***Woolmington***"):[5]

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2 Chen Siyuan, "A Preliminary Survey of the Right to Presumption of Innocence in Singapore" (2012) LAWASIA Journal 78, 79.

3 See, *e.g.*, the differing views of Andrew Stumer, Richard Lippke, and Larry Laudan who argue for a procedural view of the presumption of innocence, against that of Ho Hock Lai and Chen Siyuan, who are of the view that the presumption ought to be more substantive in nature. See also Lippke's and Laudan's disagreement on what the concept of "innocence" should be.

4 Misuse of Drugs Act (Cap 185, 2001 Rev Ed).

5 *Woolmington v Director of Public Prosecutions* [1935] AC 462, 481.

> "Throughout the web of the English Criminal Law ***one golden thread is always to be seen***, that it is the duty of the prosecution to prove the prisoner's guilt … If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution of the prisoner … the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, ***the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained***." (emphasis added)

The *Woolmington* conception is therefore understood to be a statement on the presumption of innocence. The burden of proof ("**BOP**") is on the Prosecution to prove the guilt of an accused person, and the standard of proof ("**SOP**") is beyond a reasonable doubt.

5 The most obvious rationale for the presumption is the need to protect innocent people from wrongful conviction.[6] As the court in *Jagatheesan s/o Krishnasamy v PP*[7] recognised, "It would be wrong to visit the indignity and pain of punishment upon a person … unless and until the Prosecution is able to dispel all reasonable doubts that the evidence … may throw up."[8] Therefore, because of the weighty impact criminal sanctions have on the accused's finances, liberty or life, the burden is laid on the Prosecution to prove his guilt beyond a reasonable doubt, which is an exceptionally high standard. Furthermore, placing the burden on the Prosecution also goes some way towards normalising the disparity in positions between the parties when entering a criminal trial, given that the Prosecution has historically always had the better "resources to investigate, prosecute and obtain evidence".[9]

III. The State of the Presumption

6 The *Woolmington* conception has been cited approvingly in the Singapore courts. Indeed, *XP v PP* ("***XP***")[10] described the presumption as "the cornerstone of the criminal justice system and the bedrock of the

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6 Andrew Stumer, *The Presumption of Innocence: Evidential and Human Rights Perspectives* (Hart Publishing, 2010), 28.

7 *Jagatheesan s/o Krishnasamy v PP* [2006] 4 SLR(R) 45.

8 *Jagatheesan s/o Krishnasamy v PP* [2006] 4 SLR(R) 45, [60].

9 Chen Siyuan and Denise Wong, "Civil and Criminal Litigation" in *The Legal System of Singapore: Institutions, Principles and Practice* (Gary Chan Kok Yew & Jack Tsen-Ta Lee gen ed) (LexisNexis, 2015), 292.

10 *XP v PP* [2008] 4 SLR(R) 686.

law of evidence. As trite a principle as this is, it is sometimes necessary to restate that every accused is innocent until proven guilty."[11]

7 A quick survey of various international instruments shows that other jurisdictions have committed to entrenching this right to the presumption of innocence. For instance, under Art 14 §2 of the *International Covenant on Civil and Political Rights*,[12] everyone charged with a criminal offence "shall have the right to be presumed innocent until proved guilty according to law." The same applies for the *European Convention on Human Rights* ("[e]veryone charged with a criminal offence shall be presumed innocent until proven guilty according to law"),[13] as well as the *American Convention on Human Rights* ("[e]very person accused of a criminal offence has the right to be presumed innocent so long as his guilt has not been proven according to law").[14] These three representative instruments seem to follow the *Woolmington* conception, and additionally accord the right to be presumed innocent substantive human right status. There also does not appear to be any large disagreement over the SOP of the Prosecution's case (*viz*. that the case against the accused must be proved beyond a reasonable doubt).

8 Nevertheless, this right to be presumed innocent does not appear to enjoy constitutional status in Singapore. The Singapore Constitution,[15] unlike the abovementioned three documents, does not explicitly define or affirm the presumption.[16] No local case has thus far also declared the presumption of innocence to be a constitutional right.[17] To muddy the waters further, none of the three international instruments cited above provide any guidance as to how we should understand the concept of "innocence", which continues to cast the scope of the

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11 *XP v PP* [2008] 4 SLR(R) 686, [91].

12 International Covenant on Civil and Political Rights (16 December 1966) (entered into force 23 March 1976).

13 European Convention on Human Rights (1950), Art 6 §2 (entered into force 3 September 1953).

14 American Convention on Human Rights (22 November 1969), Art 8 §2 (entered into force 18 July 1978).

15 Constitution of the Republic of Singapore (1999 Reprint).

16 Chen Siyuan, "A Preliminary Survey of the Right to Presumption of Innocence in Singapore" (2012) LAWASIA Journal 78, 81. Although an argument could be made that Art 9(1) of the Constitution provides such a presumption, Chen argues that Lord Diplock did not read the presumption of innocence into Art 9(1).

17 Chen Siyuan, "A Preliminary Survey of the Right to Presumption of Innocence in Singapore" (2012) LAWASIA Journal 78, 82.

presumption in doubt. This lack of clarity as to what "innocence" or "guilt" entails leads to further confusion: what exactly should we be presuming? If the presumption is a substantive right, does it mean that the presumption can be used to adjudicate on the substance of the criminal law? And what kind of criminal justice system would best fit such a presumption?

IV. The Concept Of "Innocence" and the Corollary Definition of the Presumption

9 Bearing these issues in mind, this essay first points out the two prevailing theories of "innocence", so that a clear understanding of what "innocence" means will lead to a clearer conception of what "presuming innocence" would entail.

A. The Two Meanings of Innocence

10 According to Professor Laudan, there are two meanings of "innocence", linked together with two meanings of "guilt" – either material or probatory.[18] He defines them as such:[19] first, *material innocence*, where an accused is factually innocent as he did not commit the offence so defined, or has an available defence. The flipside to this is *material guilt*, where the accused is factually guilty in that he committed the offence so defined, without any available defence. Second, there is *probatory innocence*, where an accused is legally innocent as the Prosecution's case did not reach or exceed the standard of proof. The flipside, again, is *probatory guilt*, where the accused is legally guilty in that the Prosecution's case has reached or exceeded the standard of proof. In essence, material innocence or guilt refers to *factual* innocence or guilt, whereas probatory innocence or guilt refers to *legal* innocence or guilt. For the man on the street, it is likely that the conventional notion of "innocence" is simply confined to material guilt: a simple question of whether the accused is guilty or not.

11 Laudan then goes on to explain the asymmetry between the two concepts. Whereas a finding that one is probatively guilty may possibly support the truth that one is *in fact* materially guilty (due to the factual

[18] Larry Laudan, "The Presumption of Innocence: Material or Probatory?" (2005) 11(4) Legal Theory 333.

[19] Larry Laudan, "The Presumption of Innocence: Material or Probatory?" (2005) 11(4) Legal Theory 333, 339.

matrix passing the requisite standard of proof), a finding that one is probatively innocent does not at all lead to the inference that one is factually innocent.[20] In this author's view, this is because a finding by the court that one is probatively innocent is simply a finding of "not guilty" – the court is not actually making a pronouncement on the truth or veracity of the assertion that one is in fact innocent. Indeed, this is recognised in s 45A(3) of the Evidence Act ("**EA**"),[21] which considers a person convicted to possess the requisite *mens rea* and *actus reus* of the offence respectively.

B. Excursus: Where Does Singapore Seem To Stand?

12 The question then, is where Singapore stands with respect to the *latter* logic, *i.e.*, the distinction between factual and legal innocence. In 2008, an Attorney-General's Chambers ("**AGC**") spokesman was reported as having said that:

> "[t]here is often confusion…[of] what an acquittal means. The prosecution [must] prove the case beyond a reasonable doubt. This means that if there is any reasonable doubt, the accused gets the benefit of it … [it] does not mean that the accused was innocent in the sense that he did not do the deed."[22]

However, his distinction between legal and factual innocence drew some furore. Although not explicitly referring to the comment, V K Rajah JA (as he then was) said in *XP*:[23]

> "***If the evidence is insufficient to support the Prosecution's theory of guilt***, and if the weaknesses in the Prosecution's case reveal a deficiency in what is necessary for a conviction, ***the judge must acquit the accused***, and with good reason: it simply has not been proved to the satisfaction of the law that the accused is guilty, and ***the presumption of innocence stands unrebutted***. ***It is not helpful, therefore, for suggestions to be subsequently raised about the accused's "factual guilt" once he has been acquitted. To do so would be to undermine the court's finding of not guilty and would also stand the presumption of innocence on its head*** … the

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20 Larry Laudan, "The Presumption of Innocence: Material or Probatory?" (2005) 11(4) Legal Theory 333, 339 – 340.

21 Evidence Act (Cap 97, 1997 Rev Ed).

22 K C Vijayan, "When acquittal is bitter-sweet", *The Straits Times*, 8 May 2008. However, the comment ought to be considered in the context of the interview, which focused on the issue of compensation; the spokesman was "explaining why compensation could not be paid to everyone who gets acquitted, by pointing out that not everyone who gets acquitted is necessarily innocent".

23 *XP v PP* [2008] 4 SLR(R) 686, [94].

> decision of guilt or innocence is constitutionally for the court and the court alone to make … there is only one meaning to "not proved" and that is that it has not been established in the eyes of the law that the accused has committed the offence with which he has been charged." (emphasis added).

13 In this regard, it is noteworthy that while Rajah JA disapproved of the AGC making comments on the material guilt of the accused, his definition of an acquittal was not explicitly defined as a finding of material innocence; all he had said was that where probative guilt was not proven, then no further suggestions of the accused's material guilt ought to be made, so as to prevent any aspersions cast upon the court's pronouncement of the absence of guilt.

14 The Minister for Law (K. Shanmugam) however, in a reply to questions posed by certain Members of Parliament, defended the AGC's statement in Parliament. He cited then AG Chan Sek Keong,[24] stating that the courts do not concern themselves with the question of material innocence. The Minister went onto define an acquittal as "the prosecution [failing] to prove the case beyond reasonable doubt."[25] The sitting Government of the day thus held that the criminal process ought only to be concerned with probative innocence, stating that a person may have committed a crime (*i.e.*, be materially guilty), but yet still obtain an acquittal in court (*i.e.*, not probatively guilty).[26] On balance therefore, it would appear that Singapore's understanding of "innocence" leans more towards *probative* innocence as compared to *material* innocence.

C. Argument for the Probatory Theory Of "Innocence"

15 Proceeding on the assumption that the Singapore legal system's understanding of "innocence" in the criminal justice system is simply probative innocence, it should remain that way. This is especially so if we consider the criminal trial process, the relationship between the civil and criminal domains, the resulting lack of clarity in the content of the presumption otherwise, and the epistemic state of the court.

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[24] Chan Sek Keong, "The Criminal Process – The Singapore Model" [1996] Singapore Law Review 434, 471.

[25] *Singapore Parliamentary Debates, Official Report* (25 August 2008) vol 84, col 2983 (K Shanmugam SC, Minister for Law).

[26] *Singapore Parliamentary Debates, Official Report* (25 August 2008) vol 84, col 2984 (K Shanmugam SC, Minister for Law).

(1) Decisions in the Criminal Trial Process and the Meaning of an Acquittal

16 First, consider the criminal trial process. Although trials are often understood as "fact-finding" processes, arguably, trials are more strictly concerned only with the establishment of sufficient facts which are probative enough to support a *legal* decision. Thus, while the trial process may deal with issues of fact, the decision to acquit or convict is ultimately a *legal* (or probatory) one that is only borne out after a factual matrix has been established to be sufficient for such a decision. This can be seen by how the Supreme Court defines an "acquittal" to be "a decision of a judge that an accused is not guilty or a case is not proven".[27] When a judge therefore acquits a person, he is making a declaration that in the eyes of the law, the accused is not guilty, in the probatory sense.

17 The criminal trial process *therefore* does not understand an acquittal to be a finding of material innocence (in that the accused did not truly commit the crime). In fact, for a factfinder to sufficiently know enough to decide on the question of whether one is materially innocent or guilty, he requires, as a minimum, one of three things: (a) to be a witness to the actual offence, (b) to possess omniscience, or (c) the accused confesses. Neither of these three methods are achievable. The first requires the judge to recuse himself; the second is impossible; and for the third, although a guilty plea is strong evidence of material guilt, there is nothing which guarantees the material truth of a confession. Thus, in *Muhammad bin Kadar v PP* ("***Kadar***"),[28] though one of the accused initially confessed to killing the deceased,[29] he was ultimately acquitted by the Court of Appeal as the evidence did not bear up in trial.[30]

18 Therefore, it is only sensible and logical to confine the decisions made within a criminal trial to the legal sense, *i.e.*, an acquittal is merely a finding of probative innocence. This would mean that the accused is not guilty in the eyes of the law, simply because the Prosecution's case has not met or exceeded the standard of proof.

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27 Supreme Court website, "Glossary of Legal Terms" <https://www.supremecourt.gov.sg/services/self-help-services/glossary-of-terms> (accessed 22 October 2020).

28 *Muhammad bin Kadar v PP* [2011] 3 SLR 1205.

29 *Muhammad bin Kadar v PP* [2011] 3 SLR 1205, [15].

30 *Muhammad bin Kadar v PP* [2011] 3 SLR 1205, [194].

(2) Potential for Subsequent Civil Suits to be Successful

19 Second, the fact that the victim of a crime can still bring a civil suit against the accused and potentially succeed on a lower standard of proof lends weight to the proposition that the term "innocence" in the criminal law context ought to refer to *probative* innocence. Consider the following scenario, where *A* is charged for stabbing *B* and killing him. The Prosecution adduces circumstantial evidence, such as DNA traces belonging to *A* on the knife. However, the defence succeeds in casting reasonable doubt on the method in which the DNA evidence was obtained, and *A* is acquitted on grounds that the Prosecution has failed its case beyond a reasonable doubt. Subsequently however, *B*'s estate sues *A* for battery. Given the lower standard of proof in civil trials, *i.e.*, a balance of probabilities, *B*'s estate succeeds in its claim and obtains damages from A. The fact that *A* can be acquitted in a criminal trial but yet still found liable for damages in a civil trial based on the same factual matrix is indicative that the acquittal was never a finding of material innocence. If this scenario sounds familiar, it probably is. The case involved O. J. Simpson, who while acquitted for the murder of his ex-wife and another man on grounds of reasonable doubt (over the DNA evidence adduced),[31] was still found liable for wrongful death and battery against the man and his ex-wife.[32]

20 Of course, the civil trial could involve an action that is vastly different from the offence disclosed in the criminal trial. Nonetheless, such a scenario is not implausible. An accused may, *ex hypothesi*, not be found guilty of criminal negligence, and yet still liable for civil negligence due to differences in the standard of proof.[33] When one further considers that our courts have previously declared that the "degree" of negligence required in criminal and civil cases are one and the same,[34] the conclusion here must be that any "additional elements … to be proved"[35] is merely an *incident* of legislation, and not due to *substantive* differences in the cause of action. Consequently, it is possible for an acquitted person, whose probative innocence has been

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31 BBC website, "1995: OJ Simpson verdict: 'Not guilty'", 3 October 1995 <http://news.bbc.co.uk/onthisday/hi/dates/stories/october/3/newsid2486000/2486673.stm> (accessed 22 October 2020).

32 B. Drummond Ayres Jr., "Jury Decides Simpson Must Pay $25 Million in Punitive Award", *The New York Times*, 11 February 1997.

33 *Lim Poh Eng v PP* [1999] 1 SLR(R) 428, [27].

34 *Lim Poh Eng v PP* [1999] 1 SLR(R) 428, [20].

35 *Lim Poh Eng v PP* [1999] 1 SLR(R) 428, [27].

declared, to still be guilty factually, as reflected by a successful civil trial proved against him on a different standard of proof. Thus, the best way to reconcile this difference is to understand the acquittal in the criminal trial as a finding of probative, and not material innocence. Such an approach is superior to chalking up the difference as reflective of systemic injustice and abuse.

(3) Lack of Clarity of Content of Presumption otherwise

21 A third reason as to why the term "innocence" should be treated as legal as opposed to factual innocence lies in a counterfactual scenario. Consider this: if one agrees that "innocence" should be understood as probative innocence, it follows that the presumption of innocence must refer to a presumption of probative, and not material innocence (*i.e.*, the accused's probative guilt has not yet been proved before a court of law). However, should the presumption be understood as a presumption of material innocence, as some have advocated for,[36] there is little clarity on what exactly is to be presumed. Here, Laudan is instructive.[37]

22 Suppose that *A* is charged for allegedly stabbing *B* and killing him. What is the court to presume? Is the court supposed to begin the trial disbelieving that (a) *A* never stabbed *B*; (b) *A* never waved the knife at *B*; (c) *A* never intended to stab *B*; (d) *A* was acting in private defence, (e) *A* had diminished mental capacity; or (f) *A* was not negligent? Simply put, is the court supposed to begin the trial disbelieving *every* single possible element of the offence or is it sufficient that it disbelieves at least one?[38]

23 Conventional wisdom dictates that it is the former.[39] Yet, if the presumption refers to the presumption of material innocence, then that goes further than what the presumption actually demands of the court, since *A* is materially innocent so long as *one* element is false.[40] Moreover,

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36 Richard L. Lippke, *Taming the Presumption of Innocence* (Oxford University Press, 2016).

37 Larry Laudan, "The Presumption of Innocence: Material or Probatory?" (2005) 11(4) Legal Theory 333, 346.

38 Larry Laudan, "The Presumption of Innocence: Material or Probatory?" (2005) 11(4) Legal Theory 333, 346.

39 Larry Laudan, "The Presumption of Innocence: Material or Probatory?" (2005) 11(4) Legal Theory 333, 346.

40 Larry Laudan, "The Presumption of Innocence: Material or Probatory?" (2005) 11(4) Legal Theory 333, 346.

it is impossible to disbelieve all possible elements at the same time, since *A* not stabbing *B* would logically rule out stabbing him but with diminished mental capacity.[41]

24 However, if the presumption is understood as referring to the presumption of probative innocence, there would not be a need for such extremes. All the court has to believe is that the elements of the offence have not been proven, since probative innocence simply means that probative guilt remains unproven. Any notion that the court may have with respect to the factual innocence or guilt of the accused is not relevant to the presumption of innocence.

(4) Better Consistency with the Epistemic State of the Court

25 The final reason is that such an approach would be more consistent with the epistemic state of the court. Consider the scenario where the court has to presume the material innocence of an accused. If so, the court must put out of its mind the thorough investigations performed and the preliminary evidence obtained by the Prosecution in making any finding against the accused. Laudan furthermore goes on to say that any fact-finder that decides that it already has sufficient information to determine factual guilt or innocence (which is what the presumption of material innocence demands) is suspect in that there is already bias,[42] even though the opinion remains rebuttable. Contrariwise, if the court were to presume probative innocence, all it would have to do is to "accept the thesis" or believe that there is not yet any evidence of probative guilt. This better reflects the epistemic state of the court, as it is difficult for any court to be truly agnostic about material guilt, given the time the accused has spent in the criminal process. It is however significantly *easier* for the court to be agnostic about probative guilt, as it has to be proved.

V. Applying the Presumption of Probative Innocence

26 Having established that "innocence" ought to be understood as "probative innocence", and the presumption ought to refer to the presumption of probative innocence, the following questions arise. First,

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41 Larry Laudan, "The Presumption of Innocence: Material or Probatory?" (2005) 11(4) Legal Theory 333, 347.

42 Larry Laudan, "The Presumption of Innocence: Material or Probatory?" (2005) 11(4) Legal Theory 333, 350.

when should the presumption apply in the criminal process? A parallel question is – to *whom* should it apply? Second, *what* should the presumption apply to?

A. When the Presumption Ought to Apply

27 Those who believe that the presumption ought to be a substantive human right have, more often than not, advocated for it to apply beyond the trial context, in particular, the pre-trial phase, where officials have to justify their investigations and their detention of suspects.[43] Arguably, however, the presumption only makes sense within the context of trial, regardless of whether one perceives the presumption as referring to material or probative innocence.

(1) The Pre-Trial Context

28 Consider the pre-trial context. In the ordinary case, if a complaint is made, or an offence is discovered in some way, the matter will be investigated by the law enforcement agencies ("**LEAs**"). Once evidence is unearthed, the wheels of the criminal system will start to turn (*e.g.*, a statement is taken, the person is detained if need be, he is charged, granted bail if possible, or otherwise remanded). Nevertheless, whether or not one refers to the presumption of material innocence or probative innocence, neither would make sense in the pre-trial context.

29 If say, the presumption refers to material innocence, it will be conceptually challenging to apply. For one, how would it operate in the pre-trial context? If LEAs have to *presume* that an accused is truly innocent as a matter of *fact*, would that require them to not take any conduct against the accused (*e.g.*, detention, investigations, and statement recording), for fear of breaching the presumption of innocence? Clearly not, because in such a case, LEAs would become redundant and utterly out of place in a criminal process that *refuses* to suspect anyone – the criminal process itself becomes toothless, and this is clearly absurd.

30 Even then, even if conduct is taken against the accused, the accused is *still* considered *factually* innocent. This is because the fact that he is being investigated as opposed to being thrown into jail

[43] Hamish Stewart, "The Right to Be Presumed Innocent", (2013) 21 Criminal Law & Philosophy 407, 413.

(immediately) shows that the criminal process of establishing guilt, whether one views it as factual or probative guilt, is still ongoing. Of course, this is not to say that such conduct does not come at a cost for the accused when he is finally acquitted, but at the very least, he is still considered innocent, in whatever sense of the word. Therefore, there is nothing to presume.

31 Similarly, if the presumption here refers only to probative innocence, it will still be superfluous in the pre-trial context, since there is no probative innocence for the LEAs to presume. The accused *is* probatively innocent – his probative guilt has not yet been proven in a court of law. To that end, the relevant actions taken by the LEAs would be permissible. No other action is required – one need not presume that which is already true.

32 A possible rebuttal to this analysis is that the presumption of probative innocence would be superfluous even in the trial process, since at any point of time in the trial before the court makes a decision, the accused *is* probatively innocent and thus, there is similarly nothing for the court to presume. However, the presumption here ought only to apply to the judge,[44] in that the judge must empty himself of any presuppositions by examining the evidence produced *in the trial alone* with a neutral view, believing only that probative guilt is not yet proven. This is because the judge is the one who makes the decision to convict or acquit. Therefore, as part of some sort of "moral assurance"[45] that the decision is based solely on the sufficient evidence adduced by the Prosecution and not on his own presuppositions, there must be an additional layer of "security" predicated of the judge's epistemic state: he *must* presume the probative innocence of the accused, something that LEAs do not require.

(2) The Post-Trial Context

33 For completeness, the presumption also ought not to apply to the post-trial context. Consider the counterfactual scenario where it does. If it does, who should the presumption apply to? It cannot be the courts,

[44] This argument applies to the fact-finders in both jury and bench trials, though in Singapore's context, the criminal process is purely bench.

[45] Richard L. Lippke, *Taming the Presumption of Innocence* (Oxford University Press, 2016). Lippke's use of "moral assurance" in his book is modified for the context of this paragraph.

given that unless and until an appeal is brought, the case will never appear before the courts again. The only logical answer is the Prosecution. Yet if the Prosecution is supposed to presume the probative innocence of an accused, would bringing an appeal against an acquittal be contrary to the presumption? Worse, if the accused ends up being convicted, at what point do we stop presuming the probative innocence of an accused? The confusion is only deepened if the presumption is understood as referring to material innocence.

B. What the Presumption Ought to Apply to

34 If properly understood as probatory, the presumption ought then to only apply to the *procedure* of the trial. Some voices have however called for the presumption to be used to adjudicate on the substance of criminal law.[46] As *Tadros* argues, the presumption ought to "place substantive constraints on the criminal law".[47]

35 However, the presumption of innocence, as properly understood, would only logically apply procedurally and not substantively. Since the presumption only requires the Prosecution to prove beyond a reasonable doubt the probative guilt of the accused, there is nothing about it that would apply *ex hypothesi* to the substance of criminal law; the presumption in and of itself is fundamentally a procedural rule of evidence.

36 It cannot be used by Parliament to decide on its criminal theory before enacting it as criminal law.[48] For instance, how will the presumption help Parliament in deciding the kind of harmful acts to criminalise? There is nothing that conceptually links the presumption to the adjudication of the substantive criminal law.

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[46] See for example Victor Tadros, "The Ideal of the Presumption of Innocence" (2014) 8(2) Criminal Law and Philosophy 449; Victor Tadros, "Rethinking the Presumption of Innocence" (2007) 1(2) Criminal Law and Philosophy 193 and JC Jeffries & PB Stephan III "Defences, Presumptions and the Burden of Proof in Criminal Law" (1979) 88(7) Yale Law Journal 1325.

[47] Richard L. Lippke, *Taming the Presumption of Innocence* (Oxford University Press, 2016), 50.

[48] For a deeper answer as to the problems of a substantive approach to the presumption, see Andrew Stumer, *The Presumption of Innocence: Evidential and Human Rights Perspectives* (Hart Publishing, 2010), 61 – 63.

37 This is not to say that there is *no* mechanism for the courts to adjudicate on the substance of criminal law: judicial review of the substance of criminal law (and by extension Parliament's criminal theory) seems to be a sounder alternative jurisprudentially, as compared to using the presumption to constrain legislative criminal theory.

VI. Addressing Concerns About Probative Innocence

38 That being said, there are concerns over a probatory theory of innocence, as it seems to conceive the scope of the presumption of innocence as "thin", which does not sit so well with the rationale of the presumption: to protect the materially innocent from wrongful conviction.

A. Weaker Protection for Accused Persons

39 The first concern therefore is that if the presumption merely refers to probative innocence, then there is insufficient protection for accused persons, given its "thinner" nature as compared to a presumption that presumes material innocence (which is necessarily the more robust of the two). Furthermore, since the presumption of probative innocence does not apply to the pre-trial context, there is reduced prevention of wrongful arraignment.

40 On closer inspection however, while an accused's rights ought to be treated with utmost gravity and protected fiercely, a presumption of probative innocence may not be the only means to that end. This concern can be addressed by other mechanisms that do not necessitate a more robust presumption, or much less even engage the presumption of probative innocence. For instance, one does not need recourse to the presumption to explain why LEAs ought to justify their arrest or investigations of suspects: the basic right to liberty as enshrined in Article 9(1)[49] provides a far firmer basis to ground the demand for LEAs to explain their pre-trial conduct towards suspects. After all, the presumption has never been treated with equal constitutional status as the positive fundamental liberties found in the Constitution.

[49] Constitution of the Republic of Singapore (1999 Reprint), Art 9(1).

41 Recent local jurisprudence already reveals a trend of the courts holding LEAs to greater levels of accountability for their actions,[50] without any reference at all to the presumption. In *Lim Boon Keong v PP*,[51] the court held that the Health Sciences Authority had a duty to review its procedures such that its tests would "accurately reflect the legal regime under which it operates".[52] In *Ong Pang Siew v PP*,[53] the court criticised the Prosecution's expert witness for failing to meet the professional standard required of him.[54] It would seem, therefore, that there is no need for any reference to the presumption. In any event, any concern about the scope of protection fails to consider that the presumption of probative innocence *has* protected the rights of accused persons. In *AOF v PP*,[55] the court acquitted the accused of raping his daughter after "extremely granular scrutiny of the evidential gaps".[56] The presumption, in demanding a high standard of proof (to discharge the burden of proving probative guilt), can prove to be sufficient protection when the courts impose exacting examination on the Prosecution's evidence.

42 Finally, if the presumption can be understood as being part of a right to a fair trial,[57] then it would be the principle of fair trial operating at its core – the presumption would no longer be the definitive way of securing protection for the accused, but be seen as one aspect of a larger rule that seeks to preserve the integrity of the criminal process by according the accused's rights sufficient weight.

B. Imbalance of Power Between Prosecution and Accused

43 A second concern (which is but another manifestation of the first) is that a "thinner" theory of the presumption may yet not adequately even the balance of power between the Prosecution and an accused.

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50 Chen Siyuan, "A Preliminary Survey of the Right to Presumption of Innocence in Singapore" (2012) LAWASIA Journal 78, 95.

51 *Lim Boon Keong* [2010] 4 SLR 451.

52 *Lim Boon Keong* [2010] 4 SLR 451, [42].

53 *Ong Pang Siew v PP* [2011] 1 SLR 606.

54 *Ong Pang Siew v PP* [2011] 1 SLR 606, [72].

55 *AOF v PP* [2012] 3 SLR 34.

56 Chen Siyuan, "A Preliminary Survey of the Right to Presumption of Innocence in Singapore" (2012) LAWASIA Journal 78, 95.

57 This essay does not take a position on this issue, although the Strasbourg Court treats the PI as an *equivalent* to the general principle of fair trial: see Andrew Stumer, *The Presumption of Innocence: Evidential and Human Rights Perspectives* (Hart Publishing, 2010), 95.

However, there is nothing to prove that a presumption of material innocence will go any way in evening out the scales better than a presumption of probatory innocence. In the end, whether the courts presume material or probatory innocence, the balance will always be tilted in favour of the Prosecution, so long as the Prosecution continues to have the State's machinery at its disposal. This is the reality, regardless of any theory of innocence.

44 Moreover, the courts *have* recognised the advantage the Prosecution holds. In *Kadar*, the court set out a framework for evidence disclosure by the Prosecution to the defence, including evidence detrimental to the Prosecution's case,[58] while referring to the presumption of probative innocence:[59] the court recognised that to require the defence to disclose evidence would run contrary to the presumption, which it defined as "the Prosecution [proving] its case beyond reasonable doubt".[60] Thus seen, the presumption *can* go some way in balancing the power between the parties. Although the Prosecution will always retain the advantage, as long as the legal system respects the presumption and continues to demand that the Prosecution prove its case beyond a reasonable doubt, there will naturally be results which have the effect of giving the accused some advantages.

V. Possible Legal Reforms

45 With these concerns addressed, there nonetheless needs to be several reforms to the law so as to give the presumption greater coherence. This essay deals with three potential examples.

A. Recalibration of Rules that Reverse the Burden of Proof

46 To start off, the presumption of probative innocence is given effect to with *Jayasena v R* ("***Jayasena***")[61] interpreting all burdens of proof imposed by the EA as persuasive (or legal) burdens, thereby placing the burden of proving probative guilt on the Prosecution.

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58 The evidence had to be of two kinds, (a) if admissible, reasonably regarded as credible and relevant to the guilt and innocence of the accused; (b) if inadmissible, would provide a real chance of pursuing a line of inquiry that led to type (a) evidence: see *Muhammad bin Kadar v PP* [2011] 3 SLR 1205, [113].

59 *Muhammad bin Kadar v PP* [2011] 3 SLR 1205, [108].

60 *Muhammad bin Kadar v PP* [2011] 3 SLR 1205, [108].

61 *Jayasena v R* [1970] AC 618.

47 Yet, the EA contains exceptions to this and these exceptions may "cripple the protection offered by the presumption of innocence".[62] For example, s 108 EA places the burden of proof on the accused to prove any fact within his knowledge. With the *Jaysena* rule that all burdens in the EA are persuasive burdens, it detracts from the protection that the presumption of probative innocence ought to provide for the accused. To that end, to provide the presumption with more coherence, Professor Hor's proposal is illuminating: should Parliament wish to derogate from the presumption by reversing the burden of proof, it ought to do so explicitly in the relevant legislation.[63] This is to provide assurance that it has directed its mind to the matter.[64] Adopting Prof Hor's proposed reform will do well in ensuring that the Prosecution is not unduly inconvenienced in its task of administering justice, while also ensuring that any derogations from the presumption is properly thought out and implemented without compromising on prevention of wrongful convictions.

B. Rethinking the Presumption of Trafficking In The MDA

48 Due to Singapore's harsh stance towards drug-related offences, there are several presumptions in the MDA in the Prosecution's favour, found in ss 17 and 18 MDA.[65] While these presumptions are usually justified by the severity of drug abuse in Singapore's society and thus provide a greater need for conviction, these presumptions do not sit well with a presumption of innocence, since they ease the burden on the Prosecution and also reallocate the burden to the accused.

49 The most troubling of the presumptions is that found in s 17 MDA, which provides that where an accused is found with beyond a certain weight of specified drugs, the accused is then presumed to

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62 Chen Siyuan, "A Preliminary Survey of the Right to Presumption of Innocence in Singapore" (2012) LAWASIA Journal 78, 84.

63 Chan Wing Cheong, Stanley Yeo & Michael Hor, *Criminal Law for the 21st Century: A Model Code for Singapore* (Academy Publishing, 2013), [2.1.5].

64 Chan Wing Cheong, Stanley Yeo & Michael Hor, *Criminal Law for the 21st Century: A Model Code for Singapore* (Academy Publishing, 2013), [2.1.6].

65 Section 17 provides that anyone proven to have certain kinds of drugs above a certain amount is presumed to have those drugs in his possession for the purposes of trafficking. Section 18 provides that anyone proven to have possession of anything containing a controlled drug is presumed to be in possession of that drug and known the nature of the drug.

possess the relevant drugs for the purposes of trafficking.[66] This is more serious than a mere presumption of knowledge, as the presumption of trafficking is a presumption of an entire offence under s 5 MDA, whereas the presumption of knowledge is only a presumption of an *element* of the relevant drug-related offence (*i.e.*, knowledge of the drug's nature). The presumption of trafficking is also far more serious than the presumption of possession, as the offence of possession under s 8 MDA does not carry the mandatory death penalty.

50 Therefore, in order to recognise the need for the presumptions and simultaneously give greater effect to the presumption of innocence, it is the view of this author that the presumption of trafficking requires some reconsideration. Arguably, the presumption of trafficking is not as justifiable as the presumption of knowledge and/or possession, given the former's complete nature and heavier consequences following a conviction on that ground. To that end, if it is incumbent for the Prosecution to prove that the accused had the drugs to traffic following the presumption of innocence, then the Prosecution ought to bear the full burden in proving the offence, *intention to traffic included*.

C. Reconceptualising the Privilege Against Self-Incrimination as a Right

51 Finally, Singapore does not recognise the privilege against self-incrimination as a right, but considers it as another evidentiary rule.[67] The closest Singapore has to such a right is found in s 22(2) of the Criminal Procedure Code ("**CPC**"). Yet even under that rule, there is no need to expressly inform the accused of this right.[68] Perhaps it is time now to reconceive it as a procedural right of the same kind as the presumption of innocence, the same kind that includes a corresponding right for the accused to be informed Barring a few exceptions,[69] every accused person ought to have a right against self-incrimination, since it would help protect the accused from incriminating himself, given that he can be lawfully denied access to counsel during the first

66 Chen Siyuan & Lionel Leo, *The Law of Evidence in Singapore* (Sweet & Maxwell, 2nd Ed, 2018), 255.
67 *PP v Mazlan bin Maidun* [1992] 3 SLR(R) 968, [13] – [37].
68 *PP v Mazlan bin Maidun* [1992] 3 SLR(R) 968, [37].
69 An example would be offences under the Prevention of Corruption Act (Cap 241, 1993 Rev Ed).

investigations. This might go some way in buttressing the presumption of innocence in its bid to protect the accused.

VI. Conclusion

52 In closing, the presumption of innocence has not enjoyed much clarity as to its definition and this has resulted in confusion as to its scope, meaning and application. This essay has sought to contribute to the debate by proposing a theory of innocence, and therefore the presumption of innocence, as probatory (or legal) in nature. To recapitulate, the presumption demands that the judge presume that the accused's probative guilt is not yet proven, by emptying himself of all and any presuppositions and applying a rigorous examination of the Prosecution's evidence to ensure that the case minimally reaches the required standard of proof.

53 It has been argued that a probatory theory of innocence better reflects the nature of Singapore's criminal process as well as the larger fabric of the law. A probatory theory of the presumption also comports better with the reality of adjudication in defining more clearly the content of the presumption and recognising the true epistemic state of every court hearing a trial. However, a probatory theory necessarily leads to the conclusion that the presumption cannot logically apply anywhere beyond the criminal trial. While such an approach would raise certain concerns regarding the protection of accused persons, such concerns can be dealt with by ensuring that the other mechanisms in place are robust enough to provide sufficient protection from wrongful conviction, and by reforming the law in certain troubling areas to give greater coherence to the presumption.

54 To that end, it may be time for lawmakers to provide greater clarity to the presumption by definitively stating a theory of innocence and the presumption of innocence. This essay has sought to provide a preliminary suggestion that could lead to further and richer discourse over a principle so crucial, yet so taken for granted. It is, beyond reasonable doubt, time to relook the presumption and consider it for all its import and significance, for it is that one golden thread that must always be seen in our criminal justice system.

FORM OR SUBSTANCE? EXCLUDING LIABILITY FOR MISREPRESENTATION

Exclusion of liability for misrepresentation has long been controversial. There are many ways in which one could go about doing it, namely, through express exclusion of liability clauses, entire agreement clauses, non-reliance clauses, and maybe even basis clauses. The key question is whether such clauses are subject to s 3 of the Misrepresentation Act, which prevents a contracting party from escaping liability when it is unreasonable to do so. Notably, English jurisprudence has taken the view that any term that excludes liability for misrepresentation in effect would be subject to the test of reasonableness. Singapore appears to be moving in the same direction, and this paper explores why Singapore should do so. The bottom line is that a contracting party should not be given full immunity for misrepresentation when the other contracting party is unsavvy and/or unwary.

Koh Zhi Jia[*]

Class of 2022 (LLB), School of Law, Singapore Management University.

I. Introduction

1 The last two decades have seen a number of developments in both Singapore and the United Kingdom ("**UK**") with respect to the increased use of contractual clauses to exclude liability for misrepresentation. The contractual clauses can be largely divided into three classes: express exclusion of liability clauses, entire agreement clauses, and non-reliance clauses. There is also a fourth category of contractual clauses, otherwise known as basis clauses. Such clauses, which recite the basis of the contract, can sometimes constitute a form of non-reliance clause that excludes liability for misrepresentation. The touchstone of the inquiry seems to be whether the clause, in effect, excludes liability for misrepresentation.

[*] The author would like to express his thanks to Mr Vincent Ooi for his guidance in writing this essay. All errors remain the author's alone.

2 Under English law, any clause that seeks to exclude liability for misrepresentation will be subject to s 3 of the English Misrepresentation Act. To that end, the English courts would appear to be focused on the substantive legal effect of the clause as opposed to its form. However, under Singapore law, the position remains that non-reliance clauses, operating under the doctrines of evidential or contractual estoppel, are not subject to s 3 of the Misrepresentation Act ("**MA**"). This paper argues that clauses which substantively serve to exclude liability, such as non-reliance clauses, should be subject to s 3 MA.

3 There are two main sections to this paper. In Part II, we discuss how express exclusion of liability clauses, entire agreement clauses, and non-reliance clauses can operate to exclude liability for misrepresentation in Singapore. Generally, entire agreement clauses can preclude liability if the parties have agreed that no representations were made, provided that the word "representations" does not take its place alongside other words expressive of contractual obligation. Non-reliance clauses may exclude liability for misrepresentation under the doctrine of evidential estoppel. It bears noting that it is difficult for the representor to rely on the doctrine of evidential estoppel as he has to prove that he did not intend for his representations to be relied upon by the representee to enter the contract. It is unclear whether a non-reliance clause may exclude liability for misrepresentation under the doctrine of contractual estoppel, which has not been adopted by our Singapore courts. If the doctrine of contractual estoppel is adopted, it is argued that contractual estoppel is merely a judicial enforcement of contractual obligations, and it operates separately from the doctrine of evidential estoppel which depends on reliance and notions of unconscionability. Also, it would typically apply in commercial transactions where both parties are of equal bargaining power, with the benefit of professional legal advice. Thus, as a matter of an objective construction of the contract, it is more likely that both parties intended for the representor to be exempted from liability for misrepresentation in such a case.

4 In Part III, we discuss whether all clauses that exclude liability for misrepresentation are subject to s 3 MA which requires the person relying on the clause to show that it satisfies the requirement of reasonableness as stated in s 11(1) of the Unfair Contract Terms Act. It is argued that any clause that excludes liability for misrepresentation should be subject to s 3 MA for the following reasons. First, to allow

parties to escape liability for misrepresentation in all situations would stultify the purpose of the Misrepresentation Act, which is to prevent contracting parties from escaping liability for misrepresentation unless it is reasonable for them to do so. Second, recent local decisions indicate that Singapore law is moving towards the position that any clause seeking to exclude liability for misrepresentation will be subject to s 3 MA. The Court of Appeal in *Deutsche Bank AG v Chang Tse Wen*[1] has, after all, mentioned by way of *obiter dictum*, in relation to the Unfair Contract Terms Act ("**UCTA**"), that the legislative eye is firmly set on the "substantive effect" of a term or notice, rather than on its "form or identification".[2] Finally, the Court of Appeal in *Orient Centre Investments Ltd v Societe Generale*[3] previously relied on an English decision to hold that non-reliance clauses may provide an insuperable obstacle to any misrepresentation claim, but that English decision does not in fact support such a proposition. Part IV concludes.

II. Exclusion of Liability for Misrepresentation

A. Modes of Excluding Liability for Misrepresentation

5 As held by the Court of Appeal in *RBC Properties Pte Ltd v Defu Furniture Pte Ltd ("**RBC Properties**")*,[4] there are three ways in which parties can exclude liability for misrepresentation:[5]

(a) the parties agreed that no representations were made;
(b) the parties agreed that there was no reliance on any representation; or
(c) the parties expressly excluded liability for misrepresentation.

6 It appears that entire agreement clauses can preclude liability for misrepresentation if they clearly express that no representations were made. Alternatively, non-reliance clauses may exclude liability if they clearly express that there was no reliance on any representation. The touchstone of the inquiry seems to be whether the clause in question clearly excludes liability for misrepresentation.[6] We turn now to

1 *Deutsche Bank AG v Chang Tse Wen* [2013] 4 SLR 886.
2 *Deutsche Bank AG v Chang Tse Wen* [2013] 4 SLR 886, [68].
3 *Orient Centre Investments Ltd v Societe Generale* [2007] 3 SLR(R) 566.
4 *RBC Properties Pte Ltd v Defu Furniture Pte Ltd* [2015] 1 SLR 997.
5 *RBC Properties Pte Ltd v Defu Furniture Pte Ltd* [2015] 1 SLR 997, [112].
6 *RBC Properties Pte Ltd v Defu Furniture Pte Ltd* [2015] 1 SLR 997, [110], [113].

examine how entire agreement clauses and non-reliance clauses operate to exclude liability.

B. Entire Agreement Clauses

7 The current position is that entire agreement clauses can preclude liability if the parties agree that no representations were made. This can be seen in the leading case of *RBC Properties*, which involved a lease agreement. There, the Appellant, RBC Properties, had represented to the Respondent, Defu, that the necessary approvals for the premises in question (to be used as a showroom) had been obtained.[7] This was untrue, since the Singapore Land Authority had not approved the premises for such a use pursuant to the appellant's rights under the landlord's state lease.[8] The court held that the Respondent was entitled to rescind the lease for misrepresentation, along with a consequential indemnity for all sums it was obliged to pay over under the lease.[9] The issue was whether liability for misrepresentation was excluded by clause 6.9 of the agreement.[10]

8 The court held that clause 6.9 was an entire agreement clause, in that it stipulated that no "representations or promises" except those expressed in the lease agreement could have contractual effect.[11] Furthermore, citing *AXA Sun Life Services plc v Campbell Martin Ltd*[12] for the proposition that "where the word 'representations' takes its place alongside other words expressive of contractual obligations, talk of the parties' contract superseding such prior agreement will not by itself absolve a party of misrepresentation",[13] the court held that since the word "representation" was employed alongside words expressive of contractual obligations, it was not dealing with whether liability for misrepresentation was excluded.[14] Thus, clause 6.9 did not clearly exclude liability for misrepresentation and the appellant could not avail itself of the clause.[15]

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7 *RBC Properties Pte Ltd v Defu Furniture Pte Ltd* [2015] 1 SLR 997, [55].
8 *RBC Properties Pte Ltd v Defu Furniture Pte Ltd* [2015] 1 SLR 997, [55].
9 *RBC Properties Pte Ltd v Defu Furniture Pte Ltd* [2015] 1 SLR 997, [56].
10 *RBC Properties Pte Ltd v Defu Furniture Pte Ltd* [2015] 1 SLR 997, [109].
11 *RBC Properties Pte Ltd v Defu Furniture Pte Ltd* [2015] 1 SLR 997, [113].
12 *AXA Sun Life Services plc v Campbell Martin Ltd* [2011] 2 Lloyd's Rep 1, [94].
13 *RBC Properties Pte Ltd v Defu Furniture Pte Ltd* [2015] 1 SLR 997, [113].
14 *RBC Properties Pte Ltd v Defu Furniture Pte Ltd* [2015] 1 SLR 997, [113].
15 *RBC Properties Pte Ltd v Defu Furniture Pte Ltd* [2015] 1 SLR 997, [113].

9 The effect of this is that an entire agreement clause can only preclude liability for misrepresentation where it clearly expresses that no representations were made. Further, the word "representations" cannot be employed alongside other words expressive of contractual obligations.

10 However, an argument may be made against this interpretation of an entire agreement clause in future cases. One might argue that the parties objectively intended for the clause to be given legal effect by entering into the agreement. In particular, it is likely that the parties intended to: (a) exclude liability for misrepresentation, and not a breach of contractual terms, by excluding representations; and (b) to exclude liability for breach of contractual warranties by excluding warranties. Afterall, such entire agreement clauses are usually drafted by trained solicitors who should be aware of the separate legal consequences of pre-contractual representations and warranties. Thus, entire agreement clauses should not be denuded of legal effect in excluding liability for misrepresentation just because the word "representations" is employed alongside words representative of contractual obligations.

C. Non-reliance clauses

11 Aside from entire agreement clauses, contractual parties have sought to exclude liability for misrepresentation by stating that the parties did not rely on any representation. Under common law, there are two methods in which such non-reliance clauses may exclude liability for misrepresentation: (a) the doctrine of evidential estoppel; and (b) the doctrine of contractual estoppel. We will examine both doctrines in turn.

(1) Evidential Estoppel

12 The *novus classicus* for the doctrine of evidential estoppel appears to be the English Court of Appeal decision of *Lowe v Lombank Ltd*.[16] In *Lowe*, Diplock J laid out the elements required for the doctrine of evidential estoppel:[17]

(a) the clause was clear and unambiguous;
(b) that the representee meant it to be acted upon by the representor; and

[16] *Lowe v Lombank Ltd* [1960] 1 WLR 196; Low Kee Yang, "Misrepresentation and Contractual Estoppel: The Raiffeisen Clarifications" (2011) 23 SAcLJ 390, [3].
[17] *Lowe v Lombank Ltd* [1960] 1 WLR 196, [205].

(c) that the representor in fact believed it to be true and was induced by such belief to act upon it.

13 The rationale of the doctrine is to prevent the party who has made a representation from asserting in subsequent litigation that the representation given to the same party is not true. In essence, primacy is given to the parties' intention, and the courts are likely to find that there was, as the parties intended, no reliance on any representation if the requirements in *Lowe* are satisfied. The test for evidential estoppel has since been adopted into Singapore law in the High Court decision of *Deutsche Bank AG v Chang Tse Wen* ("***Deutsche Bank* (HC)**"),[18] where it was applied on the facts of the case.[19] It is of note that while the case went on appeal, the doctrine of evidential estoppel was not one of the issues on appeal.

14 In *Deutsche Bank* (HC), Deutsche Bank submitted that it did not owe Dr Chang any duty of care and in any event, there was no breach of any duty of care by reason of evidential or contractual estoppels arising from the service agreement.[20] The service agreement stated that, if Deutsche Bank gives advice or makes recommendations, "such advice or recommendations are given and on the basis [that the representee] will make [his] own assessment and rely on [his] own judgement". The court held that the second requirement in *Lowe* was not satisfied as there was no evidence to suggest that the relevant disclaimers were "brought to Dr Chang's attention".[21] The court went further in observing that the outcome would have been different if Dr Chang had been informed before signing the account application form that he could not rely on Deutsche Bank to exercise reasonable care in advising him on managing his new wealth, and that he should retain his own independent professional or legal advisors for that purpose.[22]

15 The difficulty lies with establishing that the representor believed the non-reliance clause to be true and that he was induced by such belief to enter into the contract. In the English Court of Appeal decision of *Watford Electronics Ltd v Sanderson CFL Ltd*,[23] Chadwick

[18] *Deutsche Bank AG v Chang Tse Wen* [2013] 1 SLR 1310.
[19] *Deutsche Bank AG v Chang Tse Wen* [2013] 1 SLR 1310, [137].
[20] *Deutsche Bank AG v Chang Tse Wen* [2013] 1 SLR 1310, [118].
[21] *Deutsche Bank AG v Chang Tse Wen* [2013] 1 SLR 1310, [137].
[22] *Deutsche Bank AG v Chang Tse Wen* [2013] 1 SLR 1310, [137].
[23] *Watford Electronics Ltd v Sanderson CFL Ltd* [2001] 1 All ER (Comm) 696.

LJ observed that the three requirements in *Lowe* are not easily satisfied in a case of misrepresentation, "not least because it may be impossible for a party who has made representations which he intended should be relied upon to satisfy the court that he entered into the contract in the belief that a statement by the other party that he had not relied upon those representations was true".[24] In other words, in a case involving misrepresentation, it is difficult for the representor to prove he entered into the contract believing that the representee did not rely on any representation. This is because it is usually the case that the representor intended for his representations to be relied upon by the representee to enter the contract.

16 Thus, in the context of excluding liability for misrepresentation, the first requirement in *Lowe* would be satisfied if the clause clearly and unambiguously states that the parties agreed that there was no reliance on any representation. Following *Deutsche Bank* (HC), it seems that the second requirement in *Lowe* would be satisfied if the non-reliance clause is brought to the representee's attention, and the representee proceeds to enter into the agreement. The third requirement would arguably be the largest hurdle to overcome, since the representor has to prove that he did not intend for his representations to be relied upon by the representee to enter the contract. Hence, a representor seeking to exclude liability for misrepresentation by relying on the doctrine of evidential estoppel may be faced with "insuperable difficulties".[25]

17 It is of note that the doctrine of evidential estoppel can only be invoked by the party seeking to rely on it if said party has specifically pleaded for the legal effect of the clause in question – that is, it excludes liability for misrepresentation.[26]

(2) Contractual Estoppel

18 The doctrine of contractual estoppel was introduced by way of *obiter dictum* in the English Court of Appeal case of *Peekay Intermark Ltd v Australia and New Zealand Banking Group Limited* ("***Peekay***").[27] In *Peekay*, the plaintiff was a company that traded in a variety of

[24] *Watford Electronics Ltd v Sanderson CFL Ltd* [2001] 1 All ER (Comm) 696, 711.
[25] *Watford Electronics Ltd v Sanderson CFL Ltd* [2001] 1 All ER (Comm) 696, 711.
[26] *Orient Centre Investments Ltd v Societe Generale* [2007] 3 SLR(R) 566, [45].
[27] *Peekay Intermark Ltd v Australia and New Zealand Banking Group Limited* [2006] EWCA Civ 386.

investments. It sued the defendant bank for damages for misrepresentation in relation to the nature of certain bonds. The bank sought to exclude liability for misrepresentation by relying on certain non-reliance clauses. Moore-Bick LJ held that there is no reason in principle why parties to a contract should not agree that a certain state of affairs should form the basis for the transaction, whether it be the case or not.[28] Specifically, if "parties express an agreement of that kind in a contractual document neither can subsequently deny the existence of the facts and matters upon which they have agreed, at least so far as concerns those aspects of their relationship to which the agreement was directed", the contract itself gives rise to an estoppel.[29]

19 The doctrine of contractual estoppel appears to have "watered down"[30] the second and third requirements of the doctrine of evidential estoppel, since the representor only has to prove the first requirement in *Lowe*, in that there was an agreement between the parties to deny the existence of the facts and matters upon which they have agreed. In the context of misrepresentation, the representor only has to prove that the parties agreed that there was no reliance on any representation. The doctrine was applied in two English cases involving actions by bank customers against banks in their capacity as derivative counterparties.[31]

20 It is unclear whether the doctrine of contractual estoppel will be adopted into Singapore law for cases involving misrepresentation if this "defence" were to be pleaded in future cases. In *Orient Centre Investments Ltd v Societe Generale*, the Court of Appeal cited *Peekay* and commented, by way of *obiter dictum*, that "the combined effect of the express general and specific terms and conditions applicable to the structured products provides an insuperable obstacle to any claim by the [appellants] against [the respondent] based on the alleged breach of representations or duties, fiduciary or contractual or on negligence".[32] This seems to indicate that the Court of Appeal would be receptive towards the doctrine of contractual estoppel if such a case appears before

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28 *Peekay Intermark Ltd v Australia and New Zealand Banking Group Limited* [2006] EWCA Civ 386, [56] – [57].

29 *Peekay Intermark Ltd v Australia and New Zealand Banking Group Limited* [2006] EWCA Civ 386, [56] – [57].

30 *Deutsche Bank AG v Chang Tse Wen* [2013] 1 SLR 1310, [132].

31 *Springwell Navigation Corporation v JP Morgan Chase Bank* [2010] EWCA Civ 1221; *Titan Steel Wheels Ltd v The Royal Bank of Scotland plc* [2010] EWHC 211 (Comm).

32 *Orient Centre Investments Ltd v Societe Generale* [2007] 3 SLR(R) 566, [50].

the court. However, in the subsequent Court of Appeal decision of *Als Memasa v UBS AG*,[33] the Court of Appeal considered whether financial institutions should be accorded full immunity for their misconduct by relying on non-reliance clauses. This was "in light of the many allegations made against many financial institutions for 'mis-selling' complex financial products to linguistically and financially illiterate and unwary customers.[34] Additionally, the High Court in *Deutsche Bank* was "extremely hesitant to apply the doctrine of contractual estoppel developed in the line of cases following *Peekay*".[35] Most recently, the Court of Appeal in *Deutsche Bank* expressed doubts as to the High Court's "exposition of this area of the law",[36] which suggests that the doctrine of contractual estoppel may be applied after all.

21 If the doctrine of contractual estoppel is adopted into Singapore law, there needs to be clarification on its conceptualisation and application. The main contention in this area of the law is whether the doctrine of contractual estoppel is a true estoppel in the sense of being a substantive legal doctrine independent of the contract, or whether it is a mere judicial enforcement of a contractual term. The key arguments against a purely contractual analysis for non-reliance clauses (or the doctrine of contractual estoppel as merely a judicial enforcement of a contractual term) are best expressed by Diplock J in *Lowe*:

(a) First, a contractual obligation "is essentially a promise by the promisor to the promisee that acts will be done in the future or that facts exist at the time of the promise or will exist in the future".[37] The representee's acknowledgement that he had not relied on any pre-contractual representations is merely a representation of past facts rather than an enforceable contractual obligation. This may give rise to an estoppel by representation, or evidential estoppel, but it cannot give rise to a positive contractual obligation by the representee.

(b) Second, it is hard to conceive how a representation of non-reliance can amount to a contractual term when it was known to be untrue at the time it was made. This can be

[33] *Als Memasa v UBS AG* [2012] 4 SLR 992, [29].
[34] *Als Memasa v UBS AG* [2012] 4 SLR 992, [29].
[35] *Deutsche Bank AG v Chang Tse Wen* [2013] 1 SLR 1310, [138].
[36] *Deutsche Bank AG v Chang Tse Wen* [2013] 4 SLR 886, [79].
[37] *Lowe v Lombank Ltd* [1960] 1 WLR 196, 204.

> inferred from Diplock J's requirement that the representation must be believed to be true by the representee.

22 We now review each of Diplock J's arguments in turn. With respect to the first argument, it is doubtful if there are grounds to restrict contractual undertakings to promises as to future conduct, which excludes statements of past or present fact.[38] In practice, statements of past and present fact can be enforced as contractual promises. Under s 14 of the Sale of Goods Act,[39] there are statutorily implied terms about the quality or fitness of the contractual subject matter, such as freedom from minor defects, safety, and durability. Indeed, as stated by *Loi*, "it is quite common in practice for statements of fact to be enforced as contractual promises".[40]

23 Alternatively, drawing an analogy with agency law, the statement of fact "may mean that one assumes liability for the statement's being incorrect and undertakes to put the other party in the position as if the statement were correct".[41] This means that it is the representee's subsequent refusal to pay compensation, rather than the initial incorrectness of the statement of fact, which constitutes a breach of contract generating a secondary obligation to pay damages.

24 Both interpretations support the argument that a statement of past or present fact may connote a contractual promise, supported by examples from agency law and sale of goods contracts. Thus, Diplock J's first argument that contractual obligations are restricted to future facts is unsupported, and the true problem is one of construction – whether the clause in question means that a party assumes an obligation in respect of non-reliance on any pre-contractual representations.

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38 Loi, K., "Contractual Estoppel and Non-Reliance Clauses" [2015] LMCLQ 346, 351; Coote, B., (R Bigwood, ed.), *Contract as Assumption: Essays on a Theme* (Hart, Oxford, 2010) ("*Coote*"), pp 13 and 131.

39 Sale of Goods Act (Cap 393, 1999 Rev Ed).

40 Loi, K., "Contractual Estoppel and Non-Reliance Clauses" [2015] LMCLQ 346, 352.

41 Loi, K., "Contractual Estoppel and Non-Reliance Clauses" [2015] LMCLQ 346, 353; AS Burrows, "Contract, Tort and Restitution – A Satisfactory Division or Not?" (1983) 99 LQR 217, 251; PS Atiyah, *Essays on Contract* (Oxford: OUP, 1986), pp 281 – 282, 325 – 236.

25 With respect to Diplock J's second argument, that argument alone does not warrant legal prohibition of contractual estoppel, but instead, qualifies the efficacy of a non-reliance clause in a situation where the parties knew that the statement of present or past fact was false when it was made. In such a case, as a matter of construction of the contract, it is very unlikely that the parties intended for the representor to be able to exclude liability for misrepresentation when the representee knew that the representation in question was false when it was made. Thus, as suggested by *Loi*, the doctrine of contractual estoppel is merely a judicial enforcement of contractual obligations, and it operates separately from the doctrine of evidential estoppel which depends on reliance and notions of unconscionability; it is not a true estoppel.[42]

26 Singapore's current position on the doctrine of contractual estoppel is possibly best expressed by Lee Seiu Kin J in the local High Court decision of *Jurong Shipyard Pte Ltd v BNP Paribas*.[43] After surveying various local and foreign authorities, Lee Seiu Kin J held that the doctrine of contractual estoppel would apply "in the absence of the normal vitiating factors such as duress, undue influence and misrepresentation".[44] This indicates that the local courts are in favour of the purely contractual analysis; the non-reliance clause, which is regarded as a contractual obligation, may be enforced. Alternatively, the contract may be vitiated altogether if the normal vitiating factors such as duress, undue influence, and misrepresentation are present in the innocent party's entry into the contract (with the non-reliance clause).

27 In sum, while local courts seem receptive towards the doctrine of contractual estoppel, it has not been officially adopted into Singapore law. If it is to be adopted into Singapore law, it would be best conceptualised as a judicial enforcement of contractual obligations. However, in view of judicial reticence of providing financial institutions with full immunity against liability in all situations, there would be an issue of whether the application of the doctrine would be subject to s 3 MA. This issue is addressed below.[45]

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42 Loi, K., "Contractual Estoppel and Non-Reliance Clauses" [2015] LMCLQ 346, 349.
43 *Jurong Shipyard Pte Ltd v BNP Paribas* [2008] 4 SLR(R) 33.
44 *Jurong Shipyard Pte Ltd v BNP Paribas* [2008] 4 SLR(R) 33, [104].
45 See [33] of the main text.

(3) How the Doctrines of Evidential and Contractual Estoppel should be applied

28 Following our discussion on the applicability of the doctrines of evidential and contractual estoppel, a further question arises as to how they should be invoked. If, indeed, the doctrine of contractual estoppel operates as a judicial enforcement of a contractual obligation as opposed to a true estoppel, it would operate separately in the alternative to the doctrine of evidential estoppel.

29 As stated by Loi, contractual estoppel derives its binding effect purely on the basis of contract, unlike evidential estoppel, which depends on notions of unconscionability or reliance to be effected.[46] This means that the doctrine of contractual estoppel has no content whatsoever apart from being the remedial consequence of a threatened breach of contract, and it is neither a true estoppel with any substance nor an independent existence apart from contract.[47] The court merely enforces the representee's contractual obligation not to assert reliance.[48] This is supported by the decision in *Peekay*, where the English Court of Appeal expressed the view that a "properly worded non-reliance clause could, apart from giving rise to the more traditional estoppel by representation if the [*Lowe*] requirements were satisfied, also raise an alternative contractual estoppel simply on the strength of the contract in which the clause was found".[49]

30 As to the cases in which the two estoppels will apply, while the doctrine of evidential estoppel is applicable so long as the requirements in *Lowe* are satisfied, the doctrine of contractual estoppel would typically apply in commercial transactions where both parties are of equal bargaining power, with the benefit of professional legal advice – as a matter of objective construction of the contract, it is more likely that both parties intended for the representor to be exempted from liability for misrepresentation in such a context. This seems to be in line with the approach taken by the High Court in *Deutsche Bank*. That case was distinguished from the Court of Appeal's decision in *Orient Investments*,

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46 Loi, K., "Contractual Estoppel and Non-Reliance Clauses" [2015] LMCLQ 346, 350; McMeel [2011] LMCLQ 185, 197; S Wilken and K Ghaly, *The Law of Waiver, Variation, and Estoppel*, 3rd edn (OUP, Oxford, 2012) [9.14], [13.21], and [13.22].

47 Loi, K., "Contractual Estoppel and Non-Reliance Clauses" [2015] LMCLQ 346, 357.

48 Loi, K., "Contractual Estoppel and Non-Reliance Clauses" [2015] LMCLQ 346, 357.

49 Loi, K., "Contractual Estoppel and Non-Reliance Clauses" [2015] LMCLQ 346, 349.

in that the representee was known by the representors to be financially inexperienced, and that the representors themselves have the expertise and undertook pre-contractually to advise the representee in managing his new wealth.[50] The doctrine of contractual estoppel was not applied. Thus, it is possible that while the doctrine of evidential estoppel typically applies, the doctrine of contractual estoppel may be applied in the alternative, in commercial transactions where both parties are of equal bargaining power, with the benefit of professional legal advice.

(4) Summary of Effect of Non-Reliance Clauses

31 A representor may rely on the operation of a non-reliance clause as evidential or contractual estoppels to exclude the representor's liability in misrepresentation, as well as the representor's "duty of care and fiduciary obligation"[51] owed to the representee. The doctrine of evidential estoppel would typically apply, as opposed to the doctrine of contractual estoppel which "watered down" the doctrine of evidential estoppel to the first requirement in *Lowe* – that the clause was clear and unambiguous that there was no reliance on any representation. In the context of misrepresentation, however, it may be impossible for the representor to invoke the doctrine of evidential estoppel as it is difficult for the representor to prove that he entered into the contract with the belief that there was no reliance by the representee on any representation.

32 In the alternative, the representor may seek to rely on the doctrine of contractual estoppel. The apex court has not made a pronouncement on the applicability of the doctrine of contractual estoppel in local courts. It is likely that the doctrine of contractual estoppel will be adopted into Singapore law should the appropriate case come before the courts. This is to promote commercial certainty and to allow for commercial allocation of risk between the parties, so that the financial services industry in Singapore will be able to maintain the "remarkable growth in recent years".[52] Afterall, the apex court is of the view that "cleaning up the paperwork and communicating in clear terms with customers after the initial discussions to identify with precision just what is and is not being provided might well be a worthwhile exercise

[50] *Deutsche Bank AG v Chang Tse Wen* [2013] 1 SLR 1310, [136].
[51] *Deutsche Bank AG v Chang Tse Wen* [2013] 1 SLR 1310, [48].
[52] *Deutsche Bank AG v Chang Tse Wen* [2013] 4 SLR 886, [92].

for banks to undertake".[53] We will now address the issue of whether a non-reliance clause, operating either under the doctrines of evidential or contractual estoppel, is subject to s 3 MA.

III. Whether such clauses fall within s 3 Misrepresentation Act

33 Entire agreement clauses, non-reliance clauses, and express exclusion of liability clauses all serve to exclude the representor's liability for misrepresentation. Hence, the question arises as to whether they are, or should, fall within the purview of s 3 MA.[54] Under s 3 MA, if a contract contains a term that would exclude or restrict liability for misrepresentation, the term has no effect except in so far it satisfies the requirement of reasonableness stated in s 11(1) UCTA.[55] It is for the representor, who is seeking to rely on the exclusion of liability clause, to prove that the term satisfies the requirement of reasonableness. However, the English and Singapore positions diverge.

A. The English Position

34 To begin with, it is important to recognise the difference between clauses that exclude liability and clauses that delimit the primary obligations of one of the contracting parties. Where, as a matter of interpretation, the term allegedly seeking to exclude liability does no more than to describe one party's primary obligations there can be no question of applying the test of reasonableness. This position is well expressed in the English High Court decision of *JP Morgan Bank v Springwell Navigation Corp*,[56] where Gloster J held that if the clause only "prevent[s] an obligation from arising in the first place", it simply defines the basis upon which performance of the contract will be rendered and should not be subject to s 3 of the Misrepresentation Act 1967.[57] Otherwise, "every contract which contains contractual terms defining the extent of each party's obligations would have to satisfy the requirement of reasonableness".[58] Thus, "basis clauses" are not subject

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53 *Deutsche Bank AG v Chang Tse Wen* [2013] 4 SLR 886, [92].
54 (Cap 390, 1994 Rev Ed).
55 (Cap 396, 1994 Rev Ed).
56 *JP Morgan Chase Bank v Springwell Navigation Corporation* [2008] EWHC 1186 (Comm), [602], [603].
57 *JP Morgan Chase Bank v Springwell Navigation Corporation* [2008] EWHC 1186 (Comm), [602], [603].
58 *JP Morgan Chase Bank v Springwell Navigation Corporation* [2008] EWHC 1186 (Comm), [602], [603].

to the requirement of reasonableness, in so far as they define the parties' primary obligations.[59] If, however, these "basis clauses" operate as a form of estoppel rather than a delimitation of the parties' primary obligations, then they may be subject to the reasonableness test.

35 Entire agreement clauses that exclude liability for misrepresentation fall under the purview of s 3 MA.[60] The position on whether non-reliance clauses are subject to s 3 has also been clarified in the recent English Court of Appeal case of *First Tower Trustees*.[61] In essence, English courts now look at the substance and not the form of the clause. If the clause, in effect, excludes liability for misrepresentation, it will be subject to the UK equivalent of s 3 MA and the requirement of reasonableness under the UK equivalent of s 11(1) UCTA.

36 The English Court of Appeal in *First Tower Trustees Ltd* explained that while the position in common law is that parties can bind themselves by contract to accept that there was no reliance or representations made, there remains consideration whether there is a "statute to the contrary".[62] The court then interpreted s 3 of the English Misrepresentation Act 1967 to give effect to its evident policy – prevent contracting parties from escaping from liability for misrepresentation unless it is reasonable for them to do so.[63] The court held that "how they seek to avoid that liability is subsidiary".[64] To hold otherwise would, in the words of Bridge LJ in *Creamdean Properties v Nash*,[65] allow "ingenuity in forms of language" to undermine the statutory purpose of s 3 of the Misrepresentation Act 1967. The court also relied on various English authorities to support its proposition that any term that excludes liability for misrepresentation in effect would fall under the purview of s 3 of the Misrepresentation Act 1967.[66]

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59 *First Tower Trustees Ltd v CDS (Superstores Intl.) Ltd* [2018] EWCA Civ 1396, [44].
60 *Thomas Witter Ltd v TBP Industries Ltd* [1996] 2 All ER 573, 597.
61 *First Tower Trustees Ltd v CDS (Superstores Intl.) Ltd* [2018] EWCA Civ 1396.
62 *First Tower Trustees Ltd v CDS (Superstores Intl.) Ltd* [2018] EWCA Civ 1396, [47].
63 *First Tower Trustees Ltd v CDS (Superstores Intl.) Ltd* [2018] EWCA Civ 1396, [51].
64 *First Tower Trustees Ltd v CDS (Superstores Intl.) Ltd* [2018] EWCA Civ 1396, [51].
65 *Creamdean Properties Ltd v Nash* [1977] 2 EGLR 80.
66 *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland plc* [2010] EWHC 1392 (Comm); *Government of Zanzibar v British Aerospace (Lancaster House) Ltd* [2000] 1 WLR 2333.

37 In summary, when a clause states that no representations have been made or, for that matter, have been relied on, there are two possible situations. First, the clause seeks to define the parties' primary obligations, in that there were no representations made that would amount to certain terms of the contract, and it will therefore not be subject to s 3 MA. Second, it seeks to exclude or restrict liability in respect of representations that were, in actual fact, made, intended to be acted on, and in fact acted on. In that case, it will be subject to s 3 MA and the requirement of reasonableness.

B. Singapore's Position

38 The contention lies in whether non-reliance clauses operating under the doctrines of contractual or evidential estoppel are subjected to s 3 MA. In the leading Court of Appeal decision of *Orient Centre Investments*,[67] the Court of Appeal expressed the view that "the combined effect of the express general and specific terms and conditions applicable to the structured products provides an insuperable obstacle to any claim by the appellants based on the alleged breach of representations". This seems to suggest that the local position is that one may exclude liability for misrepresentation by relying on a non-reliance clause, even if it is not reasonable under s 11(1) UCTA.

39 There are, however, strong arguments to the contrary. It is possible that the local Court of Appeal may take the English position in *First Tower Trustees* in future cases. In the more recent Court of Appeal decision of *Deutsche Bank*, the court mentioned in *obiter* that allowing basis clauses to exclude liability for breach of an existing duty even if it is unreasonable to do so "seems to place undue emphasis on the form of the language used rather than on its substantive effect".[68] The court expressed the view that "the only question which arises for a court is whether a term or notice has the effect of excluding or restricting the imposition of a duty of care in law. If so, it will have to satisfy the requirement of reasonableness".[69] It is submitted that there are three reasons why non-reliance clauses should be subjected to s 3 MA.

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67 *Orient Centre Investments Ltd v Societe Generale* [2007] 3 SLR(R) 566, [50].
68 *Deutsche Bank AG v Chang Tse Wen* [2013] 4 SLR 886, [63].
69 *Deutsche Bank AG v Chang Tse Wen* [2013] 4 SLR 886, [68].

40 First, to allow contracting parties to escape liability for misrepresentation in all situations would stultify the purpose of the Misrepresentation Act, which is to prevent contracting parties from escaping from liability for misrepresentation unless it is reasonable for them to do so. In *Orient Centre Investments*,[70] the Court of Appeal may have relied on a passage from Chadwick LJ in *Watford Electronics* where it was mentioned that:[71]

(a) it is reasonable to assume that the parties desire commercial certainty. They want to order their affairs based on the written document which they have signed and avoid the uncertainty of litigation based on allegations of pre-contractual oral agreements;
(b) it is reasonable to assume that the price to be paid reflects the commercial risk which each party is willing to accept, a practice that is legitimate and commercially desirable. The risk is determined, in part at least, by the warranties which the vendor is prepared to give based on what the purchaser is prepared to pay.

41 The author is of the view that while the above reasoning makes a strong case for adopting the doctrine of contractual estoppel into Singapore law, it does not justify why non-reliance clauses operating under the doctrines of contractual or evidential estoppel should not be subject to s 3 MA. Chadwick LJ only acknowledged that effect should be given to non-reliance clauses in the limited situation "where those parties have the benefit of professional advice".[72] Contracting parties should not be allowed to undermine the purpose of the Misrepresentation Act with ingenuity in forms of language; by wording what is, in effect, an exclusion of a liability clause as a non-reliance clause capable of invoking the doctrines of evidential or contractual estoppel. Requiring the clause to satisfy s 3 MA would allow the courts to recognise situations where it is unreasonable for contracting parties to escape liability for misrepresentation.

42 Second, recent local decisions indicate that Singapore law is moving towards the position taken by the English Court of Appeal in

[70] *Deutsche Bank AG v Chang Tse Wen* [2013] 4 SLR 886, [44].
[71] *Watford Electronics Ltd v Sanderson CFL Ltd* [2001] 1 All ER (Comm) 696, 710.
[72] *Watford Electronics Ltd v Sanderson CFL Ltd* [2001] 1 All ER (Comm) 696, 710.

First Tower Trustees Ltd, in that any clause seeking to exclude liability for misrepresentation will be subjected to s 3 MA. In the Court of Appeal decision of *Als Memasa*, it was held that "it may be desirable for the courts to reconsider whether financial institutions should be accorded full immunity for [their misconduct] by relying on non-reliance clauses which unsophisticated customers might have been induced or persuaded to sign without truly understanding their potential legal effect". [73] The wording suggests that the Court of Appeal is receptive to the idea that a party should not be able to escape liability by relying on a non-reliance clause, even when it is not reasonable for the party to do so.

43 The most recent case of *Deutsche Bank* further demonstrates our local courts' receptiveness towards subjecting non-reliance clauses to the test of reasonableness. While the High Court in *Deutsche Bank* recognised the Court of Appeal's concerns in *Als Memasa* that financial institutions should not be accorded with full immunity from misconduct or negligence as against unsophisticated customers, it was bound by the Court of Appeal's decision in *Orient Centre Investments*. It distinguished *Orient Centre Investments* on the basis that the representee was known to the representors to be financially experienced and the representors themselves undertook pre-contractually to advise him in managing his new wealth. This indicates judicial sentiment that financial institutions may not always exclude liability for misrepresentation simply with the use of a non-reliance clause. On appeal, the Court of Appeal mentioned in *obiter* that "the legislative eye is firmly set on the substantive effect of a term or notice, rather than on its form or identification".[74] In other words, so long as the term or notice has the effect of excluding or restricting the imposition of a duty of care in law, it will have to satisfy the requirement of reasonableness under the Unfair Contract Terms Act.[75]

44 It appears from the decisions of *Als Memasa* and *Deutsche Bank* that non-reliance clauses may be subject to s 3 MA in future cases. Similar to s 13(1) UCTA, which was noted by the Court of Appeal in *Deutsche Bank*, s 3 MA prevents a party from excluding or restricting liability for misrepresentation by reference to a contractual term. This appears to preclude "any material distinction being drawn between

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73 *Als Memasa v UBS AG* [2012] 4 SLR 992, [29] .
74 *Deutsche Bank AG v Chang Tse Wen* [2013] 4 SLR 886, [68].
75 *Deutsche Bank AG v Chang Tse Wen* [2013] 4 SLR 886, [68].

clauses which exclude liability and those which restrict the scope of the duty or the obligation".[76] The test of reasonableness is unlikely to fail in commercial transactions where parties are usually of equal bargaining power and they enjoy benefit of professional advice; parties would be able to rely on their non-reliance clauses, and the test of unreasonableness would not undermine commercial certainty and the allocation of commercial risk between the parties. Thus, the impact of subjecting non-reliance clauses to the Misrepresentation Act on financial institutions should not be overstated; contracting parties should not be allowed to undermine the purpose of the Misrepresentation Act by wording what is, in effect, an exclusion of a liability clause as a non-reliance clause capable of invoking the doctrines of evidential or contractual estoppel.

45 Third, *Watford Electronics*, which was relied upon by the Court of Appeal in *Orient Centre Investments*, does not stand for the proposition that non-reliance clauses which exclude liability for misrepresentation are not subject to s 3 MA. The contract in that case contained clause 7.3 which limited liability for indirect losses and clause 14 which is an entire agreement clause stating: "… no statement or representations made by either party have been relied upon by the other in agreeing to enter into the Contract". Chadwick LJ held that "where both parties to the contract have acknowledged, in the document itself, that they have not relied upon any pre-contract representation, it would be bizarre (unless compelled to do so by the words which they have used) to attribute to them an intention to exclude a liability which they must have thought could never arise".[77]

46 It is important to note that Chadwick LJ was referring to clause 7.3 which limited liability for indirect loss arising out of negligence or otherwise, as opposed to clause 14 which is a non-reliance clause. The issue was whether clause 7.3 was intended to capture liability for pre-contractual representation. It was in that context that Chadwick LJ held that it was bizarre to attribute to parties in clause 7.3 an intention to exclude liability which they must have thought could never arise. Thus, Chadwick LJ was not considering whether s 3 of the Misrepresentation Act applied to clause 14. His proposition, that an intention to exclude a

[76] *Deutsche Bank AG v Chang Tse Wen* [2013] 4 SLR 886, [63].
[77] *Deutsche Bank AG v Chang Tse Wen* [2013] 4 SLR 886, [41].

liability should not be attributed to the parties when they have acknowledged that they have not relied upon any pre-contractual representation, does not apply where a party seeks to exclude liability for misrepresentation. Instead, it applies where a party seeks to limit liability for indirect loss arising out of negligence or otherwise. Thus, *Watford Electronics* does not stand for the proposition that non-reliance clauses are not subject to s 3 of the Misrepresentation Act.

47 To summarise, following *Orient Centre Investments*, the current position in Singapore is that unlike entire agreement clauses and express exclusion of liability clauses, non-reliance clauses are not subject to the test of reasonableness. However, in light of the High Court and Court of Appeal's reticence of granting financial institutions with full immunity for their misrepresentations in all situations, it is possible that any clause seeking to exclude liability for misrepresentation may be subject to the test of reasonableness in future cases. This seems to be the position taken by the Court of Appeal in the recent case of *Deutsche Bank*, and such an approach would also be concordant with the purpose of the Misrepresentation Act, namely, to prevent contracting parties from escaping from liability for misrepresentation unless it is reasonable for them to do so.

48 It is also important to note that in cases involving fraudulent misrepresentation, any exclusion of liability clause is very unlikely to be given legal effect. In *Thomas Witter*,[78] the relevant clause under the contract (clause 17.2) had an exclusionary effect, but it referred to "any liability" and "any misrepresentation". Clause 17.2 was subject to s 3 MA and it had to pass the test of reasonableness under s 11(1) UCTA. The court held that the term was not severable: it was either reasonable as a whole or not.[79] The court was of the view that since the clause did not distinguish between fraudulent, negligent, or innocent misrepresentation, it purported to exclude liability for all types of misrepresentation. Hence, the clause was deemed to be unreasonable as it sought to exclude liability for fraudulent misrepresentation. This demonstrates that fraud cannot be excluded from contracts as a policy reason and courts will, as a matter of construction, always interpret contracts as not excluding fraud.

[78] *Thomas Witter Ltd v TBP Industries Ltd* [1996] 2 All ER 573, 598.
[79] *Thomas Witter Ltd v TBP Industries Ltd* [1996] 2 All ER 573, 598.

IV. Conclusion

49 Contractual covenants may effectively exclude liability for misrepresentation even when they are phrased as entire agreement clauses or non-reliance clauses. In the case of non-reliance clauses, this can be done through the doctrines of evidential or contractual estoppel. While Singapore courts appear receptive towards the doctrine of contractual estoppel, its application remains an open question. It is suggested that if the doctrine is to be applied, it should be a mere enforcement of contractual obligations.

50 A further question is whether said contractual covenants are subject to s 3 of the Misrepresentation Act. The English Courts have set their eyes on the substantive legal effect of the clause, as opposed to the form it takes. Similarly, it would seem that Singapore courts are moving towards the position that s 3 MA applies so long as the clause, in effect, excludes liability for misrepresentation. After all, this will prevent a contracting party from escaping liability even when it is not reasonable to allow him to do so, which is the purpose of the Misrepresentation Act. Furthermore, the Court of Appeal clearly expressed in *Deutsche* Bank that the focus should be on the substantive effect of the clause as opposed to the form of the language used. Thus, any clause seeking to exclude liability for misrepresentation in effect may be subject to s 3 MA.

51 The impact that this will have on financial institutions should not be overstated since financial institutions will be allowed to exclude liability for pre-contractual representations where it is reasonable for them to do so. This is likely to be the case in commercial transactions involving parties with independent legal advice and equal bargaining power. What will be required of such financial institutions, in the final analysis, is this: they must exercise prudence in making pre-contractual representations when dealing with linguistically and financially illiterate and unwary customers.

THE LIMITS TO FREEDOM TO CONTRACT

Supreme Court Case Summary:

Leiman, Ricardo v Noble Resources Ltd

[2020] 2 SLR 386 / [2020] SGCA 52
Court of Appeal of Singapore
Sundaresh Menon CJ; Andrew Phang JA; Judith Prakash JA; Steven Chong JA; Belinda Ang J
28 May 2020

TAN Jia Xin

Class of 2022 (LLB), School of Law, Singapore Management University

I. Executive Summary

1 In line with the principle of freedom to contract, the courts will give effect to the intention of the parties in creating their contract, and also hold them to their duty to perform their primary obligations under such contract. However, where the contracting parties agree to vest certain decision-making powers to a specific (non-judicial) entity, to what extent may a court review the exercise of powers by such entity?

2 In addition, the corollary to recognising the parties' freedom of contract is that the law also allows them the freedom to change their mind and break their contractual agreements if they so wish, albeit at a price. However, at what point can such price be considered a penalty imposed by the non-breaching party, and hence not enforceable under the law?

3 These questions were dealt with by the Court of Appeal ("**CA**") in Leiman, Ricardo and another v Noble Resources Ltd [2020] SGCA 52. Ricardo Leiman ("**Leiman**"), former chief executive officer of Noble Group Ltd ("**NGL**"), filed suit against Noble Resources Ltd ("**NRL**") and its parent company NGL, for denying him certain post-resignation entitlements under an agreement that he entered into with NRL to deal with the terms of his departure from the Noble group of companies ("**Noble**"). These entitlements concerned certain share options that had vested or were due to vest in him; shares which had been

assigned to him or whose allotment was pending shareholder approval; and a bonus for 2011.

II. Material facts

4 Leiman began his employment with Noble in 2006. The terms of his employment were set out in an employment agreement ("**Employment Agreement**"). For compensation, Leiman was awarded NGL share options pursuant to the Noble Group Share Option Scheme 2004, NGL shares pursuant to Noble's Annual Incentive Plan ("**AIP**"), as well as discretionary annual bonuses. He assigned his shares and share options to the Adelaide Trust, a trust that he established. This trust is administered by Rothschild Trust, the second appellant, as trustee.

5 In 2011, Leiman and the Chairman of NGL, Mr Richard Samuel Elman ("**Elman**"), got into some disagreements, leading the parties to start planning for Leiman's exit from Noble in late 2011. The parties signed a separation agreement ("**Settlement Agreement**") in November 2011, which set out the terms on which Leiman was to resign from NRL. This included ensuring that Leiman would preserve his entitlements to certain shares and share options that had been awarded to Leiman over the past few years. Specifically,

(a) Clause 3(a) stated that Leiman was entitled to receive the payments and benefits as stipulated in the Settlement Agreement, but only if he complied with his non-competition and confidentiality obligations under the Employment Agreement and the Settlement Agreement;
(b) Clause 3(b) required Leiman to enter into an advisory agreement with Noble;
(c) Clause 3(c) stated that Leiman was entitled to exercise his outstanding 7,727,272 NGL share options as well as 44,818,182 vested but unexercised options (collectively, the "**Share Options**"), provided in part that "prior to exercise he has not acted … to the detriment of Noble," and the Renumeration and Options Committee ("**R&O Committee**") of Noble "shall make a final determination in the event of any dispute";
(d) Clause 3(d) provided that 17,276,013 NGL shares (the "**Shares**") previously awarded to Leiman under the AIP would vest in him and be free of trading restrictions, also provided that

"prior to exercise he has not acted … to the detriment of Noble and the [R&O Committee] …shall make a final determination in the event of any dispute"; and

(e) Clause 3(e) stated that Leiman was entitled to be considered for a discretionary bonus for 2011.

6 Not covered under the Settlement Agreement were an additional 5,652,421 shares ("**Additional Shares**") under the AIP, which were separately awarded to Leiman through a letter in May 2011, and whose allotment was pending shareholder approval.

7 Unbeknownst to Leiman, Noble had hired a private investigator in November 2011 to monitor his activities. The investigator's reports revealed that Leiman had met with current and former Noble employees between late 2011 and early 2012. He was also corresponding with the President and CEO of Summa Capital, one of Noble's business and strategic partners, regarding entering the global commodities trading market.

8 In February 2012, Noble engaged Wolfe Associates to conduct an investigation into Leiman's dealing with two individuals (collectively "**Carlier and Ozeias**"). Leiman had been involved in hiring them in 2006 to run one of Noble's sugar mills in Brazil. That same month, Rothschild Trust asked to exercise certain of Leiman's NGL share options. The R&O Committee, made up of Elman and two independent directors, was informed of the request. It also received copies of Leiman's e-mails to Summa Capital, as well as a report from Wolfe Associates which set out preliminary findings on allegations against Carlier and Ozeias of fraudulent mismanagement of a Brazilian company, and Leiman's involvement in their hiring despite his knowledge of these allegations. The R&O Committee, which convened on 1 March 2012, unanimously resolved to refuse approval of the exercise of Leiman's share options. Rothschild Trust protested the decision and asked for details of the information upon which the decision had been based, but NGL did not provide these details.

9 The R&O reconvened on 27 March 2012 and reaffirmed its 1 March 2012 decision. NGL's Group General Counsel and a NRL director, who assisted the R&O Committee, informed Rothschild Trust that Leiman's right to exercise the share options was "conditional on [his]

not acting in any way to the detriment of Noble prior to exercise". The R&O Committee considered that this condition had not been fulfilled as Leiman had breached his non-competition and confidentiality obligations, and had hired certain persons who were not qualified and might have participated in "fraudulent conduct at a previous employer". Noble also subsequently informed Rothschild Trust that: (a) Leiman was not entitled to the Shares referred to in clause 3(d) of the Settlement Agreement; (b) the R&O Committee did not approve the vesting of the Additional Shares; and (c) Leiman was not awarded a bonus for 2011 (the "**2011 Bonus**").

10 Leiman and Rothschild ("**appellants**") subsequently commenced suit against NRL and NGL in the High Court ("**HC**"). They sought, amongst other things, declarations that the R&O Committee's decisions pertaining to Leiman's benefits were invalid, and that NRL was in breach of the Settlement Agreement. They also claimed against NRL and NGL in conspiracy, inducement of breach of contract and unlawful interference. The HC dismissed the claims.

III. Issues

11 On appeal, the CA considered the following issues:

(a) the interpretation of clause 3 of the Settlement Agreement;
(b) whether certain clauses under clause 3 were void for being penalty clauses;
(c) the validity of the R&O Committee's decisions under clauses 3(c) and 3(d) of the Settlement Agreement; and
(d) whether Leiman was entitled to the 2011 Bonus, and the Additional Shares.

12 The CA also considered whether the HC erred in dismissing the appellants' economic tort claims, and the remedies that they are entitled to (if any).

A. The Interpretation of Clause 3

13 The CA first noted that the Settlement Agreement was a mutually beneficial arrangement between Leiman and NRL that regulated Leiman's post-resignation conduct and relationship with Noble. With that context in mind, the CA noted that clause 3 established

a "two-track" regime. Clause 3(a) encompassed all of Leiman's severance entitlements as contemplated under clauses 3(a) to 3(e), and conditioned them upon his compliance with his contractual non-competition and confidentiality obligations. The CA held that the question of whether or not he was in compliance with these obligations was a legal question to be determined by the courts. On the other hand, clauses 3(c) and 3(d) dealt with the entirely separate commercial question of whether Leiman had acted to Noble's commercial detriment, and as such was to be determined by the R&O Committee. His rights to the Share Options and the Shares, under clauses 3(c) and 3(d) respectively, were subject to the condition in clause 3(a) that he comply with his contractual non-competition and confidentiality obligations, as well as the additional condition in clauses 3(c) and 3(d) that he not act to Noble's detriment.

14 The next question was therefore the interpretation of the word "detriment". The CA disagreed with the HC's finding that this did not need proof of actual detriment to Noble. Instead, the CA held that the word must refer to some negative consequence to Noble arising from Leiman's conduct. The CA noted that absent any actual detriment to Noble, it was difficult to see how it could be said that Leiman had acted to Noble's detriment. It also noted that this interpretation cohered better with the context of the Settlement Agreement, which rested on a mutually beneficial arrangement to bring about a smooth and amicable parting of ways. This objective called for commercially sensible arrangements that duly protected both sides.

15 The CA further noted that such "detriment" related only to conduct taking place after the parties' entry into the Settlement Agreement; this was in line with their purpose in entering the agreement, which was to regulate Leiman's post-resignation conduct and relationship with Noble in a mutually beneficial way. The CA also rejected the appellants' argument that Leiman would only be found to have acted to Noble's "detriment" if he was in breach of the obligations under clause 3(a). It would be counterintuitive for the parties to have left the identical issue of his compliance with his contractual obligations to be dealt with by two separate bodies, i.e. the courts and the R&O Committee. The parties would also have repeated the qualification in clause 3(a) in clauses 3(c) and 3(d) if they had intended the "detriment"

considered by the R&O Committee to be co-extensive with breaches of the same contractual obligations.

16 Finally, the CA stated that in assessing whether Leiman had acted to Noble's detriment, the R&O Committee was not entitled to consider whether he had complied with his contractual obligations. The R&O Committee, being a body of commercial people, was not suited to make determinations of a legal nature. Commercial detriment can follow upon conduct that does not involve a breach of contract, and not every breach of a contractual obligation will give rise to commercial detriment. Moreover, it was not objectively plausible that a legal determination by the court should be interpreted as being open to annulment by the determination of a body of commercial people. Finally, the R&O Committee's task was never to determine the appropriate legal remedies for any breach of contract by Leiman. If the court found that he had breached his contractual obligations, it would be the court's task to ensure that NRL was adequately compensated for the loss of its bargain with Leiman, through the grant of appropriate remedies. In contrast, the R&O Committee was concerned only with Leiman's Noble-related severance entitlements; the deprivation of these entitlements would not be a recognised remedy for a purported breach of contract.

B. Whether certain Clauses under Clause 3 were void for being Penalty Clauses

17 The CA then considered whether clause 3 fell afoul of the rule against penalties. The corollary of recognising the parties' freedom of contract is that the law allows them the freedom to change their mind and break their contractual undertakings, albeit at a price. To address this, the law imports into contracts a secondary obligation to pay compensatory damages to remedy breaches of contract. Where the parties stipulate the way in which a secondary obligation is to be discharged, this will be scrutinised by the court before it is upheld.

18 In this respect, the rule against penalties makes a clause unenforceable if that clause imposes consequences on a party who breaches a contract which are not reflective of the innocent party's interest in being compensated, but are in fact meant to hold the breaching party in terrorem, or "in terror", with a view to compelling the breaching party to act in a certain way. Such penalty clauses would not be given effect by the courts.

19 The traditional test for whether a clause is a penalty is whether the penalty constitutes a genuine pre-estimate of damages ("**Dunlop test**"). A later test, however, has reformulated the rule and stated that a clause is a penalty clause if it imposes a secondary obligation (rather than a primary obligation) which imposes a detriment on the breaching party which is out of all proportion to the legitimate interest of the innocent party that is sought to be protected by the clause ("**Cavendish test**"). Singapore had, up to now, adopted the Dunlop test, and had yet to decide on the Cavendish test. However, the HC adopted the Cavendish test and found that clause 3(c) was not an unenforceable penalty clause.

20 The CA did not either affirm or overrule the HC on the applicability of the Cavendish test. The CA found that clause 3(a) was a penalty clause regardless of whether the Cavendish or Dunlop test was applied. As to clauses 3(c) and 3(d), the question did not even arise as they were not secondary obligations that were triggered by Leiman's breach of contract.

(1) Primary versus Secondary Obligations

21 The CA reiterated that the rule against penalties applied only to clauses that impose secondary obligations. In considering whether a clause imposes a primary or secondary obligation, the court should approach the issue as a matter of substance rather than form, with the inquiry being directed towards and guided by: (a) the overall context in which the bargain in the clause was struck; (b) any reasons why the parties agreed to include the clause in the contract; and (c) whether the clause was entered into and contemplated as part of the parties' primary obligations under the contract in order to secure some independent commercial purpose or end, or whether it was to hold the affected party in terrorem in order to secure his compliance with his primary obligations.

22 The CA then applied this framework to the present case. Looking to the overall context of the Settlement Agreement, the CA first noted that the impetus for this agreement was the parties' desire to create a mutually beneficial compromise to effect a "clean break" in their employment relationship, with the intent of leaving no outstanding legal issues between them.

(2) Clause 3(a)

23 The CA considered that as a matter of form, clause 3(a) was phrased as a primary obligation upon Noble to provide Leiman with payments and benefits upon a contingency being fulfilled, *i.e.*, Leiman's continued compliance with his contractual obligations of non-competition and confidentiality. However, in substance, clause 3(a) imposed a secondary obligation on Leiman, which engaged the rule against penalty clauses.

24 First, the rights provided under clauses 3(b) (regarding the advisory agreement) and 3(e) (regarding his entitlement to the 2011 Bonus) were based on considerations independent of Leiman's continued compliance with his non-competition and confidentiality obligations under the Employment Agreement and the Settlement Agreement. It was not clear what independent commercial purpose would be served by requiring Leiman to continue to comply with his contractual non-competition and confidentiality obligations in order to be entitled to these rights. Second, while it was possible to discern that Noble had an independent commercial purpose in extracting from Leiman an agreement to subject his rights under clauses 3(c) (with regard to the Share Options) and 3(d) (with regard to the Shares) to his being a "good leaver" after his resignation, the parties had already specifically provided for a "good leaver" condition under clauses 3(c) and 3(d). As such, clause 3(a) imposed an additional hurdle on Leiman, by subjecting his rights to these Share Options and Shares to the additional condition that he not breach his contractual obligations of non-competition and confidentiality. The CA concluded that in substance, clause 3(a) was included in the Settlement Agreement in terrorem with regard to Leiman, and any thought he might have had of breaching his contractual non-competition and confidentiality obligations.

25 As a secondary obligation, clause 3(a) was an unenforceable penalty clause, regardless of whether the Dunlop test or the Cavendish test was applied. It was not a genuine pre-estimate of damages under the former test, since it disentitled Leiman from receiving fixed benefits under clause 3, regardless of the nature and extent of his breach of his contractual non-competition and confidentiality obligations. Clause 3(a) would also fail the Cavendish test, as it was unclear what legitimate

interest Noble could have had in upholding this clause, beyond punishing Leiman if he breached his obligations of non-competition and confidentiality.

(3) Clauses 3(c) and 3(d)

26 However, the CA held that clauses 3(c) and 3(d) were not penalty clauses. As a result of clause 3(c), Leiman gave up his unqualified ability to exercise some vested rights, in return for an extension of time to exercise those rights and the grant of more rights that he would not otherwise have been entitled to. The consummation of those enhanced rights was subject to the condition that Leiman was not to act to Noble's detriment. This was a condition mutually arrived at by the parties. In short, the parties agreed to clause 3(c) as part of their primary obligations, so that Leiman could exchange one set of entitlements for another in return for being a "good leaver".

27 Moreover, this did not impose on Leiman any secondary obligation to pay damages to or compensate Noble for any breach of his contractual obligations. Clause 3(d) similarly set out a fresh primary obligation on Noble to vest the Shares in Leiman on the condition that he not act to Noble's detriment, as determined by the R&O Committee in the event of a dispute. As such, clauses 3(c) and 3(d) superseded the original terms of the grant of the Share Options and the Shares, as part of a fresh bargain that Leiman struck with Noble, and imposed fresh primary obligations on Noble to honour Leiman's enhanced rights in respect of the Share Options and the Shares.

C. The validity of the R&O Committee's decisions under Clauses 3(c) and 3(d)

28 As the CA found that clause 3(a) was an unenforceable penalty clause, Noble could not deny Leiman his rights under clause 3 of the Settlement Agreement, even if he had breached those obligations. However, the respondents could still deny him those rights if the R&O Committee validly determined under clauses 3(c) and 3(d) that he had acted to Noble's detriment.

29 In considering the validity of the R&O Committee's decisions, the CA first established that there is no general requirement that a party purporting to exercise a particular contractual right, or to act in a

particular way that might be prejudicial to the other party, has a general duty to act fairly. There is also no specific duty to observe any particular requirements of natural justice. Contracting parties are generally entitled to act in their own interests. If, in doing so, it should turn out that a party has breached its contractual obligations, then it may be liable in damages.

30 However, this general position may be displaced by the terms that the parties have agreed on, whether expressly or impliedly. As such, a court's assessment of whether the exercise of a particular contractual right has been made subject to any duty of fairness or observance of any particular procedure is a contextual one that considers: the particular contractual right in question, the language of the relevant provision, the consequences of any decision made under that provision, and what was contemplated procedurally. In other words, a claim that any requirement of fairness has been breached is in actuality a claim in breach of contract, and the first port of call must always be the terms of the contract.

31 With regard to clauses 3(c) and 3(d), the CA first found the R&O Committee's jurisdiction would only be triggered if Leiman had allegedly done something that amounted to acting "to the detriment of Noble". Second, the R&O Committee was specifically designated to make a final determination on whether Leiman had acted to the detriment of Noble "in the event of any dispute", which was a very specific circumstance. That phrase meant that there had to be a contention that Leiman had acted to the detriment of Noble, and such allegation had to be put to Leiman, so that he could decide whether he was going to dispute it. Third, in the event of a dispute, the R&O Committee's determination as to whether Leiman had acted "to the detriment of Noble" would be final.

32 The CA thus found it implicit that Leiman had to be given notice of Noble's allegations that he had acted to its detriment, and the basis for such allegations if necessary, before the R&O Committee could even be activated to make its determination. This was because the R&O Committee's jurisdiction was engaged only when there was a dispute. For there to be a dispute, Leiman would have to be informed of the basis of allegations to decide whether he wanted to dispute the allegations. If so, the R&O Committee would then have to give Leiman an opportunity to put forward his reasons for disputing the allegations before it could exercise its power to make a final determination as to whether Leiman

had acted "to the detriment of Noble". Beyond this, once Leiman was apprised of the allegations against him and if he chose to dispute them, the R&O Committee had to act fairly in making its final determination on whether he had acted to Noble's detriment.

33 These requirements were not complied with. The R&O Committee did not make Leiman aware of the allegations against him or give him the opportunity to decide whether he disputed them, and if so to respond to them. Thus, he was never in a position even to decide whether to dispute the allegations. Further, he was not given any opportunity to make representations to the Committee before it made its determination against him. There was therefore no valid "final" determination under clauses 3(c) and 3(d) of the Settlement Agreement. As such, the R&O Committee's determinations that Leiman had acted to Noble's detriment were invalid, as were its subsequent refusal to allow him to exercise his Share Options and receive the Shares on the basis of those determinations.

D. Leiman's other entitlements (2011 Bonus and the Additional Shares)

34 The CA agreed with the HC that Leiman was not entitled to the 2011 Bonus. The evidence showed that a general decision was taken that no bonus would be awarded to Noble's top management for 2011, and also that other members of Noble's top management indeed did not receive bonuses for 2011.

35 However, the CA held that the forfeiture of Leiman's right to the Additional Shares was invalid. These were excluded under clause 3(d) of the Settlement Agreement, and were governed by the AIP instead. Clause 5 of the AIP stated that the shares awarded to Leiman under the AIP would be forfeited if Leiman "act[ed] or engag[ed] in inimical or contrary to or against the interests of the Noble Group". Such conduct included "any other conduct or act reasonably determined by the [R&O] Committee to be injurious, detrimental or prejudicial to the interests of the Noble Group".

36 Therefore, the question was whether there was a "reasonabl[e] determin[ation]" made by the R&O Committee to deny Leiman the Additional Shares. The CA reiterated that "detriment" assessed by the

R&O Committee under the AIP must refer to actual loss, damage and harm; the same approach applied for the terms "injurious" and "prejudicial". There was no basis for the Committee's determination under clause 5 of the AIP to be sustained as a "reasonabl[e] determin[ation]" of injury, prejudice, or detriment, given that Leiman's conduct did not amount to actual detriment or damage to Noble's business interests.

E. Economic Torts and Remedies

37 With regard to the economic tort claims, the CA upheld the HC's dismissal of these claims, as it was satisfied that the elements of the pleaded economic torts had not been proved adequately. As for remedies, while the CA found that the R&O Committee's decision relating to the Shares and Share Options was invalid, it did not direct the R&O Committee to reconsider the entitlements, as the time for such action had long passed and the Committee as it was constituted at the material time no longer existed. The CA instead ordered that damages were to be assessed for the losses sustained a result of the wrongful decisions.

IV. Key Takeaways

38 Regarding the penalty doctrine: it remains to be seen whether the Cavendish test will become part of Singapore law, and how it will interact with the Dunlop test. However, the CA's decision that the relevant clauses would have been caught as a penalty clause under both tests indicates that it would be prudent to consider implications under both tests when drafting. The CA also laid down various considerations that are relevant in determining whether a clause stipulates a primary or secondary obligation. In particular, the consideration of whether the clause was intended to secure some commercial purpose, as opposed to simply to holding the relevant party in terrorem to secure compliance, reveals the CA's inclination to consider the background and purpose of the commercial transaction in its entirety. This makes it clear that while clear drafting of the clause is still highly important, at the end of the day, the court would still consider substance over form.

39 Regarding the issue of contracts which vest decision-making powers in a contractually designated entity: it is now clear that there is no general duty to abide by the principles of natural justice when such

powers are exercised. However, where non-judicial decision-making bodies are concerned, the courts have the jurisdiction to review how these bodies may validly exercise their powers, as part of a contractual analysis undertaken through a detailed construction and examination of the specific contractual language and the parties' intentions. The first port of call is the contract, and hence, should parties contemplate and agree on certain procedural requirements on decision-making bodies, these intentions should be accurately reflected and captured by the language of the contractual provision.

THE IMPOSSIBILITY DEFENCE

Supreme Court Case Summary: Han Fang Guan v Public Prosecutor

[2020] 1 SLR 649 / [2020] SGCA 11
Court of Appeal of Singapore
Sundaresh Menon CJ; Andrew Phang Boon Leong JA; Steven Chong JA
28 February 2020

LEE Kwang Chian

Class of 2020 (JD), School of Law, Singapore Management University

I. Executive Summary

1 In *Han Fang Guan v Public Prosecutor* [2020] SGCA 11, the Court of Appeal ("**CA**") clarified the law regarding "impossible attempts", which are attempts to commit an offence that could not possibly have been consummated in the circumstances. The accused Han Fang Guan ("**Han**") was charged with the capital charge of *attempting* to possess one bundle containing not less than 18.62g of diamorphine (also known as heroin) for the purpose of drug trafficking, an offence under section 5(1)(a) read with section 5(2) and section 12 of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("**MDA**").

2 Han was convicted following trial in the High Court ("**HC**"). As he had not been issued a certificate of substantive assistance (for assisting officers in disrupting drug trafficking activities within or outside Singapore after their arrest) by the Public Prosecutor, and he was not found to be a mere courier, the mandatory death sentence was imposed upon him.[1] Han appealed. He argued, among other things, that he had not actually ordered *diamorphine* from his drug supplier, but had only ordered 100g of *ketamine* and 25g of "*Ice*" (a street name for methamphetamine).[2]

[1] The courts have the discretion to sentence an offender to life imprisonment (instead of the death penalty) if the offender was found to be merely a courier under section 33B(2)(a) of the MDA, and the Public Prosecutor has issued a certificate of substantive assistance under section 33B(2)(*b*) of the MDA.

[2] Under the MDA, Han's claimed order of 100g of ketamine and 25g of Ice would not ordinarily attract the death penalty.

3 On appeal, the CA held that for Han's conviction to be sustained, the Prosecution had to prove beyond a reasonable doubt that Han: (a) intended to possess the drugs in question, and knew the nature of the drugs, *i.e.*, that they contained diamorphine; and (b) intended to traffic in those drugs. However, the CA found that there was a reasonable doubt as to whether Han had indeed ordered (and hence intended to traffic) diamorphine from his supplier, as Han was consistent in his assertion that he had ordered ketamine and Ice. This was also supported by objective evidence of a possible mix-up of the orders from the drug supplier. The Court therefore allowed the appeal by Han, and acquitted Han of attempting to possess one bundle containing not less than 18.62g of diamorphine for the purpose of drug trafficking.

4 However, the CA then had to consider whether the current charge of attempting to possess diamorphine for the purposes of trafficking could be amended to one of attempted possession of some other drugs (i.e. ketamine and Ice) for trafficking. The attempt to possess ketamine and Ice for trafficking was an "*impossible attempt*", as there was no possibility of Han actually obtaining those drugs at that time. The CA decided to apply a two-stage framework to examine such "impossible attempts":

(a) *First*, was there a specific intention to commit a criminal act? ***Only if so*** would the courts look to the second step.
(b) *Second*, were there sufficient acts by the accused in furtherance of the specific intention to commit the criminal act in (a)?

5 A conviction may only be arrived at if the answer to the second stage was also "Yes".

6 The CA then adjourned the matter pending submissions from the Prosecution as to whether the charge against Han should be amended to one of attempting to possess ketamine and Ice for the purpose of trafficking, alongside any subsequent responses from Han.

II. Material Facts

7 Sometime before 2nd March 2016, Han contacted his drug supplier, known as "Lao Ban", to order some drugs. A drug courier, Khor Chong Seng ("**Khor**"), collected two motorcycle helmets

containing several bundles of drugs from Lao Ban in Malaysia, intending to cross into Singapore and deliver the drugs to various recipients in Singapore.

8 Early morning on 2nd March 2016 (around 12.10am), Khor was stopped and searched by Central Narcotics Bureau ("**CNB**") officers after entering Singapore through Woodlands Checkpoint. In total, the CNB officers found seven bundles of controlled drugs on Khor: (a) three big bundles, wrapped in black tape, each bundle weighing approximately 450 grams, each of which contained diamorphine; (b) one small bundle, wrapped in black tape, weighing approximately 50 grams, which contained methamphetamine; and (c) three bundles wrapped with transparent tape, each of which contained nimetazepam tablets.

9 Khor informed the CNB officers that he was tasked to deliver the drugs to various recipients in Singapore. He agreed to assist the CNB officers in a follow-up operation against the intended recipients, where he would communicate with Lao Ban and the intended recipients to deliver the drugs, and give the information to the CNB officers. Shortly after 2am on 2nd March 2016, Khor received instructions from Lao Ban, via phone calls, to deliver the drugs to three individuals in the following manner: two big *yellow* bundles to "99", one *yellow* bundle to "T", and the rest to "Ah Ken". Lao Ban also told Khor to collect $3,600 from "T", and later instructed Khor that "T" would call Khor. At 2.47am, Han called Khor and introduced himself as T.

10 Subsequently, over four phone calls between 4.02am and 4.40am, Han and Khor made arrangements to meet. CNB officers set up an ambush, subsequently arresting Han. $3,600 in cash was found on Han. In his recorded statements and at trial, Han asserted consistently that the $3,600 found on him was meant for gambling (although he admitted that if someone had arrived with ketamine and Ice, he would have used the money to pay for the drugs), and further that he had ordered ketamine and Ice from Lao Ban, and not diamorphine.

III. Issues on Appeal

11 The CA considered the following issues on appeal:

(a) Was there a reasonable doubt that Han had ordered diamorphine from Lao Ban?

(b) If so, under what circumstances can criminal liability attach to impossible attempts?

A. Was there reasonable doubt?

12 Han was charged under section 12 of the MDA, whereby the accused person must intend to commit the underlying offence of attempting to possess one bundle containing not less than 18.62g of diamorphine for the purpose of drug trafficking. The Prosecution had to prove beyond a reasonable doubt that:

(a) Han intended to possess the drugs in the *specific* bundle that he was supposed to have received, which contained not less than 18.62g of *diamorphine*, and knew that the bundle contained *diamorphine*; and
(b) Han intended to traffic in those drugs *specifically*.

13 The CA found that there was reasonable doubt[3] as to whether Han had in fact ordered diamorphine from Lao Ban. It thus allowed the appeal and acquitted Han on the current charge.

14 *First*, there was a significant inconsistency in the Prosecution's case. In a phone conversation shortly after 2.00am on 2nd March 2016 between Lao Ban and Khor, Lao Ban had repeatedly referred to the bundle he intended for Han as a "*yellow* bundle". However, the bundle attributed to Han under the section 12 MDA charge was a *black* bundle.

15 Further, with regard to that phone conversation, Khor had already been apprehended and was assisting the CNB investigating officer (who was also listening in on the conversation), and the seized (non-yellow) bundles were also in sight of that CNB officer during the phone conversation. Nonetheless, no instruction was given to Khor to clarify with Lao Ban what he meant by the *yellow* bundles.[4] Instead, the investigating officer had chosen to proceed on the "presumption" that Lao Ban was referring to the big *black* bundles when he mentioned the *yellow* bundles.

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[3] Reasonable doubt, as explained in *Public Prosecutor v GCK* [2020] SGCA 2, means doubt that is supported by reasons that are logically connected to the evidence.

[4] The investigating officer explained, at trial, that to ask too many questions during the operation would likely raise Lao Ban's suspicions.

16 Additionally, the Prosecution's case was that *all* the three black bundles that Lao Ban had referred to as "yellow bundles" were identical and were referred to interchangeably. While it was true that all three black bundles contained diamorphine, there was a complete lack of evidence that the other two bundles (meant for the buyer referred to as "99") were *intended* to contain diamorphine. 99, who had also been apprehended in the same CNB operation, could well have been called to called to testify that he had ordered diamorphine. Had the Prosecution established that 99 had in fact ordered diamorphine, the CA might have come to a different conclusion as to whether there was a reasonable doubt that Han had also ordered diamorphine from Lao Ban, given that Lao Ban had referred to the three bundles in a way that suggested they were interchangeable.

17 *Second*, the CA found that Han had been consistent in his claim that he had not ordered *diamorphine* but instead had ordered ketamine and Ice. He made this claim even before he was aware of objective evidence that supported his claim (*i.e.*, the phone conversation between Khor and Lao Ban), which would have indicated the possibility of a mix-up in the drug orders.

B. Criminal liability for impossible attempts?

18 Given that the essence of Han's defence was that he had ordered ketamine and Ice instead of diamorphine, the CA then considered whether the current charge against Han should be amended to one that he attempted to possess *some other drug* for the purpose of trafficking. However, such an act would be considered an "impossible attempt": given that there were never any bundles containing 100g of ketamine and 25g of Ice, there was no possibility of Han consummating the primary offence of possessing ketamine and Ice for the purpose of trafficking. Could he then be charged with *attempting* to commit that offence?

19 The CA stated that, typically, "impossible" attempts arise in two broad situations. The *first* is where an accused person has not completed his intended course of action (*e.g.*, because he was inept, had inadequate tools, or another party intervened).

20 The *second* is where the accused person has done all that he intended to do, but the offence has not been consummated for some reason. In such cases, the accused was often operating under a mistaken belief as to some fact. For example, in one case, [5] the accused, who was charged with trafficking diamorphine, claimed that he believed he was actually carrying ecstasy pills. Such cases led to a dissonance between the act that the accused *intended* to carry out (*e.g.*, trafficking in ecstasy), and the act which *he in fact carried out* (*e.g.*, trafficking in diamorphine).

21 The CA found that many previous cases had erroneously assumed that the issue of whether the accused person could be charged with attempting to commit an offence should be assessed by reference to the act that the accused *actually* did, rather than by reference to the act that the accused *intended* to do. For example, in the UK case of *Haughton v Smith* [1975] AC 476, a van that was loaded with stolen corned beef had been intercepted by the police partway through its intended journey; the police decided to let the van continue to where the driver was supposed to meet, and did later meet with, the accused. The police subsequently arrested the accused for handling stolen goods (*i.e.*, the corned beef). However, by the time the accused handled the corned beef, it was no longer considered stolen because it had been restored to lawful custody when the police intercepted the van. The court therefore acquitted the accused of attempting to handle stolen goods. The act that the accused *committed* (attempting to handle goods that were already in police custody) was used as the rationale for the court's decision, instead of the act *intended* (attempting to handle goods that were stolen).

22 The CA held instead that an "attempt" is criminalised because the intended (or attempted) act is illegal. The imposition of a requirement that there be sufficient acts to corroborate the existence of that guilty intention serves not only as an evidentiary threshold, but also, and more importantly, as a safeguard to ensure that an accused person is not penalised purely for having a guilty intent. Thus, cases involving impossible attempts must be resolved by focusing on the criminality of the *intended* act. If the criminality of the *intended* act was sufficiently established, it would not generally matter if what the accused person did would not objectively amount to an offence. For example, a would-be

[5] *Public Prosecutor v Mas Swan bin Adnan* [2012] 3 SLR 527.

murderer who stabbed a bolster in the mistaken belief that it was his intended victim could still be charged for attempted murder.

23 The accused's acts must also be analysed against the *guilty intent* with which he set out to commit the offence. Sufficient actions towards the fulfilment of the *intended* act must have been performed by the accused, so as to filter out cases that are only the products of a guilty mind (without sufficient acts to satisfy the *intended* crime).

24 The CA thus set up a two-stage framework to be applied to "impossible attempts":

(a) *First*, was there a specific intention to commit a criminal act? The focus would be on the *act* that the accused person specifically *intended* to do, as well as the criminality of such an act (whether on its face, or due to some mistaken belief harboured by the accused person). The inquiry would move on to the second stage only if the answer to the above was *yes*. This would sieve out situations where what the accused intended to do was not an offence at all.

(b) *Second*, were there sufficient acts by the accused in furtherance of his specific intention to commit the criminal act under (a)? The inquiry here was directed at whether there were sufficient acts to reasonably corroborate the presence of that intention, and demonstrate substantial movement towards its fulfilment. This would avoid penalising mere guilty intentions.

25 The CA noted that this framework would resolve several difficulties that have plagued the traditional judicial attitude towards "impossible attempts". For instance, the result in *Haughton* (discussed above) was subject to much criticism. That decision was intuitively unsatisfactory, as the act that the accused had *intended* to do was a crime in every sense of the word. Now, under this two-stage framework, the same situation would have a different result: in specifically intending to deal with stolen goods and coupling that specific intent with sufficient acts, the accused in *Haughton* would be found to be both morally and legally culpable, and therefore would have been convicted of the crime.

IV. Lessons Learnt

26 There are two important lessons to be applied from this case. *First*, in the process of gathering evidence, it is important for investigators to clarify any discrepancies that might lead to reasonable doubt during trial. The CA pointed out that it might have come to a different conclusion if the CNB officer had instructed Khor to clarify with Lao Ban concerning the apparent discrepancy in the colour of the bundles, or the Public Prosecutor had obtained evidence through "99" that the two similarly coloured black bundles in Khor's possession were meant to contain diamorphine.

27 *Second*, parties who have committed "impossible offences" are not protected from criminal liability. An accused person may be found guilty of a criminal attempt, even if the offence could not possibly have been consummated, so long as it is proven that the accused had intended to commit a crime and had taken sufficient steps in furtherance of such criminal intent. For instance, while the CA did not discuss whether Han would be found guilty of attempted trafficking of ketamine and Ice, an analysis of Han's acts under the two-stage framework would seem to imply that he would be found guilty if the current charge were amended to a charge of attempting to possess ketamine and Ice for the purpose of trafficking.

DO ALGORITHMS DREAM OF MISTAKEN CONTRACTS?

Supreme Court Case Summary: Quoine Pte Ltd v B2C2 Ltd

[2020] 2 SLR 20 / [2020] SGCA(I) 2
Court of Appeal of Singapore (International)
Sundaresh Menon CJ; Andrew Phang JA; Judith Prakash JA; Robert French IJ; Jonathan Mance IJ
24 February 2020

Lokman **HAKIM** Bin Mohamed Rafi

Class of 2021 (JD), School of Law, Singapore Management University

I. Executive Summary

1 Can an agreement which is formed purely through the operation of algorithms be considered a binding contract? If so, can such a contract be unilaterally cancelled because of a mistake, where such mistake resulted in trades being concluded at 250 times the market rate? This was the question before the Court of Appeal ("**CA**") in the case of *Quoine Pte Ltd v B2C2 Ltd* [2020] SGCA(I) 2.

2 B2C2 Ltd ("B2C2") traded on a cryptocurrency exchange created by Quoine Pte Ltd ("**Quoine**"), known as QUOINExchange (the "**Platform**"). Both B2C2 and Quoine were market-makers on the Platform: they created liquidity there, by actively placing orders to buy and sell cryptocurrencies.

3 B2C2's entire trading process was automated using its algorithmic trading software ("**Trading Software**"). This meant that its trades were concluded without any direct human involvement, save for that involved in the creation of the algorithmic processes leading to their formation. The algorithms were also *deterministic*, meaning they would do only what they were programmed to do.

4 To determine the price on the trades, the Trading Software essentially relied on inputs based on the 20 best orders on the Platform. Without such input, it was pre-programmed to rely on a failsafe trading price (the "**Deep Price**") of 10 Bitcoins ("**BTC**") to 1 Ethereum

("**ETH**"). [1] This price was established by Mr Maxime Boonen ("**Boonen**"), a director of B2C2 who also designed the Trading Software.

5 The events in question occurred around 19 April 2017. There were 13 trades ("the **Disputed Trades**") concluded between B2C2 and two other users of the Platform – Pulsar Trading Capital ("**Pulsar**") and Mr Yu Tomita ("**Tomita**") (Pulsar and Tomita together the "**Counterparties**") – where B2C2 sold them ETH for BTC at around the Deep Price. These rates were approximately *250 times* the then-going market rate of around 0.04 BTC for 1 ETH. The Disputed Trades were automatically settled by the Platform.

6 It transpired that due to an operational oversight by Quoine, the Platform was not able to access external market data to generate new orders, resulting in the Trading Software having no or insufficient input for its trades. This caused the Deep Price to come into effect, eventually making the Disputed Trades.

7 When Quoine became aware of the Disputed Trades the next day, it considered the rates of the trades to be highly abnormal, and unilaterally cancelled the trades. The debit and credit transactions involving B2C2's account and the Counterparties' accounts were also reversed.

8 B2C2 subsequently commenced proceedings against Quoine for breach of contract and/or breach of trust. Generally, B2C2 argued that usage of the Platform was governed by a user agreement (the "**Agreement**"), and Quoine had breached a provision in the Agreement which disallowed an order from being cancelled once fulfilled (the "**Irreversible Action Clause**"). A central plank of Quoine's defence was that the contracts underlying the Disputed Trades (the "**Trading Contracts**") were void or voidable[2] for unilateral mistake.

9 The case was first pursued in the Singapore International Commercial Court ("**SICC**"), where judgment was given in favour of B2C2 on both issues of breach of contract and breach of trust. On appeal,

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1 Both BTC and ETH are types of cryptocurrencies.

2 A void contract is treated as if it never existed and cannot be enforced. A voidable contract continues to exist and is enforceable until it is set aside by the party that did not breach the contract.

the CA in a majority decision[3] upheld the SICC's judgment on breach of contract, but reversed the decision on breach of trust.

II. Issues on Appeal

10 To determine the claims, the CA had to consider:

(a) the nature of the contractual relationships between the parties;
(b) whether the Agreement allowed Quoine to cancel the Disputed Trades;
(c) whether the Trading Contracts were invalidated by unilateral or common mistake;
(d) whether B2C2 was unjustly enriched (hence allowing Quoine to cancel the Disputed Trades); and
(e) whether Quoine held the cryptocurrencies on trust for B2C2.

A. The Nature of the Parties' Contractual Relationships

11 To determine if the defence of unilateral mistake could be raised, the CA first had to examine the nature of the contractual relationships between Quoine, B2C2 and the Counterparties. This would allow it to see which contract was affected by any asserted mistake, and who the actual mistaken party was. The CA held that Quoine merely provided a service to the users of the Platform under the Agreement, and that trading contracts were made directly between buyers and sellers. Thus, the Trading Contracts were formed directly between B2C2 and the Counterparties, and it was the parties to the Trading Contracts that were responsible for whether and on what terms they would place or fill orders.

B. Whether Quoine could cancel the Disputed Trades

12 Quoine had two main arguments on this issue: first, that the Agreement permitted it to cancel the Disputed Trades, and second, that terms could be implied into the Agreement that allowed Quoine to cancel the Disputed Trades.

[3] A majority decision of the court happens when it is agreed to by more than half of the judges. A minority, or dissenting, opinion refers to the decision of the judges that did not agree with the majority. Here, the majority comprised Chief Justice Sundaresh Menon, Judges of Appeal Andrew Phang and Judith Prakash, and International Judge Robert Shenton French. The sole dissent was by International Judge Johnathan Mance.

(1) The Agreement permitted Quoine to reverse the Trades

13 Quoine argued that in addition to the Agreement, its services to the Platform users were also governed by a "Risk Disclosure Statement" posted on Quoine's website. This Risk Disclosure Statement contained a clause empowering Quoine to cancel trades resulting from an aberrant value produced by the Platform (the "**Aberrant Value Clause**"). Further, Quoine argued that under the Agreement, it could amend the terms of the Agreement without first informing the Platform's users of such change. This was due to clauses which stated that the Agreement "may be changed at any time by [Quoine]" and that Quoine could change any of the terms "for access to or continued use of services … without providing notice of such change" (the "**Unilateral Variation Clauses**").

14 However, the CA agreed with the SICC that the Unilateral Variation Clauses did not allow Quoine to change the terms of the Agreement without first notifying the Platform users of such change. It held that a user had to have reasonable means of knowing that there had been a modification to the terms, and what that modification was, before any such change could have legal effect. With such knowledge, the user could then decide whether it would continue to use the Platform. Quoine's actions in merely uploading the Risk Disclosure Statement onto its website, without doing more, did not suffice to constitute the requisite notice.

15 In any case, the clause which stated that changes would be made "without providing notice of such change" contemplated that Quoine would take active steps to inform its users of such changes, as it also stated that changes would be "posted or emailed". The Agreement also separately provided that "[i]t is the responsibility of the User to keep himself/herself updated with the current version of the Agreement" – the CA held that this contemplated that users would have the opportunity to review the changes in the first place, which in turn necessitated them being given notice of these changes.

16 In any event, the Aberrant Value Clause did not have the effect Quoine intended. It was applicable only when the Platform, because of "emergency system maintenance" or "system failure", generated a price that was not intended by the user. Here, while the price was abnormal, it was clearly intended by B2C2 in accordance with its programming. The

Disputed Trades were concluded based on prices *correctly* quoted by the Trading Software for B2C2, and market orders that were *correctly* placed by the Platform for the Counterparties. Further, "system failure" had been defined as situations where orders could not be placed; this was not such a situation.

(2) Terms could be implied into the Agreement allowing Quoine to cancel the Trades

17 Quoine sought to *imply* the existence of two additional terms into the Agreement (that were not already written in the Agreement): that Quoine could reverse trades executed at an abnormal price resulting from a technical error or system failure, as well as trades resulting from a breach of the Agreement (collectively, the "Proposed Implied Terms"). However, the CA rejected this argument because these terms contradicted the Irreversible Action Clause, a clause which was actually written in the Agreement.

C. Whether the Trading Contracts were invalidated by unilateral or common mistake

18 Quoine also argued that there was both *unilateral* mistake and *common* mistake:

(a) *First*, there was a *unilateral mistake at common law* that allowed Quoine to void the Trading Contracts. Quoine alleged that the Counterparties entered into the Trading Contracts based on two mistaken beliefs: that it was necessary to sell in response to the margin calls the Platform made on them;[4] and that the price of the Disputed Trades accurately represented the true market value of the ETH relative to BTC on such date.

[4] Margin trades, which are trades entered into using borrowed funds (including cryptocurrencies), is permitted on the Platform. For margin traders with loans from Quoine, the assets in their accounts served as the collateral for the loans. If the collateral in the margin trader's account fell below a pre-determined percentage of such loan, a "margin call" was triggered and the Platform would automatically sell the cryptocurrencies being held by that trader to meet the shortfall in the loan (*i.e.*, force-close an open position). Due to the way that the Platform was programmed, abnormally priced orders or an abnormally thin order book could affect whether the collateral in accounts had fallen below the pre-determined percentage, causing the Platform to force-close the margin trader's positions, at the best available price on the Platform.

(b) *Second*, there was a *unilateral mistake at equity*, given that B2C2 exploited the Counterparties' mistake as to the price.
(c) *Alternatively*, Quoine argued that B2C2 and the Counterparties shared a *common mistake* as to the price.

19 However, the CA found that there was neither unilateral mistake (either in common law or equity[5]) nor common mistake here. The CA first reiterated that a *unilateral* mistake in contract happens when *one* party *knows* that the other party entered into the contract because it was mistaken about a *fundamental term* of the contract, such as the price. Conversely, a *common* mistake happens when *both* parties share a mistake about the terms of the contract.

20 There are also two types of unilateral mistake. Unilateral mistake at *common law* requires that the non-mistaken party have *actual* knowledge that the other party had mistaken a term of the contract. In contrast, unilateral mistake at *equity* does not require actual knowledge by the non-mistaken party. Instead, the question is whether a reasonable person in the position of the non-mistaken party would have known of the mistake (i.e. *constructive* knowledge). The non-mistaken party must also have acted unconscionably in the latter situation.

(1) Unilateral mistake

21 Before deciding whether and how the doctrines of unilateral mistake should apply to contracts made by computerised trading systems and algorithms, the CA first had to consider whether there could be a valid contract in such situations. In such cases, the parties would not know beforehand that a contract (in this case the Trading Contracts) would be entered into, or the specific terms on which such contract would be concluded (here, the price), but would nonetheless be content to abide by what the relevant algorithms did, so long as it was within the ambit of their programmed parameters.

22 The court thus first considered the more fundamental question of how such contracts were formed. It compared the Trading Contracts with the automated electronic contracting process found in the insurance industry. Essentially, automated contracting allows insurance brokers to

[5] Generally, there are different rules and remedies when one argues a claim in "law" versus in "equity."

receive quotations *automatically* calculated from a set of pre-programmed criteria (*i.e.*, a deterministic algorithm) from insurers, and enter into contracts generated from these quotations. Such automatically generated contracts have been deemed valid by the English courts despite the parties not knowing the terms of the contract before it was entered into.

23 Similarly, the CA held that a contract can be formed when an offer made by one algorithm is accepted by another. In this regard, the CA rejected what it called Quoine's "artificial" argument that the mistake should be analysed through the lens of traders having a face-to-face negotiation on the "floor of the exchange". Instead, the CA agreed with the SICC that where contracts are made by way of deterministic algorithms, any analysis concerning knowledge of a mistake or unconscionably taking advantage of one must be done by reference to the *programmer's* (or the person running the algorithm's) state of mind.

24 In addition, the relevant time frame for assessing the programmer's knowledge would be from the point of programming *up to the point* that the relevant contract is formed. This accounts for situations where a programmer who did not contemplate the relevant mistake at the point of programming came to learn of it subsequently before the contract was formed, and yet allowed the algorithm to continue running, intending thereby to take advantage of the mistake.

25 Thus, the inquiry should be: when programming the algorithm, was the *programmer* doing so with *actual or constructive knowledge* of the fact that the relevant offer would only ever be accepted by a party operating under a *mistake*, and was the programmer acting to *take advantage* of such a mistake?

26 Applying the above principles, the CA held there was no unilateral mistake here, whether at common law or equity.

(a) No Mistake

27 The CA held that the Disputed Trades, and the trading price of the cryptocurrencies, were a result of the deterministic algorithms deployed by B2C2. These algorithms had acted exactly as they had been programmed to act. In fact, the actual mistake here was a mistaken

assumption on the part of the *Counterparties* as to how the Platform operated. They had assumed that the Platform would either always operate as intended, or there would be adequate systems to prevent trading from continuing if the Platform operations deviated from this assumed state. However, this was a mistaken assumption only as to the *circumstances* under which the Trading Contracts would be concluded, not as to a fundamental term of the contracts.

(b) No Knowledge

28 The CA also held that Boonen did not have actual or constructive knowledge of the fact that the price of the Disputed Trades did not accurately represent the true market value of the ETH relative to BTC on such date. As programmer of B2C2's algorithm, Boonen would have had to foresee a "perfect storm of events" that began with the problems with Quoine's own algorithm, and ended with the Disputed Trades being concluded at the Deep Price for him to have had, or be taken to have had, this knowledge. There was no evidence that he had ever contemplated anything of the sort. Indeed, based on the evidence, Boonen had never considered that there was a *real* possibility of orders placed on the Platform being filled at the deep prices. Boonen also did not know of the glitches causing the illiquidity on the Platform until after the Disputed Trades had been transacted.

(c) No Taking Advantage

29 In any event, the CA agreed with the SICC that there was no sinister motive behind Mr Boonen programming the Trading Software with the Deep Price. He had not programmed it with either the awareness or the intention to take advantage of a mistaken bid by a counterparty or to enter into a contract on that basis. Following from the principles stated above, the relevant inquiry would be: when programming the Trading Software with the deep prices, was the programmer doing so with actual or constructive knowledge of the fact that sell orders at those prices would only ever be accepted by a party operating under a mistake and was the programmer acting to take advantage of that mistake? The CA held that the answer was no.

(2) Common mistake

30 Quoine also argued that B2C2 and the Counterparties shared a common mistake to the price of the Disputed Trades. The CA quickly dismissed this argument as well, as there was no mistake on B2C2's part. B2C2 had placed its sell orders for ETH at around the Deep Price because the intentionally pre-programmed deep price of 10 BTC to 1 ETH had taken effect.

D. Whether B2C2 was unjustly enriched

31 Quoine claimed it was entitled to cancel the trade because B2C2 had been unjustly enriched due to the mistake, at the expense of the Counterparties and/or Quoine. The CA stated that for an action in unjust enrichment to succeed: there must be a benefit received by the defendant; the benefit must be at the claimant's expense; and the defendant's enrichment must be unjust. In this case, the CA held there was nothing "unjust" about the situation. The Trading Contracts were not invalidated by any mistake. Moreover, an enrichment cannot be "unjust" if it was the result of a valid contract between the parties.

E. Whether Quoine held the cryptocurrencies on trust for B2C2

32 To create a trust, three things must exist: an intention to create a trust, a property to be placed on trust, and a beneficiary of the trust. The CA did not have to decide whether cryptocurrency was a species of property that could be held on trust, given its finding that there was no intention to create a trust.

33 The SICC had found that Quoine's separation of cryptocurrencies in different accounts was a "decisive factor" in inferring intent to create a trust, as it indicated that Quoine claimed no title to the user's assets and acknowledged that it was holding them for the user who could demand withdrawal at any time. However, the CA held that the mere fact that Quoine's assets were segregated from its customers' could not, in and of itself, lead to the conclusion that there was a trust. In any event, the way the BTC was stored by Quoine suggests that there was in fact, no segregation.

III. Minority's Dissent

34 In contrast to the majority opinion, the minority (Mance IJ) found that there was indeed a unilateral mistake at equity. However, Mance IJ conceptualised unilateral mistake at equity differently: the mistake need not be as to a fundamental term of the contract if it was sufficiently fundamental to justify judicial intervention.

35 Mance IJ further stated that the law of unilateral mistake should not be applied in a manner that left out of consideration circumstances normally central to its application, simply because parties entrusted their dealings to computers which could have no such consciousness. The law had to be adapted to the new world of algorithmic programmes and artificial intelligence, in a way which gave rise to the results that reason and justice would lead one to expect. Thus, there was nothing surprising about the law applying a test which asked what an honest and reasonable trader would have understood, given knowledge of the particular circumstances (*i.e.*, Quoine's proposed test).

36 Mance IJ also noted that the SICC's decision omitted a usually important element in any appraisal of such a situation, namely (as here): 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 could 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.

37 Here, any reasonable trader would at once have identified, as B2C2 did identify, a fundamental computer system breakdown as the cause of the transactions, which could be rectified without detriment to B2C2 or other third parties. The considerations weighing in favour of reversal of the transactions outweighed any errors or faults which led to that breakdown.

38 Mance IJ also discussed the role of the concept of unconscionability, stating that unconscionability (in bringing about the transactions) should not have a role in this novel situation. However, to the extent that the concept might be relevant, it was clearly unconscionable in this context of unilateral mistake 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.

IV. Implications

39 *First*, the majority confirmed, and the dissent did not appear to disagree, that contracts formed through deterministic algorithms are valid. The follow-up question is whether the majority's reasoning applies to algorithms capable of machine or "deep" learning (termed loosely as artificial intelligence or "AI" here). The issue is that such AI can make its own decisions (within certain broad parameters), as it is programmed to continually "learn" from data input and modify its decision-making behaviour. Since it can modify its decision-making behaviour, logically such AI would not be considered *deterministic*, in the sense used by the majority. It thus follows that in cases where the AI has modified its decision-making behaviour, it may no longer reflect the intent of its programmers; hence agreements formed by it may not fit within this analysis.

40 A related question would also be: where AI can "learn" and modify its behaviour, who should be held responsible for what the AI subsequently does? For example, assume an AI chatbot was released on social media because its programmers intended it to interact with and learn from other users. However, the chatbot instead learns offensive remarks from these users. In such cases, would the programmers be responsible for its behaviour, as they intended for the chatbot to learn autonomously? Or should responsibility lie with the users who taught the chatbot such behaviour?

41 *Second*, whether cryptocurrency can be held on trust remains an open question. The CA noted that there was much to commend the view that cryptocurrencies can be assimilated into the general concepts of property. However, the difficulty of the precise nature of the property remains. In coming to this conclusion, the CA canvassed cases from other jurisdictions that had accepted cryptocurrency as property, but noted that they had not pinned down the exact nature of the property. It also noted that while academic commentators broadly agree that cryptocurrencies can be property, there was still much disagreement on its exact nature.

42 *Lastly*, there is value in considering the dissenting opinion. While too much judicial flexibility can lead to uncertainty in commercial transactions, there are some cases where justice and fairness should prevail. For example, if (as the dissent suggested) the mistake was caused by hackers depriving the Platform of access to the external market data, and not because of an oversight on Quoine's part, the majority's approach may not have led to a just outcome.


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