Negotiating Damages for Breach of Contract: *Morris-Garner v One-Step (Support) Ltd* [2018] UKSC 20[1]

I. Introduction

At the quantification stage in breach of contract claims, claimants must sometimes think out of the box. Where no loss has been suffered or loss is hard to prove, one solution is to argue for "negotiating damages", or damages for breach of contract assessed by reference to the sum a claimant could hypothetically have received in return for releasing the defendant from the obligation breached.[2] Unfortunately, the principles regarding their availability have been so lax and uncertain that negotiating damages have been labelled "jackpot damages".[3] In *Morris-Garner v One Step (Support) Ltd* ("*Morris-Garner*"),[4] the UK Supreme Court considered the issue for the first time and sought to remedy this unsatisfactory state of affairs.

The central argument offered here is that Singapore should not extend the scope of negotiating damages beyond that currently recognised in our jurisprudence—that is, in lieu of an injunction or specific performance.[5] As the difficulties with the Law Lords' approaches show, any attempt to define the circumstances of their grant beyond the present scope runs into difficulty.

II. The decision in *Morris-Garner*

The claimant, One Step (Support) Ltd, bought a business providing support for young people leaving care, which had previously been run by the defendants.[6] As part of the agreement, the defendants undertook not to compete with the business that had just been sold, or solicit its clients.[7] They breached these undertakings and the claimant sued.[8]

At first instance, Phillips J found that the defendants were indeed in breach and awarded damages.[9] Considering the difficulties in quantifying financial loss, he held that the claimants were entitled to elect between ordinary compensatory damages and damages "on a *Wrotham Park* basis (for such amount as would notionally have been agreed between the parties, acting reasonably, as the price for releasing the defendants from their obligations)".[10] Unsurprisingly, the claimant chose the latter.[11] The defendant's appeal was subsequently dismissed by the Court of Appeal.[12]

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[2] *Morris-Garner v One Step (Support) Ltd* [2018] UKSC 20 ("***Morris-Garner***"), [1].
[3] *Marathon Asset Management LLP v Seddon* [2017] EWHC 300 (Comm) ("***Marathon Asset Management***"), [282]–[283].
[4] *Morris-Garner*, [1].
[5] *Tan Kok Yong Steve v Itochu Singapore Pte Ltd* [2018] SGHC 85; *JES International Holdings v Yang Shushan* [2016] 3 SLR 193, discussed at footnote 61 below.
[6] *Morris-Garner*, [4].
[7] *Morris-Garner*, [9].
[8] *Morris-Garner*, [11] and [16].
[9] *Morris-Garner*, [16].
[10] *Morris-Garner*, [18]–[19].
[11] *Morris-Garner*, [19].
[12] *Morris-Garner*, [20]–[22].

However, the Supreme Court allowed the defendant's appeal of the Court of Appeal's decision.[13] It held that negotiating damages were not available as a measure of damages.[14] While the outcome was unanimous, Lord Reed, writing for the majority, and Lord Sumption differed somewhat in their reasoning.[15]

A. Lord Reed

Lord Reed began by distinguishing the award of negotiating damages in two contexts. First, negotiating damages are available in equity, pursuant to the court's jurisdiction to award damages in lieu of an injunction or specific performance.[16] This much is uncontroversial. Secondly, they are also available in *some* breach of contract cases at common law. Lord Reed's proposed litmus test was that the breach of contract must result in a loss of a "valuable asset created or protected by the right which was infringed".[17] In his view, this included breach of restrictive covenants over land, intellectual property agreements, and confidentiality agreements, but not breach of non-compete agreements.[18]

On the facts, negotiating damages were not justified as a measure of damages.[19] The breach of the non-compete and non-solicitation covenants did not result in the loss of a valuable asset.[20] These covenants safeguarded only the claimant's interest in preventing competition, and as such were not a recognised type of valuable asset.[21] Accordingly, the claimant would have to prove loss (such as loss of profits or goodwill) and quantify these by adducing evidence of loss.[22]

B. Lord Sumption

According to Lord Sumption, negotiating damages may be available in three situations. First, they may be awarded where a claimant has an interest in the observance of his rights which extends beyond financial reparation.[23] This interest may be proprietary (where an award of negotiating damages is given on the user principle[24]), or contractual (Lord Sumption gives the example of a "non-pecuniary governmental interest" from *AG v Blake*).[25]

[13] *Morris-Garner*, [100], [124] and [127].
[14] *Morris-Garner*, [100] and [106].
[15] Lord Carnwath gave a separate concurring judgment supporting Lord Reed's reasoning and criticising Lord Sumption's judgment. Some of these criticisms will be refuted below.
[16] *Morris-Garner*, [41]–[47].
[17] *Morris-Garner*, [95].
[18] *Morris-Garner*, [92]–[93].
[19] The hypothetical bargain measure had, at most, evidentiary value to show the claimant's loss.
[20] *Morris-Garner*, [97]–[99].
[21] *Morris-Garner*, [98]–[99].
[22] *Morris-Garner*, [98]–[100].
[23] *Morris-Garner*, [109].
[24] See *Stoke-on-Trent City Council v W & J Wass Ltd* [1988] 1 WLR 1406, 1416: "It is an established principle concerning the assessment of damages that a person who has wrongfully used another's property without causing the latter any pecuniary loss may still be liable to that other for more than nominal damages. In general, he is liable to pay, as damages, a reasonable sum for the wrongful use he has made of the other's property."
[25] *Morris-Garner*, [112].

Secondly, they may be awarded where the claimant would be entitled to the specific enforcement of his right.[26] This category corresponds to the first context identified by Lord Reed, and includes the case of *Wrotham Park* itself.[27]

Thirdly, they may be awarded where a claimant has suffered pecuniary loss and the notional release fee is treated as evidence of that loss.[28] In this category Lord Sumption places the award of damages for patent infringement and other cases of tortious competition (such as a notional royalty for confidential information and notional endorsement fee for passing off).[29] For a case to fall within the third category, there must be evidence on which the notional release fee can be assessed and even then, it is only relevant so far as the trial judge finds it helpful, in the light of other evidence.[30]

On the facts, the claimant had not claimed injunctive relief. Neither did it have a legally recognised interest in performance beyond the recovery of pecuniary loss. Since this case did not fall within the first two categories, a notional release fee could, at best, be an evidential technique rather than a measure of damages.[31] Lord Sumption therefore returned the case to the judge for quantification, deciding "neither to require nor to exclude" the use of a notional release fee as evidence of the claimant's loss.[32]

III. Discussion

In our view, Lord Reed and Lord Sumption's judgments are more similar than different.[33] Summarising the key principles with respect to breach of contract cases, each would essentially award negotiating damages in these situations:

Lord Reed	Lord Sumption
(a) Where a breach of contract results in the loss of a valuable asset created or protected by the right which was infringed (e.g. land, patent infringement, confidential information) (b) Where the claimant seeks damages in lieu of an injunction or specific performance	(i) Where the claimant's contractual interest extends beyond financial reparation (e.g. land) (ii) Where the claimant seeks damages in lieu of an injunction or specific performance
(c) Where the hypothetical negotiation measure is otherwise useful as an evidentiary technique to show what the claimant lost (e.g. when there is evidence of a hypothetical negotiation)	(iii) Where the hypothetical negotiation measure is otherwise useful as an evidentiary technique to show what the claimant lost (e.g. patent infringement, confidential information)

[26] *Morris-Garner*, [109] and [112]–[114].
[27] *Morris-Garner*, [112].
[28] *Morris-Garner*, [109] and [115]–[123].
[29] *Morris-Garner*, [116] and [120].
[30] *Morris-Garner*, [124].
[31] *Morris-Garner*, [124].
[32] *Ibid*.
[33] C.f. Lord Carnwath, who considers there to be "significant differences between the two approaches": *Morris-Garner*, [127].

The most significant[34] difference is the test adopted at (a) and (i) of the above. For the reasons discussed below, neither test is satisfactory.

A. Lord Reed's approach

Lord Reed held that negotiating damages can be awarded for breach of contract where the breach results in the loss of a "valuable asset created or protected by the right which was infringed".[35] The main issue then would be what qualifies as a "valuable asset". However, Lord Reed's definition of a "valuable asset" is, in our view, problematic.

To begin with, Lord Reed appears to attribute two meanings to the term "valuable asset". The primary meaning, evident in most parts of the judgment,[36] is that a valuable asset is a ***right to control the use of a thing***.[37] But at times the term seems to refer to ***the underlying thing itself***, whether land, IP rights or confidential information. This is apparent from how Lord Reed consistently describes the valuable asset as one "*created by or protected by* the right which was infringed' [emphasis in italics].[38] "[C]reated by" indicates that the right of control may itself be the valuable asset, but "protected by" suggests that the underlying thing may also count as a valuable asset.

This is significant because the rationale that justifies an award of negotiating damages does not carry through to the situation where the valuable asset is the underlying thing. Where the claimant has in substance been deprived of a valuable asset, meaning the ***right to control a thing***, his loss is logically measured by determining the economic value of the right in question. But where the claimant has been deprived of ***the thing itself***, why should loss to the *thing* necessarily be measured by the economic value of the right of control?[39] Lord Reed's notion of the "valuable asset" therefore embodies some judicial sleight of hand to work practical justice.

Moreover, even where the valuable asset is defined as the right to control the use of a thing, it is unclear why contractual rights to control land, IP rights or confidential information are treated differently from other contractual rights. Lord Reed sought to pre-empt this objection by adding a qualifier: the right must be "of such a kind that its breach can result in an identifiable loss equivalent to the economic value of the right, considered as an asset, even in the absence of any pecuniary losses which are measurable in the ordinary way".[40]

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[34] There is also a difference between (c) and (iii) in that (c) potentially covers a smaller category of cases, both because Lord Reed regards patent infringement cases as falling under (a) and because he appears to require evidence of prior negotiation before accepting the utility of the hypothetical bargain measure: *Morris-Garner*, [94].

[35] *Morris-Garner*, [95].

[36] *Morris-Garner*, [30] (explaining the use of the term, albeit in the context of the user principle).

[37] He gives the example of *Vercoe v Rutland Fund Management Ltd* [2010] EWHC 424 (Ch), where the asset is the right to control the use of confidential information (that information being the relevant "thing").

[38] *Morris-Garner*, [92] and [95].

[39] While the value of the right to control a thing is often a proxy for the value of the thing, this does not always hold true. For instance, the right to prevent the construction of a fancy on land does not necessarily have the same value as the land itself.

[40] *Morris-Garner*, [93].

But this qualifier cannot explain Lord Reed's own categorisation of rights controlling the use of intellectual property as valuable assets. Take the case of a patent: In what sense can there be "identifiable losses" absent any pecuniary losses measurable in the ordinary way? Lord Sumption takes up this point, explaining that a patent infringer does not appropriate the patent in the same way that a person who infringes on tangible property rights does.[41] The patentee has not lost the power to sue the infringer (or other infringers) for an injunction. The patent infringement might also cause pecuniary losses from wrongful competition, but these are also measurable by conventional means (e.g. loss of profits) and it is hard to see how there is any other loss, since the patentee also has no interest in the observance of the patent beyond its financial value.[42]

Considering these difficulties, might Lord Reed's test be salvaged by identifying a "valuable asset" based on whether it is regarded as "property"? Unfortunately, this "easy" way out appears untenable. For example, confidential information, which Lord Reed accepts as a valuable asset, is not conventionally understood as property.[43] Moreover, the claimant's rights in *Morris-Garner* itself were arguably analogous to property rights.[44] Since the non-compete and non-solicitation clauses were given as part of a sale of shares in a business,[45] it could be said that there was a valuable asset (the shares) protected by the non-compete and non-solicitation clauses.[46] In the light of the above, Lord Reed's approach is unsatisfactory.

B. Lord Sumption's approach

We submit that Lord Sumption's test is also unsatisfactory because it provides insufficient guidance to parties.

In respect of his first category of an interest extending beyond financial reparation, the notion of the claimant's legitimate interest is inherently problematic. It has attracted unfavourable comment since *AG v Blake*, which purportedly engendered uncertainty by allowing the court to take into account all the circumstances of the case.[47] Lord Sumption has reignited this debate by adopting a similar approach to legitimate interest here.

In respect of his third category of the notional release fee as the measure of pecuniary loss, this category is too open-ended with inadequate guidance on which types of case fall within this category. [48] Lord Sumption stated that "there must be evidence on which the notional release fee can be assessed and even then, it is only relevant so far as the trial judge finds it helpful, in the light of other evidence."[49] But it is not particularly helpful to declare that the evidential technique is only relevant so far as it is "helpful" to the judge.[50] This problem is further compounded by how Lord Sumption indicates that "other evidence" might influence how

[41] *Morris-Garner*, [119].
[42] This last point was made by Lord Sumption at [119].
[43] *Clearlab SG Pte Ltd v Ting Chong Chai* [2015] 1 SLR 163, [307]; *Morris-Garner*, [120].
[44] *Morris-Garner*, [125].
[45] *Morris-Garner*, [125].
[46] *Morris-Garner*, [125].
[47] Detractors cite *Esso Petroleum v Niad* as an instance of the uncertainty this engenders. There, the court concluded that Esso had a legitimate interest in preventing Niad from breaching its pricing agreement and thus awarded it an award of account of profits. It is difficult to see how an account of profits was called for since this remedy ought to be awarded only in "exceptional" circumstances, and there was nothing exceptional on the facts.
[48] *Morris-Garner*, [136].
[49] *Morris-Garner*, [124].
[50] See also Lord Carnwath's statements at [136].

negotiating damages, as an evidential technique, are relevant,[51] without explaining how this might work. The result is that it might not be possible for lawyers to advise their clients prior to any dispute, since the third category is partially contingent on the quality of evidence at trial.

In fairness to Lord Sumption, however, two criticisms made by Lord Carnwath in his concurring judgment[52] do not in our view stand up to scrutiny either.

Lord Carnwath's first criticism is that Lord Sumption's approach is inconsistent with the authorities.[53] The problem is that Lord Sumption carves out patent infringement cases from his first category of "claimant's interest beyond financial reparation" (which includes property rights) in apparent disregard of their proprietary nature.[54]

Arguably, however, this difficulty can be resolved. Intellectual property is inherently different from tangible property because it is non-rivalrous. Further, as the patentee does not have an interest in the observance of his patent exceeding its financial value,[55] it would be conceptually more accurate to place this within Lord Sumption's third category. The problems, discussed above, arising from Lord Reed's categorisation of rights controlling the use of intellectual property as valuable assets should also not be forgotten.

Lord Carnwath's second criticism is that Lord Sumption blurs the distinction between the notional release fee as a *measure of damages* and as an *evidential technique* in formulating his third category of "notional release fee as the measure of pecuniary loss".[56]

However, this point has been overstated. The "measure of damages" versus "evidential technique" distinction is meaningful where the kind of damage is based on a different conceptual foundation from the evidential technique. To give an example, an account of profits is obviously restitutionary. Where the kind of damage claimed is loss-based, an account of profits has evidentiary value in the sense of being a proxy for loss—the profits earned by the defendant and the sum he would reasonably have been willing to pay are two sides of the same coin.[57] But here, negotiating damages are compensatory[58] and *not* to be treated as an *alternative* measure of damages differing from "ordinary compensatory damages".[59] Hence, it is not fruitful to quibble with Lord Sumption's apparent blurring of negotiating damages as a measure of loss and an evidential technique. They are, for all practical purposes, indistinguishable in this context.

All things considered, Lord Sumption's test might be conceptually sounder than Lord Reed's in view of how Lord Carnwath's criticisms may be refuted. However, it remains unsatisfactory because of the outstanding problem of vagueness.[60]

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[51] *Morris-Garner*, [124].
[52] *Morris-Garner*, [132]-[137].
[53] See the cases cited at *Morris-Garner*, [133]–[135].
[54] *Morris-Garner*, [133].
[55] *Morris-Garner*, [119].
[56] *Morris-Garner*, [133]–[137].
[57] See the discussion of *Jaggard v Sawyer* in *Yenty Lily v ACES System Development Pte Ltd* [2013] 1 SLR 577 (SGHC).
[58] C.f. *Marathon Asset Management*, which regards negotiating damages as restitutionary.
[59] *Morris-Garner*, [106].
[60] The counterargument is that Lord Sumption's test is still the less bad of the two because this problem is manageable: courts are adept at discerning what counts as a legitimate interest. The concept has appeared as a legal test in various guises. A "legitimate interest" is necessary for a penalty clause to be valid, and a "legitimate

IV. Lessons for Singapore

A. Should negotiating damages be awarded on a wider basis?

Thus far, cases in Singapore have only considered the award of negotiating damages pursuant to the court's statutory jurisdiction to award damages in lieu of an injunction or specific performance.[61] It is unclear whether negotiating damages may be awarded on a wider basis. On one hand, courts have refused to award negotiating damages and injunctions as cumulative remedies for the same loss.[62] This contrasts with the English position in *Experience Hendrix v PPX Enterprises*,[63] where the remedies were awarded together.[64] On the other, the Court of Appeal in *PH Hydraulics & Engineering Pte Ltd v Airtrust (Hong Kong) Ltd*[65] referenced in passing the then-prevailing approach in England of awarding negotiating damages for breach of contract generally.[66]

In our view, *Morris-Garner* is a cautionary tale against extending the scope of awarding negotiating damages beyond their award in lieu of an injunction or specific performance. English courts have had to develop new tests to limit common law negotiating damages, but this is not easily done, as *Morris-Garner* shows. Considering these difficulties, the Singapore courts should not recognise the broader availability of negotiating damages. If so, it will be necessary to better define the circumstances in which negotiating damages may be awarded in lieu of an injunction or specific performance.

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proprietary interest" is the touchstone for upholding a restraint of trade clause. The real objection is where a so-called legitimate interest is relied on to justify the award of an account of profits where profit-stripping is not the norm for breach of contract, but that concern does not arise in this context. In fact, Lord Sumption's approach may be preferable because it directly challenges courts to enunciate the policy motivating the award of negotiating damages. On this view, while the phrase "legitimate interest" is inherently uncertain, it could be said that the law accepts a degree of uncertainty and hence fears of uncertainty arising out of the use of the term "legitimate interest" might not be a compelling reason to reject Lord Sumption's approach.

[61] A recent illustration is *Tan Kok Yong Steve v Itochu Singapore Pte Ltd* [2018] SGHC 85, released a few days before *Morris-Garner*. Similar to *Morris-Garner*, the case involved an employer's counterclaim against an employee for breach of a non-compete clause. But unlike in *Morris-Garner* where an injunction would not be fruitful, here the employer sought both an injunction and damages in addition to or in lieu of the injunction. One basis of claiming such damages was on the footing of negotiating damages. Tan Siong Thye J granted an injunction considering the employee's proclivity to breach his obligations (at [109]). While the court affirmed the applicability of negotiating damages in Singapore, an award was denied. The parties not adduced evidence on the notional release sum. Further, granting an injunction would also be akin to double recovery because negotiating damages are typically awarded in lieu of a mandatory injunction (at [115]).

See also *JES International Holdings v Yang Shushan* [2016] 3 SLR 193. The case concerned the defendant's transfer of shares in breach of a contractual moratorium entered into with the plaintiff. Kannan Ramesh JC declined to order specific performance because the defendant was not in a practicable position to return the shares, these having been sold (at [182]–[183]). Having decided to order damages in lieu of specific performance, the issue was whether negotiating damages or compensatory damages should be awarded (at [207]–[209]). Negotiating damages were inappropriate because no commercially acceptable agreement could realistically have been reached. Accordingly, compensatory damages were awarded.

[62] *Tan Kok Yong Steve v Itochu Singapore Pte Ltd* [2018] SGHC 85; *Clearlab SG Pte Ltd v Ting Chong Chai* [2015] 1 SLR 163.

[63] [2003] 1 All ER (Comm) 830.

[64] *Experience Hendrix LLC v PPX Enterprises Inc* [2003] 1 All ER (Comm) 830 at [13], [34] and [45]–[46].

[65] [2017] 2 SLR 129.

[66] *PH Hydraulics & Engineering Pte Ltd v Airtrust (Hong Kong) Ltd* [2017] 2 SLR 129, [80].

B. When should the court award damages in lieu of specific performance or an injunction?

Though the focus in *Morris-Garner* was on negotiating damages, Lord Reed and Lord Sumption dealt with the standard for claiming damages in lieu of specific performance or an injunction in their wide-ranging judgments. In this regard, the Law Lords doubted different parts of a proposition by Lord Walker in *Pell Frischmann Ltd v Bow Valley Iran Ltd*.[67] In that case, Lord Walker had stated that:[68]

> "Although damages under Lord Cairn's Act are awarded in lieu of an injunction it is not necessary that an injunction should actually have been claimed in the proceedings, or that there should have been any prospect, on the facts, of it being granted".

Lord Reed doubted the first part of Lord Walker's principle, stating that the provision that the damages can be awarded "in substitution" for an injunction might imply that the court must have an application for an injunction before it.[69]

Lord Sumption doubted the latter part of Lord Walker's principle, arguing that the notional release fee represents the loss to the claimant resulting from the court's discretionary refusal specifically to enforce the covenant.[70] But where an injunction is not available, the notional release fee cannot represent the loss because there was no entitlement to an injunction in the first place.[71] Thus, Lord Sumption considered that Lord Walker's suggestion that it was not necessary that there should have been any prospect of an injunction would "expand the concept so far as to lose almost any connection with the court's jurisdiction to grant injunctive relief".[72]

It may be noted that Lord Reed's suggestion could have undesirable consequences. It seems wasteful to require a claimant to apply for an injunction if what he really wants is damages in lieu of injunction. Further, as long as the claimant makes it clear that he is seeking damages in lieu of injunction, the defendant is not prejudiced by the lack of any application for injunction. Regardless, the issue awaits judicial resolution and the points discussed by Lord Reed and Lord Sumption provide food for thought as to which test should be appropriate for Singapore.

C. Other considerations

If, however, the court does decide to recognise the availability of negotiating damages on a wider common law footing, two points are worth considering.

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[67] [2011] 1 WLR 2370.
[68] *Pell Frischmann Engineering Ltd v Bow Valley Iran Ltd* [2011] 1 WLR 2370, [48].
[69] *Morris-Garner*, [45].
[70] *Morris-Garner*, [113].
[71] *Morris-Garner*, [113].
[72] *Morris-Garner*, [113].

First, insofar as both Lord Reed and Lord Sumption's approaches are based on the user principle, an incipient conceptual incongruity needs to be addressed. *Morris-Garner* held that the user principle is compensatory in nature.[73] But the Singapore Court of Appeal in *ACES System Development v Yenty Lily* suggested in obiter that the user principle is restitutionary.[74] In most cases there is likely to be little practical difference, since the claimants' loss will overlap precisely with the defendant's gain. But the point may still be significant as, based on *Yenty Lily*, the claimant could well end up with full market value under the user principle but greater than market value under the hypothetical negotiation approach.[75] It remains to be seen whether the Singapore Court of Appeal will continue to favour the restitutionary view of the user principle, or move towards eventual assimilation of user damages and negotiating damages by adopting a compensatory view of the latter.

Secondly, with regard to Lord Sumption's approach, the Singapore High Court has indicated that where the purchaser's interest in the land is wholly commercial, damages might be an adequate remedy and hence specific performance might not be awarded.[76] This approach, which examines the nature and function of the property in relation to the purchaser/owner, could also be applied to Lord Sumption's first category, which examines whether the claimant has a legitimate interest beyond financial reparation. Thus, if Lord Sumption's test were to be applied in Singapore, negotiating damages might not always be available for breaches of restrictive covenants over land.

V. Conclusion

Morris-Garner represents the UK Supreme Court's attempt to rein in the availability of negotiating damages for breach of contract, the genie having been let of out of the bottle with the expansion of their grant beyond the traditional basis of damages in lieu of an injunction or specific performance. The authors' view has been that Singapore should reject the expansionary view in the first place. Beyond this, *Morris-Garner* also offers much food for thought, and it will be interesting to see how the Singapore courts deal with this attempt to clarify the law from first principles.

[73] *Morris-Garner*, [29]–[30].
[74] [2013] 4 SLR 1317, [55].
[75] The user principle is restitutionary and looks to the profits made by the defendant. Negotiating damages, being compensatory and pegged to the hypothetical bargain measure, can exceed profits made by the defendant: *Pell Frischmann Engineering Ltd v Bow Valley Iran Ltd* [2011] 1 WLR 2370.
[76] *Good Property Land Development v Société Générale* [1998] 1 SLR(R) 97, [26]; *E C Investment Holding Pte Ltd v Ridout Residence Pte Ltd* [2011] 2 SLR 232, [105]–[106]. On appeal, the Court of Appeal did not take a position on this issue.