# THE GLOBAL DAMAGES REVIEW

FOURTH EDITION

**Editor**
A Scott Davidson

THE LAWREVIEWS

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# PREFACE

The inaugural edition of this publication a few years ago addressed various rules that set boundaries on what is permissible damages evidence. The focus in that publication was to survey the codified rules and common law principles underpinning the analysis and quantification of financial loss or damages and the presentation of the same.

Subsequent editions have expanded on that analysis, including additional discussion of the key principles, updates on rule changes and discussion of noteworthy cases from the various jurisdictions. One observes that though jurisdictional differences obviously exist, nonetheless 'a loss is a loss is a loss' and that is the common thread to be focused on in determining the relevant quantum.

I hope that you find this publication to be a helpful resource and I look forward to hearing your comments and suggestions.

**A Scott Davidson**
Kroll
Toronto
September 2021

**Chapter 11**

# SINGAPORE

*Vikram Nair, Mazie Tan and Ashwin Menon*[1]

## I OVERVIEW

Courts in Singapore, like in other jurisdictions, have broad powers to award damages for almost the entire spectrum of civil claims, arising in tort, contract and equity. The general purpose of damages is to compensate – to put the plaintiff in the same position as it would have been in if the contract had been performed.[2] This general principle is subject to the common law principles that (1) the losses must have been caused by the breach; (2) the losses must not be too remote in law; and (3) the plaintiff has undertaken mitigatory efforts.

The courts in Singapore continue to adopt the traditional principles of remoteness of damages laid down in *Hadley v. Baxendale*.[3] In so deciding, the courts have chosen to depart from the developments in the UK, where it now seems that a plaintiff will not be able to recover for losses if the defendant cannot reasonably be regarded as having assumed responsibility for such losses.[4]

Recently, *Wrotham Park* damages have been accepted by the Court of Appeal as part of the contractual remedies available under Singapore law.[5] The rationale behind the *Wrotham Park* rule is that an injured party must be sufficiently compensated for moneys that it would have demanded in allowing the defaulting party to do what otherwise would have been prohibited under the contract between them.[6] The courts in Singapore have recently applied the rationale behind the *Wrotham Park* rule to a situation that does not strictly involve damages. In *Kiri Industries*, the court applied the *Wrotham Park* rationale *mutatis mutandis* in a valuation scenario, incorporating the hypothetical loss suffered by a company in recognition of the fact that the company would have demanded a licence fee into the final valuation of the company.[7]

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1 Vikram Nair is a partner and Mazie Tan and Ashwin Menon are associates at Rajah & Tann Singapore LLP.

2 *Judah Value Activist Fund v. Open Faith Investment Ltd* [2021] SGHC(I) 7 at [134].

3 *Hadley v. Baxendale* [1854] 9 Exch 341.

4 *Judah Value* (see footnote 2) at [134]–[135].

5 *Turf Club Auto Emporium v. Yeo Boong Hua* [2018] 2 SLR 655

6 *Kiri Industries Ltd v. Senda International Capital Ltd and another* [2021] 3 SLR 215 at [180].

7 id. at [182].

## II QUANTIFICATION OF FINANCIAL LOSS

### i Introduction

In most commercial cases, the object of an award of compensatory damages is, as far as reasonable, to put the plaintiff in the position as if the wrong had not occurred.[8] While this point is straightforward, the way this objective is effectuated differs slightly in both tortious and contractual claims. In a contractual claim, the plaintiff is entitled to be compensated for the loss of their bargain, so that their expectations arising out of or created by the contract are protected.[9] However, in a tortious claim, the objective of compensatory damages is simply to put the plaintiff in the position they would have been in if the tort had not been committed.[10]

Besides this general difference, several secondary issues arise in upholding the compensatory principle. This includes how the plaintiff's financial position is to be quantified and which consequences from the wrongdoer's breach will be relevant in the assessment of the quantum. A number of these secondary issues are now addressed.

### ii Evidence

A plaintiff claiming damages must place before the court sufficient evidence of both the fact of damage and its amount.[11] The Singapore courts will not hesitate to award nominal damages where the plaintiff fails to prove that they have suffered loss. In *Exklusiv Resorts*,[12] 170 members of a social club brought representative proceedings against the club's owner and operator. The court allowed the claim for breach of contract against the defendants, but awarded nominal damages of S$1,500 each to the 170 members as against their original claim for more than S$110,000 each as the plaintiffs failed to prove that they had suffered loss.[13]

The process of proving damages is factual and whether the proof of damage is sufficient depends wholly on the factual matrix.[14] The plaintiff is not required to prove with complete certainty the exact amount of damage suffered.[15] If precise evidence is obtainable, 'the court naturally expects to have it'.[16] If not, the court must do 'the best it can' to estimate the damages.[17]

This flexible approach enables the court to balance the plaintiff's burden of proof with the fact that in some cases, 'absolute certainty and precision is impossible to achieve'.[18] For example, where the assessment of damages is dependent on contingencies, the plaintiff is not precluded from substantial damages just because their loss 'cannot be assessed with mathematical accuracy'.[19]

8 Justice James Edelman, *McGregor on Damages* (21st edn, Sweet & Maxwell 2021) at 2-001.
9 Edwin Peel, *Treitel on The Law of Contract* (Sweet & Maxwell, 12th Ed, 2007) at para 20-018.
10 ibid.
11 *Robertson Quay Investment Pte Ltd v. Steen Consultants Pte Ltd and another* [2008] 2 SLR(R) 623 at [27] and [31].
12 *Meow Moy Lan and others v. Exklusiv Resorts Pte Ltd and another* [2021] SGHC 155.
13 id. at [139].
14 *Robertson Quay* (see footnote 11) at [27].
15 *McGregor on Damages* (see footnote 8) at 10-002; *Robertson Quay* (see footnote 11) at [28].
16 *Biggin & Co Ld v. Permanite* [1951] 1 KB 422 at 438; *Robertson Quay* (see footnote 11) at [30].
17 ibid.
18 ibid.
19 *Chaplin v. Hicks* [1911] 2 KB 786 at 793–795; *Robertson Quay* (see footnote 11) at [29].

However, where the difficulty in proving damages is a result of the defendant's wrongful conduct, the *Armory* principle may apply. The *Armory* principle is an evidential presumption raised in the plaintiff's favour giving them the benefit of any relevant doubt where the defendant makes it difficult or impossible for the plaintiff to adduce evidence.[20] The applicability of the *Armory* principle is subject to the following qualifications.[21] First, the adverse presumption only arises where the defendant has intentionally and in bad faith destroyed or refused to produce the evidence necessary for the plaintiff to prove its case. Second, the adverse presumption only arises where the defendant's actions makes it difficult or impossible for the plaintiff to prove its loss or where the facts needed to prove the loss are known solely by the defendant and he does not disclose these facts to the plaintiff. Third, the adverse presumption must be consistent with the facts of the case and founded on the evidence that has been presented.[22]

Thus, where the plaintiff has done its best to prove the loss and the evidence is cogent, the court should allow the plaintiff to recover the damages claimed.[23] Even if the evidence is 'far from satisfactory', the court may still be able to award damages in so far that this is justified by reference to legal rules and principles.[24]

### iii Date of assessment

The general rule in tort and contract law is that damages should be assessed as at the date of breach (the 'breach date rule').[25] However, the breach date rule is not to be applied inflexibly and the court could assess damages with reference to events subsequent to the date the cause of action arose if the adoption of the breach date rule produces injustice.[26] The House of Lords in *The Golden Victory* reasoned that the desirability of achieving certainty in commercial contracts was subject to the overriding compensatory principle that the damages awarded should represent no more that the value of the contractual benefits of which the plaintiff had been deprived.[27] Therefore, where at the date of assessment an event had already happened and which would have entitled either party to terminate the contract, the court should have regard to what actually occurred.[28]

It appears that the principles elucidated by the House of Lords in *The Golden Victory* principle apply in Singapore. The Singapore High Court in *Swiss Singapore* accepted the general principles although it distinguished them as being inapplicable on the facts.[29]

Other Singaporean cases have accepted the principle in the context of the sale of property based on *Johnson v. Agnew*.[30] However, one should not regard the principle as

20 *Armory v. Delamirie* (1722) 1 Stra 505, 93 ER 664.

21 *Sea-Shore Transportation Pte Ltd v. Tecknik-Soil (Asia) Pte Ltd* [2018] SGHC 231 at [69].

22 id. at [70].

23 *Robertson Quay* (see footnote 11) at [31].

24 *MFM Restaurants Pte Ltd and another v. Fish & Co Restaurants Pte Ltd and another appeal* [2011] 1 SLR 150 at [62] and [65].

25 *Johnson v. Agnew* [1980] AC 367 at 400; *Tay Joo Sing v. Ku Yu Sang* [1994] 1 SLR(R) 765 at [36]–[37].

26 *Alcoa Minerals of Jamaica Inc v. Herbert Broderick* [2002] 1 AC 371 at 377–378 and 383; *Golden Strait Corpn v. Nippon Yusen Kubishika Kaisha* [2007] 2 AC 353 at [32]–[33].

27 ibid.

28 Justice Andrew Phang, *Contract Law in Singapore* (1st edn, Kluwer Law 2012) at [1457].

29 *Swiss Singapore Overseas Enterprises Pte Ltd v. Exim Rajathi India Pvt Ltd* [2006] SGHC 209 at [66].

30 *Tay Joo Sing* (see footnote 25) at [36]; *TCL Industries (Malaysia) Sdn Bhd v. ICC Chemical Corp* [2007] SGHC 211 at [16].

being applicable only in such instances.[31] The point is that although the courts do retain the discretion to decide the damages after the date of breach, this will not be done where injustice may arise. An instance where such an injustice may arise is when the plaintiff had acted unreasonably in pursuing the remedy of specific performance by commencing the action after unreasonable delay.[32]

### iv Financial projections

Financial projections are commonly utilised in the quantification of financial loss, particularly where valuations are necessary. Financial projections or forecasting inevitably involve an element of guesswork.[33] The courts will scrutinise the veracity of the financial projections utilised by experts and parties in conducting their valuations. Where an expert or party relies heavily on financial projections that are unreliable, the court will not hesitate to reject the same.

In *JWR Pte Ltd*, the court rejected the plaintiff's claim on the quantum of its alleged losses as the losses claimed varied significantly over time and were not substantiated.[34] The court found that the figures relied upon by the plaintiff were 'wildly optimistic' with, among other things, no accounting for tail-off in the growth projections and assuming that 'growth would continue on an endless upward trend'.[35] The court rejected the possibility of such a projection as no commodity or product has displayed such a 'continuous, endless upward trend, returning exponential profits over such an extended period of time'.[36]

### v Assumptions

Assumptions are a key component in financial and valuation models for the purposes of quantifying loss where assets such as shares are involved. The International Valuation Standards 2020 provide that valuers are required to make impartial judgements as to the reliability of inputs and assumptions.[37] All assumptions and special assumptions must be identified.[38] Additionally, they must also be reasonable under the circumstances, supported by evidence and be relevant having regard to the purpose of the valuation.[39]

Where assumptions are utilised in valuation, the courts will undertake an assessment of whether the assumptions are realistic and corroborated by evidence. The courts will reject expert evidence where the valuation undertaken is premised on highly optimistic and unrealistic assumptions which are contradicted by objective evidence such that they are unlikely to hold true.[40]

31 *Johnson v. Agnew* (see footnote 25) at 390–391.

32 *Tay Joo Sing* (see footnote 25) at [37].

33 *Kiri Industries* (see footnote 6) at [222].

34 *JWR Pte Ltd v. Edmond Pereira Law Corp and another* [2020] 4 SLR 832.

35 id. at [99].

36 id. at [100].

37 International Valuation Standards Council, International Valuation Standards (2020) at [40.1].

38 id. at [20.3(i)].

39 id. at [200.5].

40 *Christie, Hamish Alexander (as private trustee in bankruptcy of Tan Boon Kian) v. Tan Boon Kian and others* [2021] SGHC 62 at [37].

### vi Discount rates

It is generally accepted that in calculating the award of damages for future losses, the multiplier must be adjusted to account for both the time value of money or accelerated receipt, where the anticipated rate of achievable return is the discount rate as well as the vicissitudes of life, in order to avoid overcompensating the plaintiff.[41]

In the context of personal injury claims where loss of earning capacity is potentially a significant component, the Singapore courts have noted four approaches to determining the multiplier (the precedent approach, the arithmetic approach, the actuarial approach and the fixed-formula approach).[42] Each of these approaches deals with the adjustments to the multiplier in different ways. In *Christian Joachim Pollmann*, the court preferred the usage of the precedent approach to cross-check results obtained by the arithmetic approach to ensure consistency[43] due to the absence of authoritative actuarial tables for Singapore lives and the absence of any formula fixed by legislation.[44]

The preferred approach in *Christian Joachim Pollmann* must now be read in light of the recent amendments to the Supreme Court and State Courts Practice Directions.[45] Pursuant to these amendments, the court will refer to the actuarial tables published by the Academy Publishing of the Singapore Academy of Law (the Actuarial Tables) to determine an appropriate multiplier. The Actuarial Tables will apply for proceedings for the assessment of damages in personal injury of death claims heard on or after 1 April 2021.[46]

The Actuarial Tables are based on the 2019 preliminary population data produced by the Singapore Department of Statistics covering Singapore residents. It also utilises a 'yield curve' representing expected investment returns for investments of different periods of time rather than a single discount rate to account for accelerated receipt.[47]

This amendment is likely to result in greater certainty and precision in the quantification of damages going forward, at least in terms of the multiplier to be adopted.[48] The advantage of the actuarial approach is that it allows a multiplier that is adjusted both for the time value of money and for the vicissitudes of life to be selected from a single source.[49] Referring to the Actuarial Tables would be more cost efficient than engaging expert witnesses to establish the appropriate discount rates, which would be prohibitively expensive for most litigants.[50]

Prior to the publication of the Actuarial Tables, counsels were utilising actuarial tables that were based on outdated life expectancy data.[51] In this regard, the publication

41 *Christian Joachim Pollmann v. Ye Xianrong* [2021] SGHC 77 at [12].

42 id. at [15].

43 id. at [16].

44 ibid.

45 Supreme Court Practice Directions (Amendment No. 2 of 2021) Part XXIV, Practice Directions at [159]; State Court Practice Directions (Amendment No. 2 of 2021) Part XXIII, Practice Direction at [145].

46 This is regardless of when the incidents which gave rise to those claims occurred, and regardless of the dates on which the actions were commenced.

47 Singapore Academy of Law, *Actuarial Tables with explanatory notes for use in Personal Injury and Death Claims* (Academy Publishing 2021) at page 5.

48 Vanessa Lim, Seow Hwei Mar, Audrey Sim, 'Introduction of actuarial tables for determining the multiplier in personal injury and death claims' in *Singapore: Is this a prelude to larger claims against doctors and healthcare providers?* (Dentons Rodyk 2021).

49 *Christian Joachim Pollmann* (see footnote 42) at [18].

50 Actuarial Tables with explanatory notes (see footnote 48) at page 4.

51 *Christian Joachim Pollmann* (see footnote 41) at [31].

of the Actuarial Tables is a welcome development as the discount rates embedded in the Actuarial Tables take into account prevailing macro-economic conditions and recent life expectancy data, which is likely to result in fairer awards of damages. Furthermore, the usage of the Actuarial Tables addresses how courts should no longer be constrained by comparable precedents which embed an underlying assumption of achieving a rate of return of 4.5 per cent per annum. This underlying assumption was out of step with the discount rate of 2.5 per cent applied in other jurisdictions.[52]

It must be noted that the courts in Singapore still retain discretion in two respects. First, they have the discretion to refer to the Actuarial Tables, which is to be done 'unless the facts of the case and ends of justice dictate otherwise'.[53] Second, they have the discretion in selecting the appropriate multipliers and the amount of damages awarded. The court may depart from the multipliers in the Actuarial Tables 'where appropriate on the facts and circumstances of the case'.[54]

In relation to corporate and commercial disputes, discount rates feature in valuation methods involving financial projections where the forecast cash flow is discounted,[55] such as the discounted cash flow (DCF) method (the DCF approach). The basis of the DCF approach is the company's projected future earnings discounted to present value by applying a relevant discount factor incorporating the company's weighted average cost of capital (WACC).[56] In accordance with the International Valuation Standards 2020, the valuer must provide evidence for the derivation of the discount rate.[57] The courts will scrutinise how the expert valuer has derived the discount rate, and will not shy away from making appropriate adjustments to the discount rate where necessary. The court in *Kiri Industries* adjusted the plaintiff's expert valuation to take into account, among other things, the country risk premium of 1.6 per cent that the expert did not account for in the company's cost of equity.[58] The result of this was to increase the company's WACC and resulted in a larger discount rate in the DCF approach.[59]

Another area where discount rates feature in valuation methods, particularly in the context of shareholder disputes, would be in the application of the discount for lack of marketability (DLOM) and the discount for lack of control (DLOC). The DLOM refers to the difficulty of selling shares in a private company[60] as opposed to that of a public company with a ready market whereas the DLOC arises in the context of minority shareholdings with an inability to exert control over the management decisions of the company.[61]

52 Actuarial Tables with explanatory notes (see footnote 47) at page 3.

53 Supreme Court Practice Directions (see footnote 45) at [159(1)]; State Court Practice Directions (see footnote 45) at [145(1)].

54 Supreme Court Practice Directions (see footnote 45) at [159(2)]; State Court Practice Directions (see footnote 45) at [145(2)].

55 International Valuation Standards (see footnote 37) at [50.29].

56 *Kiri Industries* (see footnote 6) at [48].

57 International Valuation Standards (see footnote 37) at [50.34(b)].

58 *Kiri Industries* (see footnote 6) at [250].

59 id. at [312(e)].

60 *Liew Kit Fah and others v. Koh Cheng Chew and others* [2020] 1 SLR 275 at [46].

61 id. at [45].

The default position taken in Singapore is that DLOM will apply to illiquid, privately held shares save in exceptional circumstances.[62] The court, assisted by expert evidence, will ultimately decide whether or not such exceptional circumstances are present. In *Kiri Industries*, the plaintiff argued that DLOM should not apply because of the presence of oppression. This argument was rejected and the court held that there was no basis to regard the presence of oppression as constituting an 'exceptional circumstance' on the facts.[63] Notwithstanding the presence of oppression, a party ought to point to other 'exceptional circumstances' warranting the non-application of DLOM.[64]

The application of DLOC is common and indeed expected in a typical voluntary commercial sale of a minority bloc of shares in a private company.[65] However, where there has been a finding of oppression, the courts have declined to apply DLOC to reflect the fact that it would not be 'fair, just and equitable' for the minority shareholder, who has unjustifiably been on the receiving end of unfairly prejudicial conduct, to be bought out on terms that do not allow him to realise the full value of his investment. At the same time, this also reflects the fact that it would not be 'fair, just and equitable' for the oppressor to benefit from a buyout on discounted terms.[66] The court in *Liew Kit Fah* further noted that DLOC should not be applied in situations where the purchaser of shares would enjoy some tangible or collateral benefit from the purchase as the purchaser should not enjoy a further benefit through the application of DLOC.[67]

### vii Currency conversion

As in the UK, the *Miliangos* doctrine applies in Singapore.[68] Thus, a court in Singapore could give judgment for a sum of money expressed in a relevant foreign currency. A foreign currency is the 'relevant currency' if it is the currency of the transaction or if it is the currency in which the plaintiff has most truly suffered its loss.[69] This does not mean that the plaintiff has an option to select the currency he wants. Instead, the *Miliangos* doctrine redefines the obligation of the debtor to pay the sum owed in the relevant currency.[70]

Additionally, under the *Miliangos* doctrine, if it was necessary to execute on the judgment, the judgment in foreign currency would be converted to local currency on the date which the plaintiff was given leave to levy execution.[71] This enables the court to get as close as possible to securing for the plaintiff exactly what they bargained for by using the date on which the court authorised execution as the date for conversion of the foreign currency into the local currency.[72]

62 *Thio Syn Kym Wendy and others v. Thio Syn Pyn and another* [2018] SGHC 54; *Kiri Industries* (see footnote 5) at [225]–[226].

63 id. at [235].

64 id. at [233(b)].

65 Hans Tjio, Pearlie Koh & Lee Pey Woan, *Corporate Law* (Academy Publishing 2015) at [11.097]; affirmed in *Liew Kit Fah* (see footnote 60) at [47].

66 *Liew Kit Fah* (see footnote 60) at [49].

67 id. at [50].

68 *Miliangos v. George Frank Ltd* [1976] 1 AC 443; *Tatung Electronics (S) Pte Ltd v. Binatone International Ltd* [1991] 2 SLR(R) 231 at [16].

69 *Indo Commercial Society (Pte) Ltd v. Ebrahim and another* [1992] 2 SLR(R) 667 at [35(a)].

70 ibid.

71 *Miliangos* (see footnote 68) at 469.

72 ibid.

### viii Interest on damages

Pre-judgment interest is the compensation awarded to a successful plaintiff for the time value of money, the use of which was lost between the date on which the plaintiff's cause of action arose and the date of the judgment.[73] Such compensation is awarded if the defendant kept money to which the plaintiff was entitled.[74]

A plaintiff may seek to invoke the power of the court to award interest. In Singapore, the general power of the courts to award interest can be found in two statutory sources. First, the Supreme Court of Judicature Act[75] grants the High Court (though it may be exercised by the Court of Appeal[76] or the Subordinate Courts[77]) to direct interest to be paid on damages, debts (whether the debts are paid before or after commencement of proceedings) or judgment debts.[78]

The second and more common source of the power is Section 12 of the Civil Law Act.[79] This power is more frequently invoked because it spells the power out more specifically and because cases interpreting the equivalent English provisions are readily available.[80] Section 12 provides the court a wide discretion to grant interest for any part of the period between the date when the cause of action arose and the date of judgment.[81] This discretion extends to a determination of whether to award interest at all; what the relevant rate of interest should be; what proportion of the sum should bear interest; and the period of which interest should be awarded.[82]

As a general rule, interest should commence from the date of accrual of loss.[83] However, this is subject to the court's discretion to order interest to run from a date other than the date of accrual of loss.[84] The purpose of this is to enable the courts to achieve justice across the infinite range of factual permutations that may confront the court by tailoring the award to fit the unique circumstances of each case.[85]

The most commonly cited justifications for the court to delay the start date for calculating interest has been when the plaintiff is guilty of inordinate delay in bringing the action.[86] In *Robertson Quay*, the Singapore Court of Appeal ordered that damages should run only from the date of service of the statement claim because of the plaintiff's unwarranted and dilatory behaviour in commencing the suit more than five years after its loss accrued.[87]

73 *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v. Inland Revenue Commissioners* [2006] QB 37 at [46].

74 *Lee Soon Beng v. Wee Tiam Sing* [1985-1986] SLR(R) 799 at [7].

75 Supreme Court of Judicature Act (Cap 322, 1999 Rev Ed) (SCJA).

76 Section 37(2) SCJA.

77 Section 31(1) (District Court) and Section 52 (Magistrates' Court) Subordinate Courts Act (Cap 321, 1999 Rev Ed).

78 Section 18(2) read with First Schedule, Paragraph 6 SCJA.

79 Civil Law Act (Cap 43, 1994 Rev Ed) (CLA).

80 Law Reform Committee, *Report of the Law Reform Committee on Pre- and Post-Judgment Interest* (Singapore Academy of Law August 2005) at [33].

81 *Robertson Quay* (see footnote 11) at [98].

82 *McGregor on Damages* (see footnote 8) at 18-031; *Grains and Industrial Products Trading Pte Ltd v. Bank of India and another* [2016] 3 SLR 1308 at [138].

83 *McGregor on Damages* (see footnote 8) at 15-063.

84 *McGregor on Damages* (see footnote 8) at 15-067; *Robertson Quay* (see footnote 11) at [102].

85 *Grains and Industrial* (see footnote 82) at [138].

86 *Jefford v. Gee* [1970] 2 QB 130 at 151; *Grains and Industrial* (see footnote 82) at [139].

87 *Robertson Quay* (see footnote 11) at [105]–[108].

There are a number of other non-exhaustive factors that are capable of influencing the exercise of the court's discretion. They include: what rate of interest would be appropriate to the relevant period; whether the plaintiff was dilatory in the bringing and conduct of the proceedings; whether the plaintiff had received compensation for the loss suffered from a source other than the defendant; whether the claimant had sought and been awarded damages which include damages for the loss of the use of money; whether the debt is paid immediately after proceedings are commenced; and whether the parties have agreed that pre-judgment interest should not be recoverable.[88]

It was generally considered that Section 12 of the Civil Law Act limits the courts' power to award only simple interest on such debts and damages for the pre-judgment period. However, the court in *The Oriental Insurance* held that the correct legal position was that the courts had discretion to award compound interest as damages if these damages were proved and the justice of the case requires that such damages should be paid.[89] The court found that Section 12 was silent with respect to the principles that the court may apply when assessing the amount of damages for which it gives judgment and did not expressly prohibit the court from granting compound interest per se or from granting damages assessed with reference to the actual compound interest lost or forgone by the plaintiff who has suffered those damages.[90] The key was to distinguish between 'interest upon the damages', which Section 12 was strictly concerned with, and 'interest as damages', which was beyond the scope of Section 12.[91] The court commented that such an approach 'accords with commercial and economic reality' and would better reflect a plaintiff's loss because otherwise, a plaintiff in a long-running case risked being severely undercompensated in damages, especially where the interest rate was ascertained to be very high.[92]

### ix Costs

'Costs' encompasses fees, charges, disbursements, expenses and remuneration.[93] Order 59 Rule 1(3) of the Rules of Court sets out the standard orders for costs. The most common are 'costs in the cause' and 'costs in any event'. In the former, the 'right to costs is not crystallised until after final determination of the matter' and in the latter, the 'obligation to pay costs are crystallised at the point in time when the order is made'.[94]

In general, a party cannot recover any of its costs of any proceedings from any other party in the action except under an order of the court.[95] The principles governing the award of costs are that costs are in the unfettered discretion of the court, [96] and costs should follow the event except when it appears to the court that some other order should be made in the circumstances of the case, or that there are special reasons for depriving the successful litigant

88 *Grains and Industrial* (see footnote 82) at [140].

89 *The Oriental Insurance Co Ltd v. Reliance National Asia Re Pte Ltd* [2009] 2 SLR(R) 385 at [135].

90 id. at [127]–[128].

91 id. at [129].

92 id. at [137]–[138].

93 Order 59 Rule 3(1) Rules of Court (Cap 322, Section 80, Rev Ed 2014) ('ROC').

94 Justice Chua Lee Ming, *Singapore Civil Procedure 2020* Volume 1 (Sweet & Maxwell 2020) at 59/1/3.

95 Order 59 Rule 1(1) ROC.

96 *The Karting Club of Singapore v. Mak David* [1992] 1 SLR(R) 786 at [6]; *Teh Guek Ngor Engelin née Tan and others v. Chia Ee Lin Evelyn and another* [2005] 3 SLR(R) 22 at [25].

of his or her costs in part or in full.[97] The court is entitled to take account of the conduct of the parties before as well as during the trial itself although the list of relevant conduct and circumstances is non-exhaustive.[98] For example in *Aurol Anthony Sabastian*, the appellant who succeeded was not awarded his costs because of his reprehensible disregard for the court and the fact that he manifested a willingness to undermine the litigant's right to avail itself of the court's process.[99]

An appellate court will only interfere with a trial judge's decision to award costs 'in clear cases',[100] which could include situations where the trial judge had erred in law or in principle,[101] had taken into account some matter which they should not have taken into account,[102] omitted to take into account some matter which they should have taken into account,[103] or where costs were awarded to a party who was not entitled to costs.[104]

Lastly, a contractual agreement between the parties which provides for legal costs to be paid by one party to the other will generally be upheld, save for situations where doing so would be 'manifestly unjust'.[105] In such a situation, the court can and should intervene to disallow the claim in the exercise of its discretion.[106]

Originally, it was thought that the court has no discretion as to costs where there was a contractual right to costs.[107] However, in *Hong Leong Finance*,[108] the court held that the plaintiff's contractual right to costs on a full indemnity basis under the mortgage instrument had, by virtue of their misconduct, absolved the court from following the contractual terms, thus making the question of costs one for the court's discretion.[109] Thus, it appears that the court will normally exercise its discretion to order costs in line with the contractual right of the receiving party, but the court may depart from the contractual arrangement where it is 'manifestly unjust' because the receiving party is guilty of misconduct.

### x Tax

In Singapore, where an award of damages is made for loss of earnings, deduction of income tax should be made as such damages represent compensation for non-receipt of a taxable income.[110] This follows the rule established in the House of Lords decision in *Gourley*.[111]

The rule in *Gourley* applies when the damages awarded are compensation for loss of a taxable income or gain (i.e., loss of future income, loss of profits) and not for non-taxable

97 *Tullio v. Maoro* [1994] 2 SLR(R) 501; affirmed in *Ho Kon Kim v. Lim Gek Kim Betsy* (No. 2) [2001] 3 SLR(R) 253 at [12].

98 *Denis Matthew Harte v. Tan Hun Hoe and Another* [2001] SGHC 19 at [41].

99 *Aurol Anthony Sabastian v. Sembcorp Marine Ltd* [2013] 2 SLR 246 at [105]–[115].

100 *Soon Peng Yam v. Maimon bte Ahmad* [1995] 1 SLR(R) 279 at [31].

101 *Singapore Civil Procedure 2020* Volume 1 (see footnote 94) at 59/2/1.

102 ibid.

103 ibid.

104 *Teh Guek Ngor* (see footnote 96) at [25].

105 *Abani Trading Pte Ltd v. BNP Paribas and another appeal* [2014] 3 SLR 909 at [93]–[94].

106 ibid.

107 *United Overseas Bank Ltd v. Sin Leong Ironbed & Furniture Manufacturing Co (Pte) Ltd and others* [1988] 1 SLR(R) 76 at [17].

108 *Hong Leong Finance Ltd v. Lee Siang Wah and another* [1993] 2 SLR(R) 577.

109 id. at [75].

110 *Teo Sing Keng and another v. Sim Bank Kiat* [1994] 1 SLR(R) 340 at [34].

111 *British Transport Commission v. Gourley* [1956] AC 185.

loss (i.e., loss of a capital asset, loss of capital gains).[112] The fundamental principle in *Gourley* was that the court should award the injured party such sum as would put them in the same position as they would have been in had they not sustained the injuries, pursuant to which the injured party should have its damages assessed upon the basis of what it had really lost.[113]

## III EXPERT EVIDENCE

### i Introduction

Losses must be established and assessed with as much certainty as the circumstances permit. Expert evidence can be utilised to prove the fact of loss as well as the quantum of loss suffered by the plaintiff. The issues that arise with expert evidence are now addressed.

### ii The role of expert evidence in calculation of damages

Expert (opinion) evidence is admissible where the court is likely to derive assistance upon a point of scientific, technical or other specialised knowledge.[114] In the realm of calculation of damages, expert evidence is used to provide their opinion on, among other things, financial projections and valuation of assets concerned.

The position in Singapore is that while expert witnesses may assist the court, they cannot usurp the function of the court[115] and they cannot answer the very question that is before the court (the Ultimate Issue Rule).[116] While the Ultimate Issue Rule has lost some force today, it remains alive in Singapore's jurisprudence, with the courts emphasising that the true ambit of the Ultimate Issue Rule in the modern context is not that an expert is prohibited from expressing an opinion on the ultimate issue, but that the judge must discharge his or her responsibility as the adjudicator to rule on the ultimate issue.[117]

### iii The court's role excluding and managing expert evidence

Order 25 Rule 3 of the Rules of Court encapsulates the court's role in excluding and managing expert evidence. During the hearing of the summons for directions, the court can make appropriate orders and directions in relation to limiting the number of expert witnesses[118] and whether the evidence-in-chief of each expert witness should be set out in a single affidavit.[119] In addition, the court can direct experts to discuss with each other prior to exchanging their affidavits to identify or specify the issues in the proceedings and, if possible, to reach agreement on an issue. Experts can also be directed to prepare a joint statement indicating issues they have agreed upon, issues not agreed upon and a summary of the reasons

112 *Teo Sing Keng* (see footnote 110) at [22].

113 id. at [21].

114 Section 47(1) Evidence Act (Cap 97, 1997 Rev Ed) (EA).

115 *Pacific Recreation Pte Ltd v. S Y Technology Inc and another appeal* [2008] 2 SLR(R) 491 at [85].

116 *Cheong Soh Chin and others v. Eng Chiet Shoong and others* [2019] 4 SLR 714 at [35].

117 *Anita Damu v. Public Prosecutor* [2020] 3 SLR 825 at [36].

118 Order 25 Rule 3(d) ROC.

119 Order 25 Rule 3(e) ROC.

for any non-agreement.[120] The court can also make orders pursuant to Order 40A Rules 1–4 of the Rules of Court,[121] which pertain to, among other things, requirements of the expert's written report[122] and written questions to the other party's expert.[123]

After the completion of the testimony of non-expert witnesses of each party or at any other time that the court may determine, the Court may order that some or all of the expert witnesses testify as a panel.[124] This giving of concurrent expert evidence is known commonly as the hot-tubbing of experts, which has been regarded as having the potential to narrow the areas of disagreement between experts.[125] During hot-tubbing, each expert will give his or her reasons to support his or her conclusions and challenge the opposing expert's conclusions, with the opposing expert having the opportunity to respond immediately.[126] Hot-tubbing can be conducted by the court or counsel asking the questions and counsel providing facts to support or challenge the reasons given by the experts.[127] Order 40A Rule 6(1) of the Rules of Court allows the court to call for hot-tubbing on appeal with the agreement of counsel even in cases where the expert witnesses had already appeared as witnesses before the assistant registrar. This was done in *Swiss Butchery* where it became apparent on appeal that further assistance from the experts was necessary.[128]

In considering expert evidence, the courts are not bound to accept any expert opinion in its entirety. The ultimate consideration before the court in deciding between conflicting expert evidence is driven by, among other things, considerations of consistency, logic and coherence with a powerful focus on the objective evidence before the court.[129] In relation to uncontradicted evidence of an expert, while the court is not entitled to substitute its own views for those of an uncontradicted expert's, neither is it bound to accept them slavishly but must closely scrutinise such unchallenged evidence.[130] Hence, while a court is not obliged to accept the unchallenged opinion of an expert, rejection of the same must be based on sound grounds.[131] The court should not, when confronted with expert evidence that is unopposed and appears not to be obviously lacking in defensibility, reject it nevertheless and prefer to draw its own inferences.[132]

In *Lim Chong Poon*, the Singapore Court of Appeal noted that the court is entitled to reject the expert evidence provided by both parties. The court reiterated that the court is under no obligation to accept either expert's opinion but must examine the basis for the expert's

120 Order 25 Rule 3(f) ROC.

121 Order 25 Rule 3(h) ROC.

122 Order 40A Rule 3 ROC.

123 Order 40A Rule 4 ROC.

124 Order 40A Rule 6(1) ROC.

125 *Re Harish Salve and another matter* [2018] 3 SLR 285 at [58] (in the context of foreign legal experts).

126 Order 40A Rule 6(3) ROC.

127 *Swiss Butchery Pte Ltd v. Huber Ernst and others and another suit* [2013] 4 SLR 381 at [114].

128 id. at [114].

129 *Armstrong, Carol Ann (executrix of the estate of Peter Traynor, deceased, and on behalf of the dependents of Peter Traynor, deceased) v. Quest Laboratories Pte Ltd and another and other appeals* [2020] 1 SLR 133 at [92]; *Lim Chong Poon v. Chiang Sing Jeong* [2020] SGCA 27 at [5].

130 *Sakthivel Punithavathi v. Public Prosecutor* [2007] 2 SLR(R) 982 at [76]; affirmed in *Hai Jiao 1306 Ltd and others v. Yaw Chee Siew* [2020] 5 SLR 21 at [216].

131 *Abhilash s/o Kunchian Krishnan v. Yeo Hock Huat and another* [2019] 1 SLR 873 at [88]; *Sea-Shore Transportation* (see footnote 21) at [72].

132 *Halsbury's Laws of Singapore* (volume 10 and 10(2): *Law of Evidence*) (LexisNexis Singapore 2016) at [120.227].

conclusions before rejecting them.[133] One of the issues on appeal was whether the judge, having rejected the evidence of both parties' experts, ought to have considered the evidence and made necessary adjustments to the expert's valuation and awarded substantive damages instead of nominal damages.[134] The Court of Appeal agreed with the decision below to award nominal damages. The Court of Appeal highlighted that both the fact and quantum of loss must be proved before substantive damages can be ordered.[135] This requires cogent evidence to be placed before the court before it allows recovery of damages where the quantum of loss cannot be determined with certainty.[136] The court was unable to determine the quantum of damages to be ordered in a principled manner as there was insufficient evidence before it. As the court had fundamental disagreements with both experts' conclusions, it was unable to make adjustments to their conclusions to determine the quantum of damages, leading the court to award nominal damages instead.[137]

### iv Independence of experts

The courts in Singapore recognise that partisan experts are a recurring feature in adversarial litigation. However, expert evidence is not discounted simply because the expert is selected, engaged and paid by a party. A party who seeks to attack the evidence of an expert witness cannot do so simply because the expert is party-appointed. Rather, challenges can be made on the basis of deficiencies in the expert's credentials, factual premises, methodology or reasoning.[138]

Experts have a duty 'to assist the Court on the matters within his expertise',[139] which overrides any obligation to the party instructing them.[140] The expert's written report must contain a statement that the expert understands this overriding duty to the court and that he has complied with this duty.[141]

Partisan behaviour includes the inclination to make suppositions and assumptions in favour of the party who appointed the expert, selective reference to evidence supporting the party's case, inclusion of baseless allegations in the expert report and omission of qualifications adverse to the party's case. Order 40A Rule 3(2) of the Rules of Court provides that where there is a range of opinions on the matters dealt with in the report, the expert must summarise this and give reasons for his or her opinion. The expert should not attempt to conceal any adverse opinions that have come to his or her knowledge.[142]

Therefore, in situations where the facts so warrant, the expert must give testimony that may harm or damage the contentions of his instructing party in providing his unbiased and independent opinion. He cannot be an advocate of his instructing party's cause.[143] In the

133 *Lim Chong Poon v. Chiang Sing Jeong* [2020] SGCA 27 at [25].
134 id. at [26]
135 id. at [28].
136 id. at [27].
137 id. at [29].
138 *Comfort Management Pte Ltd v. OGSP Engineering Pte Ltd and another* [2020] SGHC 165 at [45].
139 Order 40A Rule 2(1) ROC.
140 Order 40A Rule 2(2) ROC.
141 Order 40A Rule 3(2)(h) ROC.
142 *Hai Jiao 1306 Ltd* (see footnote 130) at [213(e)].
143 id. at [213(c)].

appropriate case, the court will not hesitate to disregard or even draw an adverse inference from expert evidence that exceeds the judicially determined boundaries of coherence, rationality and impartiality.[144]

In *JWR Pte Ltd*, the court noted that the expert witness failed to display greater criticality and analysis of the factual basis underlying his expert opinion. The expert report was founded on unsubstantiated assumptions and assertions that were not supported by evidence. In particular, the expert failed to show that the information he based his report on was reliable. The court concluded that it was not confident that the expert truly understood his role as an expert witness.[145]

### v Challenging experts' credentials

An expert is statutorily defined as a person with scientific, technical or other specialised knowledge based on training, study or experience.[146] As the courts have considerable laxity in determining who qualifies as an expert,[147] any person can be regarded as an expert if the court is satisfied that they have the relevant knowledge or experience in that particular subject matter.[148]

Nevertheless, a party can challenge an expert's credentials on the basis of how the expert came to be skilled or the level of their skill as these factors are relevant in assessing the weight to be given to expert evidence.[149] In some cases, it may also be possible for a party to challenge the expert's witness on the basis that the court is unlikely to derive assistance from the evidence. In *Arnold William*, the High Court did not consider a commercial diver with 23 years of experience as an expert because not only did it not find his testimony to be of any assistance to the court, he had relied solely on the plaintiff's version of events as to what transpired on the day of the accident without any independent verification.[150]

In *Pacific Recreation*, the Court of Appeal held that the expert's report ought to, at the very minimum, contain a curriculum vitae detailing the expert's relevant experience, with special regard to the issue on which the expert's opinion was sought.[151] Form 12 of Appendix A of the State Courts Practice Directions provides that an expert should state in their report their relevant professional or academic qualifications, specific training and expertise, and the number of times they have appeared as an expert witness in litigation proceedings and the number of occasions for each of the parties.[152] This provides an additional basis for the party to challenge the expert's credentials.

Additionally, a party may, with the leave of court, put questions to the other party's expert about his report[153] provided that such questions are for the purpose only of clarification

144 id. at [213(c)].

145 *JWR Pte Ltd* (see footnote 34) at [101].

146 Section 47(2) EA.

147 *Leong Wing Kong v. PP* [1994] 1 SLR(R) 681 at [16].

148 Singapore Civil Procedure 2020 Volume 1 (see footnote 94) at 40A/2/1.

149 Chen Siyuan and Lionel Leo, *The Law of Evidence in Singapore* (2nd edn, Sweet & Maxwell 2018) at [6.046].

150 *Arnold William v. Tanoto Shipyard Pte Ltd* [2016] SGHC 89 at [51]–[53].

151 *Pacific Recreation* (see footnote 115) [2008] 2 SLR(R) 491 at [67].

152 Form 12 of Appendix A of the State Courts Practice Directions.

153 Order 40A Rule 4(1) ROC.

of that expert's report.[154] In the event the expert does not answer the question or does not answer adequately, the court may make such order as it thinks just,[155] including an order that the other party may not rely on the evidence of that expert.[156]

### vi Oral and written submissions

In civil cases where experts are party-appointed, unless the court otherwise directs, the expert's evidence must be given in a written report signed by the expert and exhibited in an affidavit sworn to or affirmed by them testifying that the report exhibited is theirs and that they accept full responsibility for the report.[157]

The report must also meet certain mandatory requirements, including:[158] (1) details of the expert's qualifications; (2) details of any literature or other material that the expert witness has relied on in making the report; (3) a statement setting out the issues that they have been asked to consider and the basis upon which the evidence was given; (4) if applicable, state the name and qualifications of the person who carried out any test or experiment which the expert has used for the report and whether or not such test or experiment has been carried out under the expert's supervision; (5) where there is a range of opinion on the matters dealt with in the report, summarise the range of opinion, and give reasons for their opinion; (6) a summary of the conclusions reached; (7) a statement of belief of correctness of the expert's opinion; and (8) a statement that the expert understands that in giving the report, the expert's duty is to the court and that they have complied with that duty.

Non-compliance with the above-mentioned requirements, at best, does not automatically render the evidence inadmissible[159] but may result in the expert's opinion being accorded little or no evidentiary weight.[160] Additionally, adverse cost consequences may be ordered for the party who engaged that expert.[161]

### vii Civil justice reforms

In October 2018, the Ministry of Law in Singapore sought public consultation on civil justice reforms, following the recommendations of the Civil Justice Review Committee (CJRC) and Civil Justice Commission (CJC).

One of the proposals was for the introduction of a general rule requiring parties to agree and appoint a single joint expert in matters where expert evidence was required to assist the court, except in special cases and with the court's approval.[162] Further, the proposal suggested that in deciding whether to allow parties to use their own experts, the judge will take into account the following factors: (1) views of the parties; (2) cost proportionality-related

154 Order 40A Rule 4(3) ROC.

155 Order 40A Rule 4(5) ROC.

156 Order 40A Rule 4(5)(a) ROC.

157 Order 40A Rule 3(1) ROC.

158 Order 40A Rule 3(2) ROC; *Pacific Recreation Pte Ltd* (see footnote 115) at [65].

159 *Alwie Handoyo v. Tjong Very Sumito and another and another appeal* [2013] 4 SLR 308 at [173].

160 *Pacific Recreation Pte Ltd* (see footnote 115) at [89].

161 ibid.

162 Civil Justice Commission Report (29 December 2017) page 21 at [3].

issues such as the amount of money or property involved, the complexity of the expert issue, whether parties have already engaged their own experts; and (3) whether evidence from a party expert is necessary to reach a just outcome.[163]

However, following the feedback during the public consultation, the proposal was refined from a blanket rule to a general recommendation encouraging parties to agree on a single expert, as far as possible.[164]

The change was a result of the fact that a majority of the respondents were opposed to the original proposal. Concerns were raised about the fact that under the current proposal, there would have been a possible increase in satellite litigation and increase in costs as parties would have to appoint the joint expert on top of their own experts to assist them with navigating the issues requiring expert opinion.[165] Additionally, under the proposal, parties would have been limited to cross-examining the single expert on his or her evidence as opposed to putting forward a positive case.[166]

## IV RECENT CASE LAW

### i Denka Advantech Pte Ltd v. Seraya Energy Pte Ltd[167]

#### *The facts of the case*

The facts of *Denka Advantech* revolved around the alleged repudiatory breach of three electricity retail agreements entered into between Seraya Energy, a retailer of electricity, and Denka, a customer. Each agreement contained a liquidated damages clause which was tied to Seraya's express contractual right to terminate the agreements under various scenarios, but especially for any breach by Denka of its obligations under the agreements. The formula in the liquidated damage clauses stipulated a payment of 40 per cent of the remaining contract value as determined by the average monthly payments around the time of termination.

The agreements were entered into in 2012 and were due to expire in 2021. However, in August 2014, Denka indicated that it no longer wished to purchase electricity under the agreements because the price under the agreements were significantly higher than the prevailing market conditions at the time. Seraya thus terminated the agreements and in December 2014 commenced action against Denka for breaches of the respective agreements and sought liquidated damages or common law damages in the alternative. Denka denied that it had wrongfully terminated the agreements and resisted Seraya's claim for liquidated damages on the basis that the liquidated damages clauses in the agreements were unenforceable penalties.

At first instance, the High Court held that Denka was in repudiatory breach of the agreements and that Seraya had validly terminated the agreements. In assessing the validity of the liquidated damages clauses, the High Court applied the principles in *Dunlop Pneumatic*[168] and held that the liquidated damages clauses in the agreements were not a genuine pre-estimate of Seraya's damages and were therefore unenforceable penalty clauses. Seraya appealed against the High Court's decision on liquidated damages.

163 Report of the Civil Justice Review Committee at [97].

164 Recommendations of the Civil Justice Commission and the Civil Justice Review (11 June 2021) at [86].

165 id. at [83].

166 ibid.

167 *Denka Advantech Pte Ltd and another v. Seraya Energy Pte Ltd and another and other appeals* [2020] SGCA 119.

168 *Dunlop Pneumatic Tyre Company, Ltd v. New Garage and Mother Company, Limited* [1915] AC 79.

***The decision***

For context, the House of Lords decision in *Dunlop Pneumatic* was, until recently, thought to be the seminal case on the applicable legal principles in relation to the penalty rule.[169] Lord Dunedin held that the 'essence of liquidated damages is a genuine covenanted pre-estimate of damage' whereas the 'essence of a penalty is a payment of money stipulated as [*in terrorem*] of the offending party'.[170] Whether a sum stipulated is a penalty or liquidated damage is a question of construction. In order to assist the court's construction of the contract, Lord Dunedin posited four principles that became the leading statement of the law on penalties.[171] First, the provision would be a penalty if the sum stipulated for is extravagant and unconscionable in comparison with the greatest loss that could conceivably be proved to have followed from the breach. Second, the provision would be a penalty if the breach consisted only in the non-payment of money and it provided for the payment of a larger sum. Third, there was a rebuttable presumption that the provision would be a penalty if the sums stipulated for was payable on a number of events of varying gravity. Lastly, the provision would not be a penalty because of the impossibility of precise pre-estimation in the circumstances of the true loss.

As Denka's main argument was that the liquidated damages clauses were unenforceable penalty clauses, the Court of Appeal had to determine what ought to be the applicable law in relation to contractual penalties in the Singapore context. To do this, the court had to decide where the law in Singapore's context stood in light of recent developments in the Commonwealth jurisdiction in relation to (1) the scope of the penalty rule; and (2) the penalty rule's applicable legal criteria.

In relation to (1), the Court of Appeal had to consider whether the penalty rule should be confined to situations involving a breach of contract, or if the law should follow the approach of the Australian High Court in *Andrews*,[172] which extended the scope of the penalty rule to include clauses dealing with situations not involving a breach of contract, such as collateral or accessorial obligations meant to secure the performance of a primary obligation. The Court of Appeal held that the penalty rule only applies where there has first been a breach of contract and therefore declined to follow the decision in *Andrews*.[173]

The Court of Appeal reasoned that although the penalty rule was developed in the context of equity, it was developed to provide relief against the enforcement of penal bonds, and there was no reason to apply it to all modern contracts in the absence of sound logic that would support such an extension.[174] Additionally, the extension of the scope of the penalty rule would vest in the courts a discretion that is both wide and uncertain.[175] This discretion would permit the courts to review a wide range of clauses on substantive and not merely procedural grounds, thus constituting a general, uncertain and significant 'legal incursion' into the freedom of contract.[176] As the Court of Appeal recognised, the freedom of contract is the rule rather than the exception in the context of the law of contract, and this

169 *Denka Advantech* (see footnote 167) at [65].

170 *Dunlop Pneumatic* (see footnote 168) at 86.

171 id. at 86–87.

172 *Andrews v. Australia and New Zealand Banking Group Limited* (2012) 247 CLR 205.

173 *Denka Advantech* (see footnote 167) at [99].

174 id. at [74]–[78], [82].

175 id. at [82].

176 ibid.

in and of itself would be an 'insuperable objection' to such an extension.[177] Third, the benefit of confining the scope of the penalty rule to secondary obligations only, specifically, the obligation of the defendant to pay damages, means that the primary obligations between the contracting parties are not interfered with at all, unlike in the broader equitable jurisdiction mooted in *Andrews*.[178]

In relation to (2), the Court of Appeal had to consider the UK Supreme Court's decision in *Cavendish Square*[179]which set out the 'legitimate interest' test. Under this, the determination of whether a clause was a penalty would hinge on whether the impugned provision was a secondary obligation which imposed a detriment on the contract-breaker that was out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation.[180] The legitimate interest test allowed the justification of a damages clause by some other consideration than the desire to recover compensation for a breach.[181] The Court of Appeal declined to follow the decision in *Cavendish Square* and instead, endorsed the statement of principles set out by Lord Dunedin in *Dunlop Pneumatic*.[182] The Court of Appeal reasoned that the approach in *Dunlop Pneumatic* was to be preferred because it was centrally concerned with whether the clause in question provided a genuine pre-estimate of loss and therefore focused on the secondary obligation on the part of the defendant to pay compensatory damages.[183] In contrast, the decision in *Cavendish Square* would permit the enforcement of clauses which were not genuine pre-estimates of likely loss but were nevertheless commercially justifiable. Additionally, similar to problem with the decision in *Andrews*, the 'legitimate interest' test as framed allowed it to be used too flexibly and would result in much uncertainty.[184]

Having settled the applicable legal principles, the Court of Appeal then applied the principles set out in *Dunlop Pneumatic* and held that the liquidated damages clauses were not penalties and were therefore enforceable.[185] Further, the court held that, having considered the expert evidence, the amounts payable by Denka as liquidated damages were not extravagant and unconscionable when compared to the greatest loss that could conceivably be proved to have followed from the breach. Therefore, Seraya were awarded the net sum of S$30,829,369.79 pursuant to the liquidated damages provisions.

***The significance of the decision***

The decision in *Denka Advantech* conclusively settles the position in Singapore regarding the applicable legal principles in relation to the penalty rule in the context of liquidated damages provisions. The law in Singapore is firmly rooted in the principles set out in *Dunlop Pneumatic* and the penalty rule will only apply to clauses that take effect upon a breach of contract and will only be enforceable only if it comports with the *Dunlop Pneumatic* test. Therefore, the

177 ibid.
178 id. at [92].
179 *Cavendish Square Holding BV v. Makdessi* [2016] AC 1172.
180 id. at [28]–[32].
181 id. at [28].
182 *Denka Advantech* (see footnote 167) at [151].
183 id. at [152].
184 ibid.
185 id. at [309].

focus for the courts will solely be on whether the clause provides a genuine pre-estimate of the likely loss of the plaintiff at the time of contracting and the only 'legitimate interest' that the courts will be concerned with is that of compensation.

It has been argued that although the Court of Appeal did not adopt the 'legitimate interest' test, the test in *Dunlop Pneumatic* does not make it any easier to identify when a liquidated damages clause constitutes a penalty.[186] This is because whether stipulated damages are 'extravagant and unconscionable' compared to the greatest hypothetical loss that could be suffered, both tests involve a large measure of speculation involving 'numerous imponderables'.[187] Nonetheless, to overcome this issue, it is advised that contracting parties obtain the written consent or acknowledgement of its counterparty that the amount of damages specified in the liquidated damages clause is reasonable or presents a genuine pre-estimate of loss based on a range of losses that has been discussed between the parties. This would go a long way to resolving any dispute that may arise on whether the liquidated damages clause in question is a penalty clause or not.

186 White & Case LLP, Old is the new 'new' – the rule against penalties in Singapore (18 January 2021) accessed on 20 July 2021 at https://www.whitecase.com/publications/alert/old-new-new-rule-against-penalties-singapore.

187 ibid.

**Appendix 1**

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