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Chapter 8

SINGAPORE

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I OVERVIEW

Courts in Singapore, as 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:

a the losses must have been caused by the breach;
b the losses must not be too remote in law; and
c 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 developments in the United Kingdom, 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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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 that 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 in which they would have been if the tort had not been committed.[10]

In addition 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 paragraph 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]; *Noor Azlin bte Abdul Rahman v. Changi General Hospital Pte Ltd* [2021] SGCA 111.

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].

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 make it difficult or impossible for the plaintiff to prove the loss or where the facts needed to prove the loss are known solely by the defendant and he or she 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 their 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]

Despite the flexible approach, claimants are still required to specifically plead aggravated damages. Aggravated damages are compensatory in nature but are awarded over and above general compensatory damages[25] when the plaintiff is able to show that there is 'contumelious or exceptional conduct or motive on the part of the defendant and that the plaintiff suffered an intangible loss, injury to personality or mental distress'.[26] In *Noor Azlin bte Abdul Rahman v. Changi General Hospital Pte Ltd*,[27] the Court of Appeal clarified the conflicting opinions from various decisions of the Singapore High Court and held that given the 'exceptional' nature of aggravated damages, it must be specifically pleaded with particularity.[28] In contrast with general damages where a simple, 'the plaintiff claims damages' is sufficient, the claim for special damages like aggravated damages must be set out separately as the law will not presume such loss to be the consequence of the defendant's act but dependent, in part at least, on the special circumstances of the particular case.[29] The plaintiff has to prove specifically and with particularity the enhanced hurt to the satisfaction of the court to be granted aggravated damages.[30] The material facts for such a claim would presumably include some allegation of the manner of, or motive behind, the offending conduct, which resulted in enhanced losses that justify an award of aggravated damages above the usual measure of compensatory damages.[31]

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 *Noor Azlin bte Abdul Rahman* (see footnote 11) at [256].

26 *Noor Azlin bte Abdul Rahman* (see footnote 11) at [261].

27 [2021] SGCA 111.

28 *Noor Azlin bte Abdul Rahman* (see footnote 11) at [247], [267].

29 id. at [253], [254].

30 id. at [261].

31 id. at [270].

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').[32] However, the breach date rule is not an absolute rule and the court has the power to fix such other date (e.g., the date of the trial)[33] as may be appropriate in the circumstances where applying the 'breach date rule' leads to injustice.[34] The compensatory principle is an 'overriding one', and it is necessary to take into account contingencies known at the date of assessment of damages to have occurred, if their effect was that the contract would have been lawfully terminated before its contractual term.[35] While this approach might undermine commercial certainty to some extent, this uncertainty does not, in itself, justify a departure from the compensatory principle so as to award a claimant windfall damages for a breach of contract that represents benefits that it would not have obtained if the contract had been performed.[36]

In *iVenture Card Ltd v. Big Bus Singapore City Sightseeing Pte Ltd*,[37] the Court of Appeal applied the exception above in the context of assessing damages for repudiatory breach of executory contractual obligations. The Court of Appeal held that an appellate court may have regard to evidence of events that reduce the value of the performance of such contractual obligations even though it occurred only after the evidential tranche, during the written closing submissions and before the trial judge delivered judgment, if such events 'would have falsified some basic assumptions common to both sides or it would have affronted common sense or a sense of justice if the court had failed to take cognizance of them'.[38]

Applying this exception, the Court of Appeal took into account the occurrence of the covid-19 pandemic in the reduction of damages awarded even though the effect of the pandemic was not raised at trial[39] and was not dealt with in the trial judgment.[40] The Court of Appeal decided that a fair date to assume that tourists stopped arriving in Singapore would be a 'mid-point' between 11 March 2020 (when the World Health Organization declared covid-19 a pandemic) and 7 April 2020 (when Singapore entered into lockdown), which they fixed as 25 March 2020.[41] From 25 March 2020 up to the date of expiry of the agreements in question ('the relevant period'), it would be assumed that there would be no tourists in Singapore.[42] As such, the expert assessment was to be adjusted to take into account the effect of the pandemic during the relevant period.[43] If parties could not agree on the reduction of

32 *Johnson v. Agnew* [1980] AC 367 at 400; *Tay Joo Sing v. Ku Yu Sang* [1994] 1 SLR(R) 765 at [36]–[37]; *The Law of Contract* in Singapore (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) at [22.002].

33 *Yeo Yoke Mui v. Kong Hoo (Private) Ltd and another* [2001] SGHC 28.

34 *iVenture Card Ltd v. Big Bus Singapore City Sightseeing Pte Ltd* [2021] SGCA 97 at [133] citing *Johnson v. Agnew* (see footnote 32) at 401.

35 id. at [137].

36 id. at [143].

37 id.

38 id. at [152].

39 id. at [129].

40 id. at [130].

41 id. at [157].

42 id. at [158].

43 id. at [164(c)(iii)].

damages as a result of the pandemic within 28 days of the judgment, this issue was to be remitted back to the trial judge to receive evidence in order to decide on the appropriate reduction to be made.[44]

iv Financial projections

Financial projections are commonly used in the quantification of financial loss, particularly where valuations are necessary. Financial projections or forecasting inevitably involve an element of guesswork.[45] 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.[46] 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'.[47] 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'.[48]

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.[49] All assumptions and special assumptions must be identified.[50] Additionally, they must be reasonable under the circumstances, supported by evidence and be relevant having regard to the purpose of the valuation.[51]

Where assumptions are used 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 that are contradicted by objective evidence such that they are unlikely to hold true.[52]

In *iVenture*, the Court of Appeal accepted the respondents' challenge to the expert assessment of the quantum of lost profits on the basis that the expert's evidence was based on assumptions relating to Singapore's tourism levels that were overly optimistic since the 'covid-19 pandemic severely curtailed tourist activity in Singapore since 2020'.[53] As such,

44 id. at [157].

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

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

47 id. at [99].

48 id. at [100].

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

50 id. at [20.3(i)].

51 id. at [200.5].

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

53 *iVenture* (see footnote 34) at [153].

while the expert assessment assumed fluctuations 'in a manner which could be sufficiently predicted by historical data',[54] the Court rejected such assumption as untenable as historical data could not have predicted the present pandemic, which had an unprecedented impact on tourism in Singapore (and around the world).[55] The Court of Appeal found that it would 'affront common sense' if the Court had sustained the expert's original assessment and awarded damages on the assumption that tourism in Singapore was unaffected by the pandemic, instead of requiring an adjustment to the expert assessment to take the effect of the pandemic into account.[56]

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.[57]

Pursuant to the recent amendments to the Supreme Court and State Courts Practice Directions,[58] 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.[59]

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.[60]

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.[61] 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.[62] 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.[63] As noted by the High Court in *Muhammad Adam bin Mohammad Lee v. Tay Jia Rong Sean*,[64] the

54 id. at [153], [156].

55 id. at [153], [156].

56 id. at [156].

57 *Muhammad Adam bin Mohammad Lee v. Tay Jia Rong Sean* [2021] SGHC 264 at [124]; *Christian Joachim Pollmann v. Ye Xianrong* [2021] SGHC 77 at [12].

58 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].

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

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

61 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).

62 Christian Joachim Pollmann (see footnote 64) at [18].

63 Actuarial Tables with explanatory notes (see footnote 70) at p. 4.

64 [2021] SGHC 264.

Actuarial Tables are a welcome contribution to this area of the law, especially for a victim of a tort who is now more likely to be entitled to a larger damages award by the application of the Actuarial Tables.[65]

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 carried out 'unless the facts of the case and ends of justice dictate otherwise'.[66] 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'.[67]

This discretion was exercised in *Muhammad Adam* where the High Court concluded that the Actuarial Tables were not applicable and, in any event, could not be completely relied upon as a matter of fairness to the defendant.[68] There are two pertinent clarifications. First, the Court clarified that the phrase 'proceedings . . . heard on or after 1 April 2021' does not include a situation where parties are no longer able to adduce any further evidence or file submissions without leave of court, after the close of trial.[69] Second, the Court can exercise discretion to depart from the multipliers where usage would occasion irremediable prejudice to the defendant.[70] In this case, the irremediable prejudice stemmed from the defendant's deprivation of the opportunity to understand and respond to the constantly shifting case mounted against it,[71] and the defendant's deprivation of the opportunity to adduce evidence (such as evidence in relation to whether there was any heightened risk of mortality to the plaintiff due to the covid-19 pandemic),[72] conduct cross examination or seek discovery of further documents to show that there were specific circumstances that warrant a departure from the multipliers in the Actuarial Tables.[73]

In relation to corporate and commercial disputes, discount rates feature in valuation methods involving financial projections where the forecast cash flow is discounted,[74] 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).[75] In accordance with the International Valuation Standards 2020, the valuer must provide evidence for the derivation of the discount rate.[76] 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

65 id. at [139].

66 Supreme Court Practice Directions (see footnote 68) at [159(1)]; State Court Practice Directions (see footnote 68) at [145(1)].

67 Supreme Court Practice Directions (see footnote 68) at [159(2)]; State Court Practice Directions (see footnote 68) at [145(2)].

68 *Muhammad Adam* (see footnote 64) at [143].

69 id. at [144].

70 id. at [145].

71 id. at [146].

72 id. at [147].

73 id. at [147].

74 International Valuation Standards (see footnote 56) at [50.29].

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

76 International Valuation Standards (see footnote 56) at [50.34(b)].

premium of 1.6 per cent that the expert did not account for in the company's cost of equity.[77] The result of this was to increase the company's WACC and resulted in a larger discount rate in the DCF approach.[78]

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[79] 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.[80]

Recently, in the Singapore Court of Appeal decision in *Kiri Industries Limited v. Senda International Capital Limited & Anor*,[81] the Court of Appeal clarified that courts making buyout orders and referring the question of valuation to experts should first determine whether it is appropriate to order a DLOC or a DLOM, or both.[82] The decision on whether the application of a DLOM is fair must be made by the court[83] – this was not a decision 'dependent upon the complexities of the differing approaches taken by the valuation experts'.[84] Taking into account the context in which the fair value inquiry of a minority investor's shares is made, the forced-sale nature of the buyout proceedings and the identity of the purchasers involved weigh heavily against the application of discounts.[85] The general rubric of fairness informing the court's exercise of its discretion under Section 216(2) of the Companies Act entitles the court to conclude that a limitation of 'fair market value' assessed in the hypothetical context of willing buyers and sellers would not be fair.[86]

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.[87] 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.[88] 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.[89]

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

78 id. at [312(e)].

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

80 id. at [45].

81 [2022] SGCA(I) 5.

82 id. at [241].

83 id. at [237].

84 id. at [242].

85 id. at [235].

86 id. at [243].

87 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].

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

89 id. at [50].

vii Currency conversion

As in the United Kingdom, the *Miliangos* doctrine applies in Singapore.[90] 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.[91] This does not mean that plaintiffs have an option to select the currency that they want. Instead, the *Miliangos* doctrine redefines the obligation of the debtor to pay the sum owed in the relevant currency.[92]

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 that the plaintiff was given leave to levy execution.[93] 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.[94]

In *Haribo Asia Pacific Pte Ltd v. Aquarius Corp*,[95] the Singapore High Court set out the relevant principles for determining the date of set-off in cases involving cross claims for different currencies. The Court ordered parties to determine the applicable exchange rate and set off their respective judgment debts on the date of the judgment.[96] Given that the set-off is a kind of notional payment, the conversion should be effected as close to the date of payment as possible (i.e., the date of set–off – ideally, on the same day).[97] The Court should assess and add to each principal amount any interest accruing up to the date of the set-off, convert the smaller amount into the currency of the larger amount at the exchange rate prevailing at that date and order payment of the balance.[98] The payment of the balance sum owing would be in the currency claimed by the overall judgment creditor, and where the judgment creditor seeks to enforce payment of this balance, the process in *Miliangos* should be applied accordingly.[99]

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.[100] Such compensation is awarded if the defendant kept money to which the plaintiff was entitled.[101]

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[102] grants the High Court (though it may be exercised by

90 *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].

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

92 id.

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

94 id.

95 [2021] SGHC 278.

96 *Haribo Asia Pacific Pte Ltd v. Aquarius Corp* [2021] SGHC 278 at [240].

97 id. at [252].

98 id. at [254].

99 id.

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

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

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

the Court of Appeal[103] or the Subordinate Courts[104]) to direct interest to be paid on damages, debts (whether the debts are paid before or after the commencement of proceedings) or judgment debts.[105]

The second and more common source of the power is Section 12 of the Civil Law Act.[106] 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.[107] 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.[108] This discretion extends to a determination of whether:

a to award interest at all;
b what the relevant rate of interest should be;
c what proportion of the sum should bear interest; and
d the period of which interest should be awarded.[109]

As a general rule, interest should commence from the date of accrual of loss.[110] 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.[111] 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.[112]

The most commonly cited justifications for the court to delay the start date for calculating interest have been when the plaintiff is guilty of inordinate delay in bringing the action.[113] 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.[114]

There are a number of other non-exhaustive factors that are capable of influencing the exercise of the court's discretion. They include:

a what rate of interest would be appropriate to the relevant period;
b whether the plaintiff was dilatory in the bringing and conduct of the proceedings;
c whether the plaintiff had received compensation for the loss suffered from a source other than the defendant;
d whether the claimant had sought and been awarded damages, which include damages for the loss of the use of money;

103 Section 37(2) SCJA.
104 Section 31(1) (District Court) and Section 52 (Magistrates' Court) Subordinate Courts Act (Cap 321, 1999 Rev Ed).
105 Section 18(2) read with First Schedule, Paragraph 6 SCJA.
106 Civil Law Act (Cap 43, 1994 Rev Ed) (CLA).
107 Law Reform Committee, Report of the Law Reform Committee on Pre- and Post-Judgment Interest (Singapore Academy of Law August 2005) at [33].
108 *Robertson Quay* (see footnote 11) at [98].
109 *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].
110 *McGregor on Damages* (see footnote 8) at 15-063.
111 *McGregor on Damages* (see footnote 8) at 15-067; *Robertson Quay* (see footnote 11) at [102].
112 *Grains and Industrial* (see footnote 129) at [138].
113 *Jefford v. Gee* [1970] 2 QB 130 at 151; *Grains and Industrial* (see footnote 129) at [139].
114 *Robertson Quay* (see footnote 11) at [105]–[108].

e whether the debt is paid immediately after proceedings are commenced; and
f whether the parties have agreed that pre-judgment interest should not be recoverable.[115]

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.[116] 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.[117] 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.[118] 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.[119]

ix Costs

The term 'costs' encompasses fees, charges, disbursements, expenses and remuneration.[120] The most common orders for costs 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 is crystallised at the point in time when the order is made'.[121]

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.[122] The principles governing the award of costs are that costs are in the unfettered discretion of the court,[123] 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 of his or her costs in part or in full.[124] 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.[125] For example, in *Aurol Anthony Sabastian*, the appellant

115 *Grains and Industrial* (see footnote 129) at [140].
116 *The Oriental Insurance Co Ltd v. Reliance National Asia Re Pte Ltd* [2009] 2 SLR(R) 385 at [135].
117 id. at [127]–[128].
118 id. at [129].
119 id. at [137]–[138].
120 Order 21 Rule 1(2) Rules of Court 2021 (ROC).
121 Justice Chua Lee Ming, Singapore Civil Procedure 2020 Volume 1 (Sweet & Maxwell 2020) at 59/1/3.
122 Order 21 Rule 2(1) ROC.
123 *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].
124 *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].
125 *Denis Matthew Harte v. Tan Hun Hoe and Another* [2001] SGHC 19 at [41].

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.[126]

An appellate court will only interfere with a trial judge's decision to award costs 'in clear cases',[127] which could include situations where:

a the trial judge had erred in law or in principle;[128]

b the trial judge had taken into account some matter that they should not have taken into account;[129]

c the trial judge had omitted to take into account some matter that they should have taken into account;[130] or

d where costs were awarded to a party who was not entitled to costs.[131]

Lastly, a contractual agreement between the parties that 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'.[132] In such a situation, the court can and should intervene to disallow the claim in the exercise of its discretion.[133]

Originally, it was thought that the court had no discretion as to costs where there was a contractual right to costs.[134] However, in *Hong Leong Finance*,[135] 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.[136] Therefore, 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.[137] This follows the rule established in the House of Lords decision in *Gourley*.[138]

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 loss (i.e., loss of a capital asset, loss of capital gains).[139] The fundamental principle in *Gourley*

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

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

128 Singapore Civil Procedure 2020 Volume 1 (see footnote 141) at 59/2/1.

129 ibid.

130 ibid.

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

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

133 ibid.

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

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

136 id. at [75].

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

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

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

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.[140]

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

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[141] and they cannot answer the very question that is before the court (the Ultimate Issue Rule).[142] 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.[143]

iii The court's role excluding and managing expert evidence

Order 12 Rule 2 is a new order introduced in the ROC 2021 that governs the court's approval of the use of expert evidence. Expert evidence can only be used in court if the court approves.[144] The court will do so only if it:

a determines that the expert evidence will contribute materially to the determination of any issue in the case; and

b the issue cannot be resolved by an agreed statement of facts or by submissions based on mutually agreed materials.[145]

Where parties intend to call expert witnesses, they must indicate this in the pre-case conference questionnaire (PCQ),[146] which must be filed one week before the first Registrar's Case Conference (RCC) to the extent possible.[147] Prior to the RCC, parties are to fill up an expert witness template that sets out general background information on the proposed

140 id. at [21].

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

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

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

144 Order 12 r 2(1) ROC.

145 Order 12 r 2(1) and O 12 r 2(2) ROC.

146 Form 6 Appendix B of the Supreme Court Practice Directions 2021.

147 Paragraph 56(2) of the Supreme Court Practice Directions 2021.

experts, the list of issues to be referred, the facts or assumed facts to be relied on, and the anticipated timelines.[148] The matter of adducing expect evidence must be dealt with during the Singapore Application Pending Trial.[149]

Parties are now required to agree on the list of issues (which, as far as possible, must be expressed as questions that can be answered with 'yes' or 'no')[150] and common set of agreed or assumed facts,[151] which must be approved by the court.[152] Where parties are unable to agree, the court must decide these matters.[153]

Another new feature in ROC 2021 is Order 12 Rule 3, which governs the '[c]ommon expert, court expert and number of experts'. To save time and costs, parties must 'as far as possible', agree on one common expert.[154]

Parties are to consider whether the experts need to be cross-examined in court.[155] If so, the court must give appropriate directions as to the method of court questioning.[156]

Where there is more than one expert, the court may order that some or all of the expert witnesses testify as a panel[157] before or after all or some of the non-expert witnesses have testified.[158] 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.[159] During hot-tubbing, each expert will give their reasons to support their conclusions and challenge the opposing expert's conclusions, with the opposing expert having the opportunity to respond immediately.[160]

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.[161] 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.[162] Hence, while a court is not obliged to

148 Form 7 Appendix B of Supreme Court Practice Directions 2021.

149 Order 9 Rule 9(4)(m) ROC.

150 Order 12 Rule 4(4) ROC.

151 Order 12 Rule 4(1) ROC.

152 Order 12 Rule 4(2) ROC.

153 Order 12 Rule 4(3) ROC.

154 Order 12 r 3(5) ROC.

155 Order 12 Rule 6(5) ROC.

156 Order 12 Rule 3(4) ROC.

157 Order 12 Rule 7(1) ROC.

158 Order 12 Rule 7(2) ROC. Pursuant to Order 12 Rule 7(3) ROC, where the defendant's expert testifies as a panel before the defendant or any of the defendant's non-expert witnesses has testified, the defendant is not deemed to have waived his or her right to submit that there is no case for him or her to answer at that stage of the hearing.

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

160 Order 12 Rule 7(4) ROC.

161 *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].

162 *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] and in *Haribo Asia Pacific Pte Ltd v. Aquarius Corp* [2021] SGHC 278 at [122].

accept the unchallenged opinion of an expert, rejection of the same must be based on sound grounds.[163] The court should not, when confronted with expert evidence that is unopposed and appears not to be obviously lacking in defensibility, reject it and prefer to draw its own inferences.[164]

In *Haribo Asia Pacific Pte Ltd v. Aquarius Corp*, the Singapore High Court clarified that what is required from experts (in the context of providing evidence on foreign law to determine entitlement of damages for lost profits) is not the bare assertion of rules but rather proof that the foreign courts 'did in fact lay down such a rule'. Without such proof, the court cannot accept that the foreign rule applies contrary to the plain meaning of contractual clauses.[165]

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 conclusions before rejecting them.[166] 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.[167] 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.[168] 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.[169] 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.[170]

iv Independence of experts

The court may disallow the use of or reject any expert evidence if it finds that the expert lacks impartiality.[171] Experts have a duty 'to assist the Court on the matters within his expertise',[172] which overrides any obligation to the party instructing them.[173] The expert's written report must contain a statement that the expert understands this overriding duty to the court and that the expert has complied with this duty.[174]

163 *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].

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

165 *Haribo Asia Pacific* (see footnote 191) at [125].

166 *Lim Chong Poon v. Chiang Sing Jeong* [2020] SGCA 27 at [25].

167 id. at [26]

168 id. at [28].

169 id. at [27].

170 id. at [29].

171 Order 12 Rule 2(4) ROC.

172 Order 12 Rule 1(2) ROC.

173 Order 12 Rule 1(3) ROC.

174 Order 12 Rule 5(2)(b) ROC.

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 12 Rule 5(2)(f) 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 their opinion. The expert should not attempt to conceal any adverse opinions that have come to their knowledge.[175]

Therefore, in situations where the facts so warrant, experts must give testimony that may harm or damage the contentions of their instructing party in providing their unbiased and independent opinion. They cannot be an advocate of their instructing party's cause.[176] In the 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.[177]

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 on which he based his report was reliable. The court concluded that it was not confident that the expert truly understood his role as an expert witness.[178]

v Challenging experts' credentials

The court may disallow the use of or reject any expert evidence if it finds that the expert lacks the requisite specialised knowledge in the issues referred to them.[179] An expert is statutorily defined as a person with scientific, technical or other specialised knowledge based on training, study or experience.[180] As the courts have considerable laxity in determining who qualifies as an expert,[181] 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.[182]

Nevertheless, a party can challenge an expert's credentials based on 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.[183] 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, but he had also relied solely on the plaintiff's version of events as to what transpired on the day of the accident without any independent verification.[184]

175 *Hai Jiao 1306 Ltd* (see footnote 191) at [213(e)].

176 id. at [213(c)].

177 id. at [213(c)].

178 *JWR Pte Ltd* (see footnote 53) at [101].

179 O 12 r 2(4) ROC.

180 O 12 r 1(1) ROC.

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

182 Singapore Civil Procedure 2020 Volume 1 (see footnote 141) at 40A/2/1.

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

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

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.[185] The position in case law is encapsulated in the new provision Order 12 Rule 5(2)(a) of the ROC, which provides that the expert's report must include the expert's qualifications showing that they have the requisite specialised knowledge on the issues referred to them.

vi Oral and written submissions

The expert's evidence must be given in a written report signed by the expert and exhibited in an affidavit made by the expert.[186] The report must also meet certain mandatory requirements, including:

a the experts' qualifications showing that they have the requisite specialised knowledge on the issues referred to them;

b the experts' statement that they understand their overriding duty to assist the court;

c a list of the issues referred to the expert and the common set of agreed or assumed facts relied on;

d a list of the materials relied on and including only extracts of material necessary to understand the report;

e where the materials include tests, experiments or the collection or analysis of data, the names and qualifications of the persons who did them and whether they did so under the expert's supervision or guidance;

f where there is a range of opinion on the matters dealt with in the report, a summary of the range of opinion, and reasons for their opinion;

g a statement of belief of correctness of the expert's opinion; and

h the conclusions reached on the issues referred to the expert and the reasons to support the conclusions.[187]

Non-compliance with the above-mentioned requirements, at best, does not automatically render the evidence inadmissible[188] but may result in the expert's opinion being accorded little or no evidentiary weight.[189] Additionally, adverse cost consequences may be ordered for the party who engaged that expert.[190]

The court may also order the parties, their solicitors and the experts to meet either during before or after the making of the expert reports to narrow any dispute and so that the parties can agree in writing on all or some of the conclusions on the issues referred to the experts.[191] Parties can, with the leave of the court, request in writing that an expert clarify any aspect of their report.[192] Experts must give their clarification in writing and such clarification is deemed to be a part of their report.[193]

185 *Pacific Recreation* (see footnote 162) [2008] 2 SLR(R) 491 at [67].

186 Order 12 Rule 5(1) ROC.

187 Order 12 Rule 5(2) ROC; *Pacific Recreation Pte Ltd* (see footnote 162) at [65].

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

189 *Pacific Recreation Pte Ltd* (see footnote 162) at [89].

190 ibid.

191 Order 12 Rule 6(1) ROC.

192 Order 12 Rule 6(3) ROC.

193 Order 12 Rule 6(4) ROC.

IV RECENT CASE LAW

i Kiri Industries Limited v. Senda International Capital Limited & Anor [2022] SGCA(I) 5

The facts of the case

This matter relates to a longstanding dispute between Kiri Industries Limited (Kiri) and Senda International Capital Limited (Senda), who were shareholders in a joint venture company, DyStar Global Holdings (Singapore) Pte Ltd (DyStar). In 2018, the Singapore International Commercial Court (SICC) found that Senda was liable for oppressive conduct against Kiri and made a buyout order.[194] Kiri's shares were subsequently valued at US$481.6 million in a judgment by the SICC in 2021.[195] In particular, the SICC had taken as a starting point the proposition that a DLOM is to be applied save in exceptional circumstances[196] and found that notwithstanding the presence of oppression, a party had to point to other 'exceptional circumstances', warranting the non-application of DLOM.[197] The SICC held that a DLOM would generally apply and should generally be applied to both the income and market-based approaches to valuation. This was because both approaches arrive at the price of the shares that an average market participant would be willing to pay. In the context of illiquid assets, market participants would generally pay less compared to assets that they could easily sell to others. Therefore, a DLOM should generally be applied.[198] The SICC went on to apply a DLOM of 19 per cent to the valuation of Kiri's shareholding in DyStar.[199]

Kiri and Senda both appealed to the Court of Appeal against various aspects of the SICC's valuation judgment. Their appeals raised 11 distinct issues arising from the SICC's judgments concerning matters affecting the valuation of DyStar and adjustments for various factors, as well as the valuation of Kiri's shareholding and adjustments relevant to that. This summary focuses only on Appeal Issue 8, which arose from the SICC's decision that a DLOM of 19 per cent should apply to the valuation of Kiri's shareholding in DyStar.

The decision

The Court of Appeal overturned the SICC's judgment on Issue 8. The Court of Appeal disagreed with SICC's starting position that a DLOM is to be applied save in exceptional circumstances and found that this wrongly 'elevated an incidental observation into a principle of law'.[200] The Court of Appeal accepted that a DLOM should not apply to Kiri's shareholding, thereby effectively increasing the value of Kiri's shareholding, previously valued at US$481.6 million by the SICC, by at least 19 per cent.

The Court of Appeal clarified that courts making buyout orders and referring the question of valuation to experts should first determine whether it is appropriate to order a DLOC or a DLOM, or both.[201] The decision on whether the application of a DLOM is fair

194 *DyStar Global Holdings (Singapore) Pte Ltd v. Kiri Industries Ltd* [2018] SGHC(I) 06.

195 *Kiri Industries Ltd v. Senda International Capital Ltd and another* [2021] 3 SLR 215 (the First Valuation Judgment).

196 id. at [225], [226] citing *Thio Syn Kym Wendy and others v. Thio Syn Pyn and another* [2018] SGHC 54.

197 id. at [233(b)].

198 id. at [226].

199 id. at [246].

200 [2022] SGCA(I) 5 at [236].

201 id. at [241].

must be made by the court[202] – this was not a decision 'dependent upon the complexities of the differing approaches taken by the valuation experts'.[203] Citing relevant principles applicable to the valuation of shares under a compulsory buyout order in the context of US jurisprudence, the Court of Appeal stated that a fair market value appraisal fails to reflect the actual circumstances surrounding compulsory buyouts in the oppression context as it assumes the presence of a willing buyer and seller under no obligation to act.[204] Taking into account the context in which the fair value inquiry of a minority investor's shares is made, the forced-sale nature of the buyout proceedings and the identity of the purchasers involved weigh heavily against the application of discounts.[205] The general rubric of fairness informing the Court's exercise of its discretion under Section 216(2) of the Companies Act entitles the court to conclude that a limitation of 'fair market value' assessed in the hypothetical context of willing buyers and sellers would not be fair.[206]

Applying this to the facts, the Court of Appeal found that the proper course for the SICC was to order that there be no DLOM applied in the valuation of Kiri's shareholding in DyStar due to the findings of oppression by Senda, the majority shareholder in DyStar, the fact that Senda would acquire full ownership of the enterprise through its shareholding and the fact that the enterprise's value would not be affected by the marketability of minority shares. There was no reason why a sale forced upon Kiri by Senda's conduct, not involving any contributory conduct by Kiri, should reflect anything less than the enterprise value of DyStar underpinning the value of Kiri's shareholding.[207]

The significance of the decision

The Court of Appeal's decision is a landmark decision as it is the first time that the Singapore courts have authoritatively decided the law on the applicability of DLOM in the making of a buyout order under Section 216(2) of the Companies Act. As the court recognised, there has been a lack of a clear path of principle on the existing state of the authorities.[208]

202 id. at [237].
203 id. at [242].
204 id. at [235].
205 id. at [235].
206 id. at [243].
207 id. at [245].
208 id. at [217].

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