IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2018] SGCA 83

Civil Appeal No 3 of 2018

Between

BOM

… *Appellant*

And

BOK

… *Respondent*

Civil Appeal No 5 of 2018

Between

BOL

… *Appellant*

And

BOK

… *Respondent*

In the matter of Suit No 1217 of 2015

Between

BOK

… Plaintiff

And

(1) BOL
(2) BOM

… Defendants

JUDGMENT

[Deeds and other instruments] — [Deeds] — [Misrepresentation]
[Equity] — [Mistake] — [Mistake of law]
[Equity] — [Unconscionable transactions]
[Equity] — [Undue influence] — [Actual]
[Equity] — [Undue influence] — [Presumed]

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v
BOK and another appeal

[2018] SGCA 83

Court of Appeal — Civil Appeals Nos 3 and 5 of 2018
Andrew Phang Boon Leong JA, Steven Chong JA, Belinda Ang Saw Ean J, Chan Seng Onn J and Quentin Loh J
10 September 2018

29 November 2018 Judgment reserved.

Andrew Phang Boon Leong JA (delivering the judgment of the court):

Introduction

1 A week after his mother's death, a wealthy 29-year-old man ("the Husband") falls into an argument with his wife ("the Wife") the evening after reading his late mother's will. Their clash ends with the Husband signing a declaration of trust ("the DOT") which effectively renders him a pauper and their infant son ("the Son") a millionaire. Soon after, the marriage collapses, and the Husband now seeks to set aside the trust. He claims that he executed the trust while grieving over his mother's death and while being misled by the Wife's representations that he could use his assets freely until his death. However, the Wife and the Son resist his attempt to reclaim beneficial entitlement to his assets, arguing that the DOT is a valid and untainted transaction, entered into by the Husband's free will.

2 Under what circumstances should a court set aside a deed of trust? That is the principal question that the above facts pose to us. In *BOK v BOL and another* [2017] SGHC 316 ("the Judgment"), the trial judge ("the Judge") found in favour of the Husband and set aside the DOT on the basis of misrepresentation, mistake, undue influence and unconscionability. Dissatisfied with the result, the Wife and the Son (collectively referred to as "the Appellants") have appealed against the entirety of the Judge's decision.

Background facts

3 The background to the dispute is set out comprehensively in the Judgment. It suffices for us to set out the facts that are material to these appeals.

4 The Husband works as a managing director in an energy company. At the age of 34, he is a man of substantial means due to his father's inheritance. He shared a close relationship with his late mother. The Wife, who is 38 years old, has been unemployed since 2012, prior to which she was a practising lawyer for a number of years. The Husband and the Wife began their romantic relationship in November 2011, and the Wife became pregnant with the Son soon after in April 2012. Notwithstanding the strong disapproval of the Husband's mother, the Husband and the Wife married in August 2012. The Son was born shortly after, in December 2012.

5 After the couple married, the Husband lived mostly with his mother in one of her properties, which we shall refer to as "the Holland Road Property". This was save for a short period from October to November 2012, during which time the Husband stayed with the Wife and her parents in their family home, which we shall refer to as "the Stevens Road Property". The period between December 2012 and January 2014 was a difficult one for the couple because of

the Husband's work and travels, but by January 2014, they had begun to discuss setting up their own home. They found an apartment that would be their family home, which we shall call "the Scotts Road Apartment".

6 Soon after, tragedy befell the Husband's mother in March 2014. She was killed at the Holland Road Property, and her funeral was held on 23 March 2014. Because the Holland Road Property had been cordoned off by the police, the Husband moved into the Stevens Road Property to live with the Wife and her family.

7 Three days after the funeral of the Husband's mother, on 26 March 2014, the Husband and his sister met with their mother's lawyers to read her will. Their mother had created a testamentary trust over her assets, which were valued at about $54m. Her assets comprised, among other things, the Holland Road Property and another landed property ("the Bukit Timah Property"). A lawyer ("the Solicitor") was appointed to assist in the administration of their mother's estate, while the Husband and his sister were appointed the executors of their mother's will and the trustees of her testamentary trust. The testamentary trust stipulated that they could sell the properties only after the 25th anniversary of their mother's death. Until then, they were each only permitted to withdraw a sum not exceeding $10,000 per month from the estate.

8 Thereafter, the Husband and his sister went to the Stevens Road Property to have lunch with the Wife and her mother. The siblings agreed not to reveal the contents of the will to the Wife. But the Wife knew that they had gone to read their mother's will, and thus asked about it. Upon being questioned, the Husband lied that his mother had willed all her property to charity, and they discussed the idea of converting the Bukit Timah Property into an art gallery in remembrance of her.

Execution of the DOT

9 After lunch, the Husband and his sister left the Stevens Road Property. That afternoon, the Wife drafted the DOT at issue in these appeals by hand. When the Husband returned in the evening, the Wife asked him into her bedroom to sign the DOT. In sum, the DOT provided that the Husband and Wife would hold *all* of the Husband's assets on trust for the Son. It read as follows:

TRUST DEED

DATE: 26 MARCH 2014

> By this Trust Deed, I, [the Husband], NRIC No. [xxx] of [xxx] hereby unconditionally and irrevocably declare that all assets, both personal and immoveable, owned by me, whether legally or beneficially, shall be held in trust by me and [the Wife], NRIC no. [xxx] of [xxx], as joint trustees for the sole benefit of [the Son], Birth Certificate number [xxx].
>
> It is also hereby declared that either I or [the Wife] shall be authorised to take any and all steps to protect and safeguard the beneficial interest of the Beneficiary [the Son], Birth Certificate number [xxx].

10 The parties dispute the precise events that took place in the Wife's bedroom that evening. In essence, the Husband claims, on the one hand, that the Wife's request for him to sign the DOT took him by surprise, and that she represented to him that the trust would only take effect upon his death. He further avers that she threatened to kick him out of the Stevens Road Property if he did not sign the DOT. On the other hand, the Wife claims that she drew up the DOT at the Husband's request, and that he signed the DOT of his own accord. This is a crucial point of contention which we will return to later. At this juncture, it suffices to note that it is undisputed that the Husband initially refused to sign the DOT, which led to an argument between the couple. It is also undisputed that the Husband eventually signed the DOT that evening, following which the Wife stored the DOT in her safe.

Execution of the Scotts Road Trust

11 Not long after the DOT was executed, the Husband informed the Wife in April 2014 that a second will by his mother had been discovered, and that he and his sister had inherited their mother's assets under this second will. It is undisputed that this was a lie. Subsequently, the Husband and his sister decided to exercise their right as beneficiaries under their mother's will to call in the assets under the will and apportion them between themselves.

12 On 9 May 2014, the Husband exercised the option to purchase the Scotts Road Apartment. In this connection, the Solicitor who assisted in the administration of the Husband's mother's estate also assisted the couple in their purchase of the Scotts Road Apartment. On the same day, the Husband executed a second trust deed ("the Scotts Road Trust"), in which he declared that he held the Scotts Road Apartment on trust for the Son. The Scotts Road Trust stated that the apartment was purchased "out of natural love and affection for the Son". It also provided that the Husband would be entitled to receive and use the rental income for his own benefit until the Son turned 21 years old.

13 In the same month, the Husband and the Wife went on a holiday to France as part of their attempt to reset their relationship. Around this time, the couple also started planning for a second child.

Events following the execution of the trusts

14 Approximately a month after the Scotts Road Trust was executed, the Wife sent an e-mail to the Solicitor on 14 June 2014 without copying the Husband. In this e-mail, the Wife enclosed a copy of the DOT and sought to bring it to the Solicitor's attention. She said:

> Before the property from the will vests in [the Husband] and his sister in name I thought you needed to know of [the DOT]. I dont [*sic*] know if [the Husband] told you about its existence but his sister is not involved in this. So he may not have mentioned in front of her. Pls do the necessary and give me a call if you need any further info.

15 Just three days later, on 17 June 2014, the Wife sent another e-mail to the Solicitor. Again, the Husband was not copied. This e-mail similarly enclosed a copy of the DOT and asked the Solicitor to take note of it when acting for the Husband's mother's estate:

> Please find attached the document [the Husband] signed previously. It is a private matter so I am not sure his sister knows about it in detail but I thought I should bring it to your attention. Something to note I guess re any property that will vest in [the Husband's] name? I am not sure of procedure. The document is in the bank so please let me know if you need a hard copy. It was done before I think even this will was found. Ok let me know if you need further information.

Deterioration of the parties' relationship

16 On 9 July 2014, the Husband and his sister entered into a deed of family arrangement, under which they agreed to exercise their rights as beneficiaries to terminate their mother's testamentary trust and to apportion their mother's assets between them. On 27 November 2014, the High Court allowed their application to do so.

17 About two weeks after the testamentary trust was terminated, the Wife re-sent her e-mail dated 14 June 2014 to the Solicitor. And on 17 December 2014, she sent yet another e-mail to him. In this latest e-mail, the Wife requested to be kept updated about the vesting of property and funds belonging to the Husband's mother's estate. She also asked if it would be necessary for them to have a meeting with the Husband, who was again not copied in the e-mail. The e-mail reads as follows:

> I am writing to you as trustee for [the Son] pursuant to the [DOT] you acknowledged receipt of below.
>
> By virtue of the [DOT], everything which passes to [the Husband] based on his mother's will is [the Son's] beneficial entitlement. As such kindly keep me informed as to when land titles, cash etc are ready to be passed as I need to ensure [the Son's] interest is safeguarded and property, funds etc are not dissipated. Last I checked they were still in process of dissolving the original trust.
>
> Please also let me know if you think we need to have a meeting with you: [the Husband] and I as trustees for [the Son] to facilitate any process etc.

18 The parties' relationship quickly fell apart thereafter. The next day, on 18 December 2014, the Solicitor replied to the Wife, copying the Husband and recommending that matters arising from the DOT be handled by his colleague. After receiving the Solicitor's e-mail, the Husband went to seek legal advice on the DOT. On 11 February 2015, the Husband resolved to leave the Stevens Road Property and wrote a letter to the Wife, explaining that he needed time to sort out his thoughts about the future of their relationship but intended to honour his obligations as a husband and a father. In the letter, reflecting on the breakdown of their relationship, he claimed that she had pressured him into signing the DOT, which he would not have done if he had been properly advised. He also claimed that the intervention of the Wife's father ("the Father") added to the pressure on him to sign it. The salient parts of the letter read as follows:

> This is not the time to go into all of the issues which have divided us and led to our frequent quarrels. *However I need to mention that one of the most disturbing episodes in our marriage is the way in which you pressured me into signing the "Trust Deed" without giving me any legal explanation of what the terms of the document meant, and which you have never provided me with a copy* [*sic*]. It was only when [the Solicitor] told me that you have sent him a copy of the [DOT] last December that I realized that you intended to treat this as a legal document.

> I have now taken legal advice and, *if I had been given proper advice on that document by you (as a qualified lawyer) or any other competent lawyer at the time of signing, I would certainly not have signed it. The intervention of [the Father] in persuading me to sign that document also added to the pressure on me to sign, and I now know that some of what he said was wrong.* Again, this is not the time to discuss this topic exhaustively, but you should know that this has greatly affected my views about your sincerity, candour and, ultimately, your concern for me.
>
> [emphasis added]

19 The next day, on 12 February 2015, the Husband went to the Stevens Road Property to deliver the letter to the Wife. This resulted in a heated confrontation involving the Husband, the Wife and her mother. Their argument was secretly recorded by the Husband ("the Recorded Conversation"), a transcript of which was admitted into evidence without objection at the trial. In gist, the Recorded Conversation revealed that the Husband and the Wife disagreed as to whether the Husband had been pressured into signing the DOT, and whether the Wife had asked the Husband to consult a lawyer before signing the DOT.

20 In April 2015, the Husband, through his solicitors, asked the Wife to deliver up the DOT for it to be destroyed. That request was refused. In November 2015, the Wife filed for divorce. Thereafter, on 30 November 2015, the Husband commenced the present proceedings to set aside the DOT on the grounds of misrepresentation, mistake, undue influence and unconscionability.

Decision below

21 The Judge held in the Husband's favour. She found that all four vitiating factors relied upon by the Husband were made out, and accordingly set aside the DOT. In arriving at her decision, she made a number of key factual findings.

22 First, the Judge found that there was no evidence that the Husband had ever told the Wife that he wanted to execute a trust (see the Judgment at [39]–[41]). He was thus taken by surprise when the Wife asked him to sign the DOT. Among other pieces of evidence, she considered an undated diary entry ("the Diary Entry") in which the Husband wrote that he wanted to "bring up good kids properly", "give them a future" and create a "$10bn fortune & put into a trust". However, she did not think that the Diary Entry supported the Wife's case because the evidence suggested that it was written around February 2015, which was nearly a year after the DOT had been signed. She was thus of the view that it revealed nothing about the Husband's state of mind at the material time.

23 Second, the Judge found that the death of the Husband's mother caused the Husband to experience acute grief, to a degree which rendered him susceptible to the Wife's influence (see the Judgment at [42]–[51]). The Judge considered the Husband's unchallenged evidence of his close relationship with his mother. Expert evidence in relation to the Husband's mental state was also adduced from both sides at the trial. The Judge found that a common thread underlying the experts' opinions was that the Husband could not be said to have acted erratically if he had intended to execute an instrument like the DOT all along. But since she had found that the Husband had had no such intention, she accepted that his decision to sign the DOT was out of character and was a signal that he was susceptible to influence. His vulnerability was exacerbated by his sense of isolation after his mother's death, a finding that was reinforced by the Wife's evidence that she and the Son were "the only family he had left".

24 Third, the Judge found that the Wife had misrepresented to the Husband that the DOT would only take effect upon his death, until which time he was

free to deal with his assets ("the Misrepresentation") (see the Judgment at [52]–[58]). It was undisputed that the Husband had initially refused to sign the DOT, and the Judge found the Wife's explanation as to why he had changed his mind implausible. According to the Wife, they had argued about how the plan to convert the Bukit Timah property into an art gallery would prevent the Husband from spending time with her and the Son. And after being left to himself for a moment, the Husband "saw the light" and resolved to spend more time with her and thus decided voluntarily to sign the DOT. The Judge rejected the Wife's account because it could not explain how the Husband's reservations about giving away all his assets were assuaged. Instead, the Judge accepted the Husband's explanation that he had signed the DOT after the Wife had made the Misrepresentation. The Judge also found that on 26 March 2014, the Wife suspected that the Husband had been bequeathed some assets under his mother's will. Further, the Judge was satisfied that the Wife knew that the plaintiff was in a particularly vulnerable mental state and intended to use that to her advantage. This was inferred from the circumstances under which the DOT was drawn up, especially the Wife's "inexplicable sense of urgency", as well as the Wife's conduct after 26 March 2014.

25 Fourth, the Judge found that the Father, a senior lawyer, was involved in the signing of the DOT. He helped persuade the Husband to sign the DOT by lending "a degree of legitimacy to [the Wife's] request" and by not contradicting the Misrepresentation (see the Judgment at [65]). In reaching her conclusion, the Judge observed that the Father was evasive during cross-examination, and had curiously refused to answer the simple question of whether the DOT was a "standard document" that he would sign (see the Judgment at [62]).

26 Fifth, as regards the Husband's understanding of the DOT at the time he signed it, the Judge found that he appreciated that the DOT covered all the assets he owned and that by signing the DOT, he would create "some sort of trust" over the assets. Importantly, she found that he eventually decided to sign the DOT because he was led by the Wife to believe that he would be able to deal freely with the assets which he held under that trust for his own benefit (see the Judgment at [68]). This was supported not only by the other factual findings the Judge had already made, but also by the Husband's conduct of his assets after signing the DOT (see the Judgment at [69]–[70]). The Judge also found that Husband had a limited understanding of how trusts operated, despite holding a Masters of Law ("LLM") from University College London (see the Judgment at [73]).

27 With these factual findings in mind, the Judge decided to set aside the DOT on the grounds of misrepresentation, mistake, undue influence and unconscionability:

(a) As regards misrepresentation, she found that the Wife made the Misrepresentation with the knowledge that it was false, and with the intention that the Husband would rely on it to sign the DOT (see the Judgment at [80]–[84]).

(b) As regards mistake, she found that the Husband was mistaken that the effect of the DOT was that he remained free to deal with his assets until the time of his death, and that this mistake struck at the heart of the DOT (see the Judgment at [85]–[88]).

(c) As far as undue influence was concerned, the Judge held that the DOT ought to be set aside on the basis of "Class 1" and "Class 2A" undue influence. In relation to "Class 1" undue influence, she found that

the Husband was susceptible to influence due to his relationship with the Wife and his grief over his mother's death, and that the Wife took advantage of this to influence him to sign the DOT (see the Judgment at [92]–[93]). In so far as "Class 2A" undue influence was concerned, the Judge accepted that a husband-wife relationship does not give rise to an irrebuttable presumption of a relationship of trust and confidence. However, she found that there was an implied retainer between the couple which created such a presumption, upon which the DOT was to be set aside for presumed undue influence (see the Judgment at [94]–[99]).

(d) Finally, the Judge also held that the DOT could be set aside based on the doctrine of unconscionability. After an extensive review of the common law, she set out a three-stage test to determine whether a transaction is unconscionable (see the Judgment at [120]–[122]). First, there must be weakness on one side, which could arise from, among other circumstances, acute grief. Second, there must be exploitation of that weakness, which could be evidenced by a transaction at an undervalue. Third, upon the satisfaction of these two elements, it will be for the defendant to demonstrate that the transaction was fair, just and reasonable. Applying this test, the Judge found that the DOT should be set aside on the ground of unconscionability (see the Judgment at [123]–[126]). The Husband was in a state of weakness caused by his acute grief, which created a window of opportunity for oppression which the Wife exploited in order to induce him into executing the DOT, which was not a fair, just and reasonable way of providing for his family.

Issues on appeal

28 The Appellants appealed against the entirety of the Judge's decision. Accordingly, the substantive issue that we have to determine is whether the DOT ought to be set aside on any one (or more) of the four vitiating factors identified above.

29 In addition to this, the Appellants raised two preliminary issues:

(a) The first preliminary issue related to the Appellants' applications to adduce fresh evidence, which they took out alongside their appeals. They claimed that the fresh evidence demonstrates that the Husband had a better understanding of trusts than what was found by the Judge. We dismissed their applications at the oral hearing on 10 September 2018.

(b) The second preliminary issue related to the Appellants' argument that the Husband is not entitled to rely on fraudulent misrepresentation as a cause of action because he did not plead it.

30 We will address the two preliminary issues before we examine the substantive overarching issue. We begin with our brief grounds for deciding to dismiss the Appellants' applications to adduce further evidence.

Preliminary issue on further evidence

31 As we alluded to above (see [29(a)] above), the Appellants sought to adduce further evidence with regard to the Husband's understanding and knowledge of trusts. The further evidence related to the Husband's affidavit of assets and means, which he filed as part of the couple's divorce proceedings in December 2016.

32 In his affidavit, the Husband stated that he had initially gifted a number of shares to his mother, but cancelled the gift because he did not want to pay the stamp duty on the proposed share transfer. He thus decided to hold those shares on trust for his mother until he could sell them. To that end, he declared a trust over those shares in favour of his mother on 18 February 2014, which was about five weeks before he signed the DOT.

Parties' arguments

33 On the back of this, the Wife argued that the Husband had more than just a layperson's understanding of trusts. She explained that this piece of evidence was not adduced at trial because her divorce lawyers were not acting for her in the present action. She also did not review the Husband's affidavit of assets and means at that time because her focus was on the present action. She further claimed that she lacked the ability and resources to attend to her divorce proceedings because she was attending to her children. She therefore reviewed the Husband's affidavit only after 31 January 2018, when he wrote to inform her that he was reducing the maintenance for her and the children.

34 The Husband contested the applications, noting that the couple exchanged their affidavits of assets and means seven months before the start of the trial of the present action. Further, the Wife's divorce lawyers tendered a joint schedule of issues and assets with the Wife's input some four months before the start of the trial of the present action. The joint schedule was prepared on the basis of the couple's affidavits of assets and means, and included reference to the shares held on trust by the Husband for his mother. Accordingly, the Husband asserted that it could not be said that the Wife had had no opportunity to review his affidavits of assets and means.

Our decision

35 We decided that the Appellants' applications were unmeritorious and dismissed them at the oral hearing. It is well-established that leave to adduce further evidence on appeal will only be given (a) if the further evidence could not have been obtained with reasonable diligence; (b) if it would probably have had an important influence on the result of the case; and (c) if it were apparently credible: *Lee Wei Ling and another v Attorney-General* [2017] 2 SLR 786 at [19], citing the seminal English decision of *Ladd v Marshall* [1954] 1 WLR 1489. Although it was not disputed that (c) is satisfied, neither (a) nor (b) was satisfied in the present case. The Husband's affidavit of assets and means could have easily been adduced if the Wife had been reasonably diligent given that it was made available about *seven* months before the commencement of the trial of the present matter. Even accepting that she was busy taking care of her children, it defies belief that she had had no opportunity at all to review the Husband's affidavit in the course of her divorce proceedings.

36 We also did not think that the further evidence would have had an important influence on the Judge's decision. Although the decision hinges in part on the Judge's finding that the Husband had a limited understanding of trusts, the further evidence, in our view, *did not* show otherwise. It merely showed that he decided to hold some shares on trust for his mother to avoid paying the stamp duty. It did not demonstrate that the Husband knew that he could not use his assets freely under the DOT, or that his knowledge of trusts exceeded that of a layperson. Moreover, the Judge's decision also hinged greatly on other findings, such as the findings that the Husband trusted the Wife on matters involving the law, that the Father had helped to persuade the Husband into signing the DOT, and that the Husband was suffering from acute grief, which put him in a position of vulnerability (see [22]–[27] above).

37 For the above reasons, we dismissed the Appellants' applications to adduce further evidence at the hearing before us.

Preliminary issue on pleadings

38 The second preliminary issue concerns the question of pleadings. In this regard, the Appellants contend that the Judge erred in making a finding of fraudulent misrepresentation because fraud had not been specifically pleaded by the Husband. They also aver that the Husband's counsel, Mr Michael Hwang SC ("Mr Hwang"), confirmed in his opening statement at trial that his case was not premised on fraud. The Husband submits otherwise, contending that his pleadings made it sufficiently clear that his case was one of fraud. He also makes the point that even if he were not allowed to premise his case on fraud, the Judge's grant of the remedy of rescission would still stand on the basis of innocent misrepresentation.

Law on pleadings

39 It is a trite principle that allegations of fraud must be pleaded with sufficient particularity. This principle finds statutory expression in O 18 r 12(1) of the Rules of Court (Cap 332, R 5, 2014 Rev Ed). It is a principle of natural justice that the court painstakingly upholds so as to ensure that the defendant knows the case it has to meet: see *Singapore Civil Procedure* vol I (Foo Chee Hock JC, gen ed) (Sweet & Maxwell, 2018) at para 18/12/2. Accordingly, where a plaintiff succeeds on findings of fact that were not pleaded, the Court of Appeal will not allow the judgment to stand: see *Sheagar s/o T M Veloo v Belfield International (Hong Kong) Ltd* [2014] 3 SLR 524 ("*Sheagar*") at [95].

40 But one must also be careful *not* to descend blindly into technicalities when assessing the adequacy of pleadings, and to always bear in mind that their

ultimate purpose is to define the scope of the issues arising for the court's determination and to ensure that the parties are not taken by surprise and deprived of the opportunity to adduce the relevant evidence: see, *eg*, *Sheagar* at [94] and *Fu Loong Lithographer Pte Ltd and others v Mok Wing Chong (Tan Keng Lin and others, third parties)* [2018] 4 SLR 645 at [61]. It is for this reason that we observed in *OMG Holdings Pte Ltd v Pos Ad Sdn Bhd* [2012] 4 SLR 231 that "evidence given at trial can, where appropriate, overcome defects in the pleadings provided that the other party is *not taken by surprise or irreparably prejudiced*" [emphasis added] (at [18]).

Our decision

41 We disagree with the Appellants that the Judge was not entitled to make a finding of fraud because we do not think it can be said that they were taken by surprise at the trial. The Appellants' case is essentially that the Husband does not identify in his pleadings the type of misrepresentation (specifically, whether it is innocent or fraudulent misrepresentation) being alleged. However, while it is true that the Husband's pleadings do not *literally* contain the word "fraud", it equally cannot be said that the Appellants were thereby prejudiced or were unaware of the case they had to meet.

42 To begin with, in his Statement of Claim ("the SOC"), the Husband averred that the DOT ought to be set aside because he was induced by a misrepresentation to sign the DOT. He went on to particularise the facts underlying his claim, claiming that the Wife told him that he would be free to deal with his assets until his death, thereby inducing him to sign the DOT (*ie*, "the Misrepresentation" as defined at [24] above):

> The [Husband's] refusal to sign the [DOT] led to arguments. The [Wife] began to get more and more agitated over the [Husband's] refusal to sign the [DOT] and the [Wife] started to raise her

> voice. During the course of their argument, the [Wife] represented to the [Husband] that the DOT was just a "safeguard", that it was not meant to take effect until the [Husband's] death, and that the [Husband] was "free to deal with all [his] assets as [he deemed] fit" (or similar words to that effect) until them. The [Wife] said that the [DOT] was just going to be left with her for "safekeeping in case anything [happened] to [the Husband]". ***Accordingly, the [Wife] led the [Husband] to believe that, if he signed the [DOT], in the event of his death, all his assets would be left to [the Son] and until then, the [Husband] was free to deal with his money and assets as he deemed fit.*** [emphasis in original omitted; emphasis added in bold italics]

43 The Wife, in her Defence and Counterclaim, acknowledges the above passage from the Husband's SOC and denies making the Misrepresentation. In the alternative, she pleads that even if she had made it, the Husband did not rely on it in signing the DOT:

> The [Wife] also denies making any representation to the [Husband] in relation to the [DOT]. Even if (which is denied) any representation was made, the [Wife] denies that the [Husband] was induced by or otherwise relied on such representation …

The foregoing makes clear that the Appellants *knew exactly* the case that they had to meet, and their primary defence was that the Wife *did not* make the Misrepresentation. We note that the Husband did not specifically and literally characterise the Misrepresentation as being "fraudulent". But it is our view that the facts pleaded by the Husband clearly contemplate the possibility of fraud. More importantly, it cannot be said that the Wife did not have the opportunity to adduce evidence to deny the Husband's allegation of fraud. She was cross-examined at trial as to her knowledge of trusts on the night that the DOT was signed, and she testified to *knowing* that a trust takes effect *immediately* upon execution. In other words, the Wife knew that the DOT took effect once the Husband signed it and he was thereby not free to use those assets as he deemed fit in his lifetime. It follows from this that if she had in fact made the

Misrepresentation, it *must* have been fraudulent in nature because she did not believe in its truth.

44 This brings us finally to Mr Hwang's opening statement which, the Appellants allege, contains a confirmation that the Husband's case was not one of fraud. Having reviewed the opening statement, we disagree. In our judgment, Mr Hwang's fundamental point was that, as a matter of law, the DOT could be set aside if the Husband had been led by a misrepresentation into signing it, regardless of whether such misrepresentation was fraudulent in nature. His further point was that the Husband's pleadings patently invite the inference of fraud, notwithstanding that they did not expressly mention "fraud". Therefore, contrary to the Appellants' contention, Mr Hwang did not confirm to the Judge that the Husband was not alleging that the Wife had made the Misrepresentation fraudulently.

45 For the reasons set out above, we do not think that the Husband's pleadings were deficient or that the Appellants can be said to have been taken by surprise at trial. Indeed, at the hearing before us, the Appellants were hard pressed to identify the prejudice that they had suffered by reason of the Husband's failure to expressly use the word "fraud". We thus disagree that the Judge's findings of fraud should be overturned on the basis that fraud was not properly pleaded.

Substantive appeal on setting aside the DOT

46 We turn now to the substantive issue, namely whether the DOT ought to be set aside on the basis of misrepresentation, mistake, undue influence or unconscionability. As will be seen, the Appellants do not strenuously contest the Judge's analysis and application of the relevant principles of law. Instead,

their case principally targets the Judge's findings of fact with regard to the Husband's desire to execute the DOT, his understanding of trusts, and the precise events on the night that the DOT was signed.

Threshold for appellate intervention

47 It is apposite to note at this juncture the well-established principle that "an appellate court should be slow to overturn a trial judge's findings of fact, *especially* where they hinged on the trial judge's assessment of the *credibility and veracity of witnesses*, unless they can be shown to be *plainly wrong or against the weight of the evidence*" [emphasis added]: *Ng Chee Chuan v Ng Ai Tee (administratrix of the estate of Yap Yoon Moi, deceased)* [2009] 2 SLR(R) 918 ("*Ng Chee Chuan*") at [12]. We stress that the credibility of witnesses is not always the appropriate touchstone for truth, and the court should always endeavour to rely on objective facts to determine where the balance of probabilities lie. However, it equally cannot be gainsaid that the aforementioned principle applies most strongly where there is an absence of contemporaneous documents and undisputed objective facts (see, in contrast, *Ng Chee Chuan* at [16]–[17]).

48 We highlight the above because there is little contemporaneous objective evidence surrounding the signing of the DOT. The Judge's findings of fact thus hinge in significant part on her assessment of the witnesses' credibility and demeanour. For example, she observed that under cross-examination, the Wife was evasive when asked why she did not confirm with the Husband that he wanted to execute a trust in favour of the Son (see the Judgment at [57(a)]). Similarly, she noted that the Father was "unnecessarily defensive and evasive" when cross-examined on whether the DOT was a "standard document" (see the Judgment at [62]). In stark contrast, she found

that the Husband was "forthright and honest" on the stand (see the Judgment at [77]). This is not to suggest that the Judge's decision is thereby unimpeachable, for it remains vital that her assessment of the witnesses' credibility and her findings of fact cohere with the objective evidence. But we note this particular point at the outset to underscore the difficulty facing the Appellants in urging us to disturb the factual findings made below.

49 We now proceed to examine whether the Judge was correct to have set aside the DOT on the basis of misrepresentation, mistake, undue influence and unconscionability.

Misrepresentation and mistake

50 We begin our analysis with the issues of misrepresentation and mistake. It will be recalled that the Judge set aside the DOT on the basis that the Husband had been mistaken as to the legal effect of the document, and had operated under the impression that the trust would only take effect upon his death. In this connection, the Judge found that the mistake had been engendered by the Misrepresentation made by the Wife which led him to sign the DOT.

Parties' arguments

51 The Appellants submit that the Judge erred in finding that misrepresentation and mistake were made out. To begin with, they contend that the Husband was much more familiar with trusts than what was found by the Judge. They rely on three main pieces of evidence in support of this contention. First, they highlight an e-mail that the Husband sent to the Solicitor on 27 March 2014 ("the 27 March E-mail"), one day after the DOT was signed. According to the Appellants, the 27 March E-mail shows that the Husband knew about the DOT's legal effect because he allegedly acknowledged therein that the

properties in his name were being held for the Son. Second, they claim that the Judge placed insufficient weight on the fact that the Husband has a LLM, during which he studied a course on trusts and equity. Third, they point out that the Diary Entry recorded the Husband's intention to create a trust for the Son, and contend that this, along with his execution of the Scotts Road Trust, demonstrated his desire to execute the DOT.

52 In addition, the Appellants claim that the Judge erred in finding that the Wife's account of events was "incredible". In this regard, they submit that there was no evidence that the Wife had made the Misrepresentation or that the Father had any role to play in the signing of the DOT. They also argue that the Father should not have been faulted for not having given a direct response under cross-examination as to whether the DOT is a "standard document" because the term is ambiguous and not a legal term of art. They further highlight that the Father explained at trial that he could not answer that question because he was a factual witness and not an expert witness.

53 Unsurprisingly, the Husband seeks to defend the Judge's decision. First, he maintains that he had a limited knowledge of trusts and did not intend to create a trust over all his assets. He avers that the 27 March E-mail was drafted by the Wife, and that he merely forwarded it to the Solicitor. In so far as the Diary Entry was concerned, he emphasises that it was written about a year after the DOT was signed, and is hence of little probative value in assessing his state of mind at the material time. Similarly, in relation to the Scotts Road Trust, the Husband highlights that it was executed in different circumstances two months after the DOT was signed, was drafted by the appointed solicitors, and contained a proviso that allowed him to collect rent on the property for his own benefit until the Son turned 21 years old.

54 In relation to the Misrepresentation, the Husband maintains that the Wife told him that the DOT would only take effect upon his death. To that end, he highlights the Recorded Conversation, during which the Wife was heard to say: "If anything happens to you, it [*ie*, the assets covered by the DOT] automatically bypasses me and it is already in [the Son's] name". In this regard, he also contests the Wife's contention that their argument leading up to the signing of the DOT was about the proposed art gallery. He relies on the Recorded Conversation as evidence that the Wife had told him to "get lost" if he did not sign the DOT on 26 March 2014.

Our decision

55 In our judgment, there are no grounds to disturb the Judge's decision to set aside the DOT on the basis of misrepresentation and mistake. As we explain below, we agree with the Judge that the Husband had no desire to divest himself of all his assets and that he was induced by the Misrepresentation made by the Wife into signing the DOT.

(1) Husband's desire to execute a trust

56 We begin with the question of whether the Husband had wanted all along to execute a trust that divested him of all his assets immediately. To be clear, the question of whether a settlor intended to execute a trust is to be objectively ascertained from the language of the document, except perhaps in circumstances where a sham trust is alleged: *Chng Bee Kheng and another (executrixes and trustees of the estate of Fock Poh Kum, deceased) v Chng Eng Chye* [2013] 2 SLR 715 at [52]. The issue here, however, is not whether the DOT evidences an objective intention on the Husband's part to divest all of his assets; it clearly does. Instead, the heart of the issue is whether the Husband *misapprehended* the legal effect of the DOT, and relevant to this issue is the

question of whether he had desired to execute such a trust. Certainly, if the Appellants are correct that the Husband knew what he was setting up by signing the DOT, his case that he was misled by the Wife would effectively crumble.

57 To briefly recapitulate, the Judge found that there was no evidence, aside from the Wife's bare allegation, supporting the Appellants' claim that the Husband had asked the Wife to draw up a trust deed (see the Judgment at [40(b)]). However, the Appellants contend that the Diary Entry shows that the Husband was familiar with trusts and wanted to create a trust like the DOT. In the Diary Entry, the Husband wrote that he wished to give his children a future and to create a trust comprising a $10bn fortune. The material part of the Diary Entry states as follows:

> What do I want out of life?
>
> - To bring up good kids properly. To give them a future.
> - Create a $10bn fortune & put into a trust.
> - Live well. To be at peace with myself & with the world.

58 We do not think that the Diary Entry takes the Appellants' case very far. The relevant question is whether the Husband had the intention to execute a trust deed that vests all his assets in the Son *at the time that he signed the DOT*. Crucially, however, the Diary Entry is undated, which means that it sheds no light on the Husband's state of mind *at the material time*.

59 Moreover, the available evidence suggests that the Diary Entry was made a substantial time *after* the DOT had been executed. A voucher on the opposing page of the diary suggests that the Diary Entry was made on or around 12 February 2015, which would mean almost a year had passed since the Husband signed the DOT. More pertinently, 12 February 2015 was also after

the Husband had sought legal advice from his lawyers upon learning in December 2014 that the Wife had e-mailed the DOT to the Solicitor. Accordingly, even if the mere mention of a "trust" in the Diary Entry can be taken to be evidence that he knows the effect of a trust, it can only be said that he had such knowledge *after* having received legal advice on the DOT.

60 The Appellants also contend that the Scotts Road Trust evinces an intention on the Husband's part to create a trust for the Son. We disagree. Most fundamentally, the Scotts Road Trust was created on 9 May 2014, which was about two months *after* the DOT was executed. It is hence also of little probative value in ascertaining whether the Husband intended to create a trust at the time that he signed the DOT.

61 In addition, we are of the view that the Scotts Road Trust in fact *militates* against any suggestion that the Husband had intended to divest all his assets to the Son. Having effectively divested all his assets upon the signing of the DOT on 26 March 2014, it is difficult to imagine that he would have had the necessary means to fund the purchase of the Scotts Road Apartment (which was purchased at the price of $4.35m) just a few weeks later. When we put this observation to the Appellants at the hearing before us, the Appellants suggested that he was using the Son's money to purchase the Scotts Road Apartment. But if that had indeed been the case, there would have been no need for the Husband to execute the Scotts Road Trust to vest the apartment beneficially in the Son's name because the Son would already be its beneficial owner. In our judgment, it is more likely that the Husband continued treating the Son's assets as his own to use freely. This conclusion is consistent with the Judge's finding that "after he had signed the DOT, he continued to spend his monies for his own benefit" (see the Judgment at [70]). This is a finding that is not contradicted by the

Appellants. We therefore accept that the Husband had not intended to divest himself of his assets immediately and was ignorant as to the true legal effect of the DOT.

62 On a final note, the Appellants suggested at the hearing before us that the Husband desired to execute the DOT as part of the couple's plan to reset their relationship. We do not find this explanation convincing. It is exceedingly unlikely that the Husband would see it fit to divest himself of *all* his assets to his Son in order to repair his relationship with the Wife. Therefore, not only does this suggestion defy common sense, it also does not explain the sense of urgency with which the DOT was drafted and signed.

63 For the above reasons, we find that the Husband had no intention to execute a trust that stripped him immediately of all his assets. Accordingly, we agree with the Judge that he was taken by surprise when the Wife presented him with the DOT for his signature.

(2) The Husband's familiarity with trusts

64 We now proceed to examine the Husband's alleged familiarity with trusts. The Appellants' argument in this respect is simple: that the Judge erred in treating the Husband as a person who lacked an understanding of how trusts operated. In this regard, the Appellants point principally to the Husband's LLM and the 27 March E-mail, which the Husband sent to the Solicitor.

65 To begin with, we disagree that the Husband's LLM changes the final analysis. The main difficulty with the Appellants' argument on this point is that they do not highlight any evidence showing how the Judge erred in her assessment. To recapitulate, the Judge concluded that the LLM did not show

that the Husband knew how the trust established by the DOT operated because the LLM was earned "through distance learning some six to eight years ago, when [the Husband] was performing National Service" and because there was "no evidence that he passed the module on corporate equity and trusts" (see the Judgment at [73]). The Appellants do not show us any evidence demonstrating that the Judge was wrong. On the contrary, the evidence suggests that the Husband's understanding of trusts was limited. At trial, he testified that each module in his LLM course had a "very basic syllabus" and that he needed to pass only 12 out of 16 modules to obtain the LLM. We thus find that the Husband had, at best, a very rudimentary understanding of trusts when he signed the DOT. This conclusion is fortified by our observation above that the Husband continued using assets covered by the DOT as his own although they belonged to the Son under the DOT (see [61] above). This conduct suggests that he was ignorant of the fact that the DOT was effective immediately upon execution.

66 Equally weak is the Appellants' argument in relation to the 27 March E-mail, which concerns the Scotts Road Apartment. In this e-mail, the Husband wrote to the Solicitor asking whether his purchase of the Scotts Road Property would be affected by Additional Buyer's Stamp Duty ("ABSD"). In it, he also acknowledges that the properties in his name were for the Son. The e-mail reads as follows:

> I wanted to check with you. .. I'm planning to buy another property for [the Son] and I would like it to be in his name. He is 1 year old. Can I have a trust document for him and can this be lodged with the land authority? whose name will it be in? If I am going to be trustee then will the property be hit by the increased stamp duty since *as you know I will already be having the mbr apartment in my name even though it is for my son*? [emphasis added]

67 Contrary to the Appellants' contention, we do not read the e-mail as establishing that the Husband knew that the DOT took effect immediately. All

it contains is an acknowledgment that he is holding his properties on trust for the Son. It does not contradict the Judge's finding that the Husband was under the impression that the DOT would only take effect upon his death. In our view, simply because the Husband knew that he was a trustee *does not necessarily* mean that he knew of the DOT's legal *effect*.

68 Moreover, the Husband's evidence at trial is that the 27 March E-mail was drafted by the Wife, and that he had simply forwarded it to the Solicitor because "nothing looked out of the ordinary". Indeed, the Husband has also consistently maintained that the focus of the 27 March E-mail was to determine how he could circumvent paying the ABSD on the Scotts Road Apartment. It is thus unsurprising that his attention was not drawn to the last sentence of the 27 March E-mail which could otherwise be construed as an admission that he was holding his properties on trust for the Son. The Appellants have not highlighted any evidence contradicting the Husband's testimony in these respects. Their failure to do so undermines the Appellants' contention that the 27 March E-mail is evidence that the Husband knew how the DOT operated.

69 For the reasons set out above, we decline to interfere with the Judge's findings on the extent of the Husband's familiarity with trusts.

(3) Whether the Misrepresentation was made

70 Having determined that the Husband had no intention to execute a trust that immediately vests all his assets in the Son, we now turn to examine whether the Wife misrepresented to the Husband that the DOT was simply a "safeguard" and would not take effect until his death. In this regard, the Appellants essentially contend that the Judge erred in making the following findings: (i) that the Wife's account of how the Husband had signed the DOT was

inherently incredible; (ii) that the Wife had suspected that the Husband had been left something under his mother's will; and (iii) that the Father was involved in the signing of the DOT. In our judgment, the Appellants fail on all counts to show that the Judge fell into error.

71 We start with the Wife's account. In our judgment, we share the Judge's view that it was inherently incredible. Not only was the Wife's evidence riddled with inconsistencies, it also defied common sense and did not cohere with the limited objective evidence surrounding the signing of the DOT. The Judge was therefore correct to prefer the Husband's account that he had signed the DOT because the Wife had made the Misrepresentation and asked him to leave the Stevens Road Property if he did not want to sign the DOT.

72 At the outset, it is important to set out in detail *the Appellants' version* of the events on the night that the DOT was signed. According to the Wife, the Husband had told the Wife that he wanted to give everything to the Son because he did not want his relatives to stake a claim over his and his late mother's assets. The Wife thus drafted the DOT. She was confused when the Husband refused to sign it because she thought that the DOT was in accordance with what they had discussed and was in plain and simple English. She then asked the Husband if he had some other arrangement in mind, and suggested that he could go see a lawyer to obtain advice.

73 The Husband asked her why she seemed unhappy. The Wife explained that she was confused at his refusal to sign the DOT. She also expressed her unhappiness about the proposal to convert the Bukit Timah Property into an art gallery because she wanted him to spend more time with her and the Son. She also told the Husband that if he did not wish to spend time with them, he could leave the Stevens Road Property. The Wife then left her bedroom and informed

her parents that they were arguing over the proposed art gallery, but did not tell them about the DOT. When she returned to her bedroom thereafter, the Husband agreed not to take charge of the proposed art gallery and to spend more time with her and the Son. He then decided on his own accord to sign the DOT and handed it to the Wife for her safekeeping.

74 In our view, the primary difficulty with the Wife's version of events is that it is contradicted by the argument that took place on 12 February 2015 (which was captured in the Recorded Conversation). Most fundamentally, the Recorded Conversation does *not* indicate at all that the couple had argued about the proposed art gallery. On the contrary, it indicates that the Wife had threatened to chase the Husband out of the Stevens Road Property if he did not sign the DOT immediately, which in turn suggests that their argument was about the Husband's initial refusal to sign the DOT. This is evident from the following portion of the Recorded Conversation:

[Husband]:	You specifically told me-
[Wife]:	I asked you-
[Husband]:	-if I didn't sign it, to get out of the house.
[Wife]:	*Ya. So? So what?*
[Husband]:	You could've asked me to seek legal opinion.
…	
[Wife]:	I said it was up to you. I told you if you want to go and get a lawyer, you can go and get law-
…	
[Husband]:	No, you never said so.
[Wife]:	I did, I did.
[Husband]:	No. Ok, then it contradicts why you said that if I didn't sign it immediately then I should get out of- get lost. You didn't want anything to do with me.

> [Wife]: *Ya. I **wanted** you to sign it. I didn't want to have anything more to do with you because you were acting up.*
>
> [emphasis added in italics and bold italics]

75 The above exchange clearly shows that the Wife had wanted the Husband to sign the DOT under threat of chasing him out of the Stevens Road Property because she did not want to have anything more to do with the Husband who was "acting up". Nothing indicates that the argument was about the proposed art gallery. This undermines the Appellants' essential case that the Husband had a change of heart over the DOT because he decided to spend more time with the Wife and the Son after the couple's argument over the proposed art gallery.

76 The evidence in the court below also militates against the Appellants' case that the Husband had told the Wife that he wanted to give everything to the Son. As the Judge noted (see the Judgment at [57(a)]), the Wife was evasive on the stand when she was asked why she did not clarify with the Husband that what he had in mind was a trust. The Wife skirted the question and said that it was up to the Husband to decide if he wanted to sign the DOT. This was her response to the relevant line of questioning:

> Well, I drafted the document for him, and if he was not happy with it, we could have, I don't know, gone to the lawyer, which is what I suggested. So it's not that – that's the thing, I never forced him to sign it. If you're asking me why I didn't clarify with him, I wrote the document and asked him what was wrong with it when he didn't want to sign it, because that was my understanding of what he wanted.

77 But the Wife's answer – or the lack thereof – is incongruous and inconsistent with the rest of the evidence, especially when one takes into account the care with which she facilitated the signing of the Scotts Road Trust. It will be recalled that for the Scotts Road Trust, which has far less serious

consequences than the DOT, the Wife ensured that the Husband had received legal advice by helping to draft the 26 March E-mail to the Solicitor asking about ABSD (see [68] above). One would have expected the Wife to put more care into drafting the DOT if the Husband had genuinely intimated a desire to execute such a drastic instrument that entailed giving away *all* of his assets immediately.

78 Certainly, given the drastic consequences of the DOT, we also agree with the Judge that the Wife's sense of urgency in drafting it and having it signed is inexplicable. The Wife stated at trial that there was no pressing reason why the DOT had to be prepared and signed that evening. Yet, in the same breath, she testified that she had drafted the DOT within *an hour* and that she had drafted it without relying on any precedents. If the Husband had indeed intimated a desire to gift *all* his assets away to the Son, it must surely have occurred to the Wife – who was legally trained – that proper legal advice should be rendered to ensure that the Husband knew what he was executing.

79 In this connection, the Wife was also asked at the trial why she did not consider using a will instead of a trust. To this question, the Wife contended that a will would not have been appropriate because his relatives may conjure a "fake will". We find this explanation unlikely because, if one were to take that line of reasoning to its logical conclusion, it is equally possible for his relatives to conjure a fake trust deed. The Wife went on to explain that a will would be useless to provide for the Son because it is only effective upon the Husband's death, and would not assist in situations where, for example, the Husband is kidnapped. We quote the relevant portion of the transcript here:

> Q But wouldn't a will also adequately protect [the Son's] interests in the event something happened to [the Husband]?

> A No.
>
> Q Why not?
>
> A Because anything could happen to [the Husband]. We were just looking at an example of if [the Husband] dies. But if [the Husband] is kidnapped, for example, a will would not help.
>
> Q Oh, so you are looking at a situation whereby when something happens to [the Husband], it doesn't necessarily mean he meets an untimely death, but you have envisaged a situation where he was kidnapped?
>
> A: Yes, because my friend – my friend's dad, who is Indonesian, was actually kidnapped and beaten up and he went missing for weeks. So he was going to Indonesia, I didn't know what could happen.

80 The above explanation as to why a will would have been insufficient strikes us as incredible. It defies belief that the Husband – whom the Appellants describe as "well-educated" and "sophisticated" – would be so single-minded in his desire to provide for the Son *at all costs* that he even considered the *faint* possibility of being *kidnapped*. More importantly, the Wife's explanation at trial as to why she thought a will was not suitable is at odds with her explanation in the Recorded Conversation, wherein she said that she did not consider a will appropriate because the Husband was "not in any state to write a will". Nothing was said about a will being ineffective to provide for the Son because the Husband could be kidnapped or because his relatives could fabricate a will. The salient portion of the Recorded Conversation proceeds as follows:

> [Husband]: I can have easily written a will. Why didn't you ask me-
>
> [Wife]: So why didn't you?
>
> [Husband]: -to write a will?
>
> [Wife]: *You were not in any state to write a will. You were just angry*. You didn't even know what you had. So we go together-
>
> [emphasis added]

81 Accordingly, it is our view that the Judge was correct to find that the Wife's account was incredible. And in the light of our findings above that the Husband had no desire to execute a trust that gives the Son all his assets immediately (see [56]–[63] above), and that he had a limited understanding of trusts (see [64]–[69] above), it is also our view that the Judge was correct to find on the balance of probabilities that the Wife had made the Misrepresentation to induce the Husband into signing the DOT.

82 This brings us to the questions of whether the Wife had suspected that the Husband had received something under his mother's will, and whether the Father had any role to play in the signing of the DOT. We note that the above analysis in relation to the Wife's account of events is sufficient to establish that the Wife made the Misrepresentation to the Husband. These questions are thus, strictly speaking, peripheral. Nevertheless, for completeness, we deal with them in turn.

83 In so far as the Judge's finding that the Wife had suspected that the Husband was bequeathed some of his mother's assets is concerned, the Appellants submit that the Judge erred because the Wife had no knowledge of the will's contents. We disagree. In our view, the Judge's decision was justified given the inexplicable urgency with which the handwritten DOT was prepared along with the pressure that the Wife placed on the Husband to sign it. Moreover, the inconsistencies in the Wife's case and evidence do no favours for the Appellants' case. In her pleadings, the Wife claimed that she "only became aware of the Will and its contents … sometime *after* 26 March 2014" [emphasis added]. However, at trial, she conceded that she had learnt about the will sometime while she was lunching with the Husband and his sister on 26 March 2014, *prior* to the signing of the DOT. We therefore do not see any reason to

interfere with the Judge's finding that the Wife suspected that the Husband had been given some of his mother's assets.

84 As for whether the Judge erred in finding that the Father had helped to convince the Husband to sign the DOT by assuring him that the DOT was "just a safekeeping", the Appellants point out that the Father denied playing any role. They also argue that the Father should not be faulted for refusing under cross-examination to answer whether the DOT was a "standard document". In our judgment, we do not think that the Judge erred in this regard because the evidence tilts the balance of probabilities in favour of a finding that the Father had some role in convincing the Husband to sign the DOT.

85 First, the Recorded Conversation demonstrates that when the Husband confronted the Wife, he claimed that she had asked the Father to force him to sign it. Instead of denying that the Father was involved, the Wife laughed off the accusation and maintained that nobody had forced him to sign the DOT:

[Wife]:	… [Y]ou have already signed it. I didn't force you. How am I to force you?
[Husband]:	You even got [the Father] to read through it and to force me to sign it.
[Wife]:	No one forced you. (chuckles) I don't know why you keep saying some one force you. How can any of us force you?

The Appellants submit that the Judge ought not to have expected the Wife, who was then pregnant with the couple's second child, to respond precisely to the Husband's questioning. While it is true that it is unrealistic to expect the Wife to respond to every accusation levelled at her during a heated argument, it is telling that she had the clarity of mind to refute the Husband's allegation that he was forced to sign the DOT but not his claim that the Father was involved in the signing of the DOT.

86 Second, we agree with the Judge that the Father was unduly evasive on the stand, refusing to answer simple questions such as whether the DOT was a "standard document" that a person in the Husband's shoes would sign. We accept that the Father was not an expert witness, but it defies belief that a senior lawyer would have difficulty providing an answer to such a simple question. We note in this connection that the Father's testimony at trial was extremely evasive, avoiding even the simple question of whether the Husband was respectful to him. By way of illustration:

> Q: Can the same be said of [the Husband], that he respected you as a father-in-law at all material times?
>
> A: I don't know. You have to ask him.
>
> Q: You should know.
>
> A: I should not. How would I know what he's thinking?
>
> Q: Was he respectful towards you?
>
> A: I don't know what you mean by "respectful". Whether he respected me or not, it is for him to answer.

In the light of his evasive behaviour on the stand, the Father cannot be said to be a credible witness. It is thus unsurprising to us that the Judge ultimately preferred the Husband's account that the Father was present at the signing of the DOT and that he helped convince the Husband to sign the DOT.

87 Third, the Father testified at trial that he and his wife were completely nonchalant when their daughter told them that the Husband was leaving the Stevens Road Property on the night that the DOT was signed. As the Judge noted (see the Judgment at [63]), it is unbelievable that the Father would have been completely indifferent. He claimed that this was because he did not interfere with his daughter's life and there was thus no reason for him to have been worked up. However, the Recorded Conversation suggests otherwise. It shows that the Father, who was not physically present, wanted to intervene in

the couple's argument on 12 February 2015 by speaking to the Husband over the phone. It is thus clear that the Father did not maintain as much distance from his daughter as he sought to portray on the witness stand. It hence defies belief that he would have remained indifferent on the night the DOT was signed when his daughter told him that she was arguing with the Husband and the Husband was leaving the Stevens Road Property that very night. Not only does this observation undermine the Father's credibility, it also lends support to the Judge's finding that he had intervened and was involved in the signing of the DOT (see the Judgment at [65]).

88 For the foregoing reasons, the Appellants' argument that the Judge erred in finding that the Misrepresentation was made fails.

(4) Whether misrepresentation and mistake are made out

89 The law on fraudulent misrepresentation is well-established and not disputed by the parties. It was recently set out by this Court in *Broadley Construction Pte Ltd v Alacran Design Pte Ltd* [2018] 2 SLR 110 as follows (at [26]):

> The elements of fraudulent misrepresentation are: (a) there must be a representation of fact by words or conduct; (b) the representation must be made with the intention that it should be acted on by the plaintiff; (c) the plaintiff had acted upon the false statement; (d) the plaintiff suffered damage by so doing; and (e) the representation must be made with the knowledge that it is false; it must be wilfully false, or at least made in the absence of any genuine belief that it is true: see *Panatron Pte Ltd v Lee Cheow Lee* [2001] 2 SLR(R) 435 at [14].

90 The parties likewise do not contest the law on mistake *vis-à-vis* voluntary dispositions. As the Singapore High Court held in *BMM v BMN and another matter* [2017] 4 SLR 1315 at [95] (endorsing the UK Supreme Court decision of *Pitt and another v Holt and another* [2013] 2 AC 108 ("*Pitt*"), the

court's equitable jurisdiction to set aside voluntary dispositions on the ground of mistake is exercisable when there was a causative mistake, as to either the legal character of the transaction or a matter of fact or law that was basic to the transaction, and that was of such gravity that it would be unconscionable to refuse relief. The relevant principles are set out in the judgment of Lord Walker of Gestingthorpe in *Pitt* (see also the English High Court decision of *Brian George Kennedy & Ors v Patrick Brian Kennedy & Ors* [2014] EWHC 4129 (Ch) at [36]), and can be summarised as follows:

(a) A causative mistake is to be distinguished from mere ignorance, inadvertence, and misprediction of a future event. That notwithstanding, forgetfulness, inadvertence or ignorance may *lead* to a false belief or assumption that constitutes a mistake upon which a voluntary disposition could be set aside. The mistake can also arise from carelessness, unless it is shown that the person making the voluntary disposition deliberately ran the risk of being wrong, or the facts are such that he must be taken to have run the risk of being wrong. Additionally, there is no requirement that the beneficiary of the disposition must have been aware of the mistake (*Pitt v Holt* at [104]–[105] and [114]).

(b) The mistake must be sufficiently grave such that it would be unjust, unfair or unconscionable for the court to refuse relief. To that end, the court must closely examine the facts, determine the circumstances of the mistake, consider its centrality to the transaction in question, and evaluate the seriousness of its consequences to the person who made the voluntary disposition (*Pitt v Holt* at [126] and [128]).

91 Applying the law to the present facts, all the elements of misrepresentation are clearly satisfied. First, the Wife made the

Misrepresentation, which entailed telling the Husband that the DOT would only be effective upon his death. Second, she knew that the Misrepresentation was false and made it with the intention that the Husband would rely on it to sign the DOT. Third, the Husband acted on the Misrepresentation in signing the DOT, thinking that he would be free to use his assets until his death, but was instead effectively rendered a pauper by doing so. Accordingly, the Judge was correct to have set the DOT aside on the ground of misrepresentation.

92 We are also of the view that the DOT was correctly set aside for mistake. The mistake harboured by the Husband as to the effect of the DOT was engendered by the Wife's Misrepresentation, and the gravity of the mistake is also sufficiently serious as to make it unjust for the court to refuse relief. This is especially the case when one bears in mind that the DOT stripped him of all his assets, and that he executed the DOT in reliance on the Wife's Misrepresentation that it would only be effective upon his death. Certainly, it turned out that the DOT had a completely different legal effect from what the Husband thought it had, and the result is that he was completely divested of his assets because of his mistake. It is therefore clear to us that the centrality of the Husband's mistake to the execution of the DOT and the seriousness of its consequences render the mistake sufficiently grave to warrant the setting aside of the DOT.

93 The above suffices for us to dismiss the appeal. But much of the Judge's decision also pertained to undue influence and unconscionability. We now thus proceed to examine the Judge's decision to set aside the DOT on those two grounds.

Undue influence

94 It will be recalled that the Judge set aside the DOT on the basis of "Class 1" and "Class 2" undue influence. With regard to "Class 1" undue influence, she found that the Wife had the capacity to influence the Husband, who was suffering from acute grief over his mother's death. The Wife had exercised the influence unduly by taking advantage of his vulnerability by persistently asking him to sign the DOT, making the Misrepresentation, and roping in the Father, whom the Husband respected as a senior lawyer, to convince the Husband to sign the DOT. As for "Class 2A" undue influence, the Judge found that there was an implied retainer which gave rise to an irrebuttable presumption of a relationship of trust and confidence between the Wife and the Husband. She also found that the DOT was manifestly disadvantageous to the Husband, and that the Wife had failed to discharge her burden of showing that she did not exercise undue influence.

Parties' arguments

95 The Appellants contend that the Judge erred in finding that undue influence was made out. In relation to the Judge's treatment of the law, they submit that the person exerting "Class 1" undue influence must have also been one who benefitted from the transaction. On the facts, the DOT was for the sole benefit of the Son and not the Wife, who allegedly exerted the undue influence.

96 With respect to her findings of fact, the Appellants do not dispute that the Wife asked the Husband to leave the Stevens Road Property on the night of 26 March 2014. But they aver that she did so because she was upset with the Husband's plan of becoming the curator for the proposed art gallery. They also argue that since the Husband had a number of properties in Singapore, the Judge

erred in finding that the Wife's threat of chasing him out of the Stevens Road Property contributed to the Husband's susceptibility to undue influence.

97 As for whether there was an implied retainer between the Wife and the Husband, the Appellants rely on the English Court of Appeal decision of *Balfour v Balfour* [1919] 2 KB 571 ("*Balfour*") to argue that the courts should be slow to impute intentions to create legal relations within the marital context. They thus submit that the Judge erred in finding that there was an implied retainer between the Husband and the Wife. To this end, they also contend that the Judge erred in not considering that the Husband is a well-educated person with an LLM, and in failing to consider the evidence showing that the Wife told the Husband to seek independent legal advice in relation to the DOT.

98 Turning to the Husband, he argues that it is settled law that there is no requirement that the person exerting the influence (in this case, the Wife) benefitted from the DOT. In so far as his susceptibility to influence is concerned, he highlights that the experts unanimously agreed at trial that there were a few stress indicators present that increased his vulnerability in the aftermath of his mother's death. They also agreed that he was suffering from acute grief, and that the signing of the DOT was an erratic act given that he had not intended to create an instrument like the DOT.

99 With respect to the implied retainer, the Husband does not refer us to any cases wherein an implied retainer was found in a husband-wife relationship. Nevertheless, he seeks to defend the Judge's decision, emphasising that the Wife was a trained lawyer who had drafted the DOT and who knew that the DOT was a legal document. Further, he emphasises that there was an established course of conduct between the couple with the Husband relying on the Wife for legal advice. The Husband also points out that the Wife's case that

she asked him to seek legal advice is contradicted by her threat to kick him out if he did not sign the DOT.

Our decision

100 We agree with the Judge that "Class 1A" undue influence is made out on the facts. Accordingly, she was correct to set aside the DOT on that basis. However, we respectfully disagree that there was an implied retainer as between the Husband and the Wife that gave rise to a presumption upon which "Class 2A" undue influence could be established.

(1) Law on undue influence

101 We begin by setting out the law on undue influence. It is well-established law that there are two classes of undue influence: see *The Bank of East Asia Ltd v Mody Sonal M and others* [2004] 4 SLR(R) 113 at [4] and *Rajabali Jumabhoy and others v Ameerali R Jumabhoy and others* [1997] 2 SLR(R) 296 ("*Jumabhoy*") at [184] (affirmed in other respects in *Rajabali Jumabhoy and others v Ameerali R Jumabhoy and others* [1998] 2 SLR(R) 434 ("*Jumabhoy (CA)*") as the doctrine of undue influence was not at issue) as well as *The Law of Contract in Singapore* (Academy Publishing, 2012) ("*The Law of Contract in Singapore*") at para 12.133). They are as follows:

> (a) "Class 1" undue influence is also known as actual undue influence. Here, the plaintiff has to demonstrate that he entered into the impugned transaction because of the undue influence exerted upon him by the defendant. To do this, the plaintiff has to demonstrate that: (i) the defendant had the capacity to influence him; (ii) the influence was exercised; (iii) its exercise was undue; and (iv) its exercise brought about the transaction.

(b) "Class 2" undue influence is also known as presumed undue influence. Under this class of undue influence, the plaintiff is not required to prove actual undue influence. It suffices for the plaintiff to demonstrate (i) that there was a relationship of trust and confidence between him and the defendant; (ii) that the relationship was such that it could be presumed that the defendant abused the plaintiff's trust and confidence in influencing the plaintiff to enter into the impugned transaction; and (iii) that the transaction was one that calls for an explanation. This class of undue influence is further divided into "Class 2A" and "Class 2B" undue influence, as follows:

(i) Under "Class 2A" undue influence, there are relationships that the law *irrebuttably* presumes to give rise to a relationship of trust and confidence. Such relationships include solicitor-client relationships, but exclude husband-wife relationships. Once the plaintiff shows that his relationship with the wrongdoer triggers the presumption and that the impugned transaction calls for an explanation, there is a *rebuttable* presumption that the wrongdoer has exerted undue influence.

(ii) Under "Class 2B" undue influence, the plaintiff must prove that there is a relationship of trust and confidence. If it is shown that there was such a relationship and that the transaction calls for an explanation, then there is a *rebuttable* presumption of undue influence.

102 Additionally, we disagree with the Appellants that undue influence operates only where the person exerting the influence is also the person benefitting from the voluntary disposition. As Prof Nelson Enonchong notes in

Duress, Undue Influence and Unconscionable Dealing (Sweet & Maxwell, 2nd Ed, 2012) ("*Undue Influence and Unconscionable Dealing*") at paras 21–002–21–003, the law will vitiate gifts that were procured by undue influence even if the person exerting the influence did not receive the said gift. This is a principle of great vintage, and can be traced to *Bridgeman v Green* (1757) Wilm 58 ("*Bridgeman*"). There, the English Chancery Court was confronted with a situation wherein the plaintiff had gifted substantial sums of money to his butler, the butler's wife, the butler's brother, and to the son of the lawyer who helped procure the gifts. In reaching the conclusion that the gifts ought to be set aside for the undue influence of the butler, the Chancery Court had to deal with the issue of whether the gifts to the butler's brother or wife ought to stand given that they exerted no undue influence on the plaintiff. Lord Wilmot held in the negative, holding as follows (*Bridgeman* at 64–65):

> There is no pretence that [the butler's] brother, or his wife, was party to any imposition or had any due or undue influence over the plaintiff; but does it follow from thence, that they must keep the money? *No: whoever receives it, must take it tainted and infected with the undue influence and imposition of the person procuring the gift; his partitioning and cantoning it out amongst his relations and friends, will not purify the gift, and protect it against the equity of the person imposed upon.* [emphasis added]

103 We agree with Lord Wilmot's observation. We see no reason in principle why the operation of undue influence ought to be confined to situations where the party exerting the influence is also the party benefitting from the voluntary disposition or transaction. As Blackburne J observed in the context of "Class 2A" undue influence in the English High Court decision of *Naidoo and another v Naidu and others* The Times (1 November 2000), the vice of a transaction procured by undue influence "lies in the abuse of a position of trust". Similarly, where "Class 1" undue influence is concerned, the heart of the inquiry is whether the person exercising the undue influence has "exercised such

domination over the plaintiff victim's mind that his independence of decision was substantially – or even totally – undermined" (see *The Law of Contract in Singapore* at para 12.123). It therefore matters not that the person benefitting from the voluntary disposition or transaction had not exercised any influence over the plaintiff. What matters is that the voluntary disposition or transaction resulted from a wrongful exercise of influence.

(2) "Class 1" undue influence

104 In our view, the critical question here is whether the Husband was suffering from such acute grief as to be in a vulnerable state. The Appellants do not contest that the death of his mother caused him grief. But they argue that he was lucid and cognisant of what he was doing, and thus cannot be said to have been susceptible to undue influence. In this regard, they point out the Judge's finding that the Husband was suspicious of the Wife and thus lied to her about his mother's will at lunch, and rely primarily on the testimony of the Husband's expert witness, Dr Ung Eng Khean's ("Dr Ung"), that a person who is suspicious of another person is less likely to be susceptible to influence from the latter. They also highlight that both experts agree that the Husband did not lack the mental capacity to execute the DOT.

105 In our judgment, these contentions are misplaced. First, in so far as Dr Ung's evidence is concerned, the Appellants appear to ignore his evidence that suspicion does *not* make it *impossible* for a person to have been susceptible to influence. As Dr Ung made clear on the witness stand, factors such as the state and circumstances of bereavement must also be taken into consideration because they make a person more susceptible to influence. Most fundamentally, the Appellants do not address the other evidence, such as the agreement between the experts that the Husband was suffering from acute grief. In this regard, it is

also the evidence of Dr Calvin Fones ("Dr Fones"), the Appellants' expert witness, that persons suffering from "depressed-like states" may have poor judgment and would be advised against making major decisions. And while the Husband was not suffering from depressive disorder, Dr Fones conceded that it was not unlikely that the Husband was experiencing symptoms akin to those of depressive disorder in the two weeks after his mother's death.

106 Second, the Appellants' contention that the Husband did not lack mental capacity is misplaced. There is no requirement in law that undue influence can only arise from a lack of mental capacity. The law recognises that "bullying or importunity may impair a person's free will and thus constitute undue influence": *Undue Influence and Unconscionable Dealing* at para 8–006. The facts of this case exemplify such "bullying or importunity". As noted above, the Wife was aware that he was not in an appropriate state of mind to execute a will: see [80] above. Crucially, she knew that the Husband was a lonely individual and that the Son and her were the only family that he had left. But that did not stop her from pressurising him into signing the DOT under threat of being chased out of the Stevens Road Property. It is clear to us that the Wife was taking advantage of the Husband's grief by badgering him into signing the DOT. The Appellants' submission that the Husband had multiple properties therefore also misses the point. In our assessment, the threat of being chased away by the Wife had less to do with homelessness and more to do with exploiting the Husband's acute sense of loneliness in a time of grief.

107 Accordingly, we agree with the Judge that "Class 1" undue influence is made out and that the DOT ought to be set aside on that basis.

(3) "Class 2A" undue influence

108 We now turn to the question of whether the DOT also ought to be set aside for "Class 2A" undue influence. We note that having found that there was "Class 1" undue influence, it is strictly not necessary for us to decide this issue. Nevertheless, we think it important to set out our views on the question as to whether there was an implied retainer between the Husband and the Wife such that there arose an irrebuttable presumption of a relationship of trust and confidence.

109 It is first helpful to set out the law as to when an implied retainer can be established. In *Anwar Patrick Adrian and another v Ng Chong & Hue LLC and another* [2014] 3 SLR 761 at [53], this Court held that the heart of the inquiry is "whether the circumstances are such that a contractual relationship 'ought fairly and properly' be imputed to all the parties". To that end, the court undertakes the objective inquiry of whether the putative client reasonably considered that the putative solicitor was acting for him, and whether the putative solicitor ought to have reasonably known that he was acting for the putative client. Other factors to consider include whether the putative solicitor asked the putative client to seek independent advice, and whether any advice by the putative solicitor was rendered without qualification. However, it ought to be emphasised that no single factor is determinative and the final assessment ultimately rests on a holistic and careful consideration of the factual matrix: see the Singapore High Court decision of *CIFG Special Assets Capital I Ltd (formerly known as Diamond Kendall Ltd) v Polimet Pte Ltd and others* [2016] 1 SLR 1382 at [117]. As the Singapore High Court noted in *Law Society of Singapore v Ahmad Khalis bin Abdul Ghani* [2006] 4 SLR(R) 308 at [66] (citing with approval the following extract from *Cordery on Solicitors* (Anthony Holland gen ed) (LexisNexis UK, 9th Ed, 1995, 2004 release) at para E 425):

> [A] retainer may be implied where, on an objective consideration of all the circumstances, an intention to enter into such a contractual relationship *ought fairly and properly to be imputed* ***to all the parties***. The implication would have to be so *clear that the solicitor ought to have appreciated it.* Circumstances to be taken into account might include, where appropriate, who is paying the [solicitor's] fees, who is providing instructions, and whether a contractual relationship existed between the parties in the past. [emphasis added in italics and bold italics]

110 On the facts of the present case, we respectfully disagree with the Judge that there was an implied retainer. We acknowledge that the Wife had drafted the DOT, and that the Husband had customarily relied on the Wife's advice on legal matters. But we do not think that those factors are enough to tip the scale in favour of a finding that there was an implied retainer between them.

111 In this regard, *Balfour* is particularly instructive. The plaintiff in *Balfour* sued her husband for money that was allegedly due under a verbal agreement for a monthly allowance that was made while they were still married. The English Court of Appeal held in favour of the defendant husband, finding that the verbal agreement did not constitute an enforceable contract for want of consideration and intention to enter into legal relations. Although the court did not rule out the possibility of there being a contract as between husband and wife, it would be rare for such agreements to be found. As Atkin LJ (as he then was) noted in his judgment (*Balfour* at 579):

> … [T]he small Courts of this country would have to be multiplied one hundredfold if these [domestic] arrangements were held to result in legal obligations. They are not sued upon, not because the parties are reluctant to enforce their legal rights when the agreement is broken, but because the parties, in the inception of the arrangement, never intended that they should be sued upon. Agreements such as these are outside the realm of contracts altogether. … The consideration that really obtains for [such agreements] is that natural love and affection which counts for so little in these cold Courts.

112 Although the court in *Balfour* was not dealing with the issue as to whether there was an implied retainer between the parties, its observations on the nature of a marital relationship and the difficulty of imputing a commercial arrangement in that context are pertinent. We think that the Judge ought to have given more weight to the fact that the Husband and the Wife were in a marital relationship that is far removed from the commercial contexts in which implied retainers are typically found. When one considers the marital context in which the DOT was signed, the facts paint the picture of a domestic arrangement rather than that of a putative solicitor rendering advice to a putative client. Simply because the Husband had traditionally relied on the Wife for her legal *knowledge* does *not necessarily* mean that the Husband reasonably considered the Wife as his solicitor, or that the Wife ought to have known that she was representing the Husband. Indeed, we observe that if that had been the case, there would have been no need for the couple to approach the Solicitor to assist them in the execution of the Scotts Road Trust. Further, to hold otherwise would mean that every legally-trained person would have to be careful with the legal knowledge that they share with their spouse. We do not think that that would be either desirable or consistent with the reality of marital relationships. That being said, we do not foreclose the possibility of an implied retainer arising as between spouses, and observe only that it would nevertheless be a rare case in which such a scenario would arise on the facts.

113 Accordingly, we do not think that there was an implied retainer as between the Wife and the Husband. It thus follows that "Class 2A" undue influence is not made out on the facts.

Unconscionability

114 We turn now finally to unconscionability, the most contentious of the vitiating factors set forth for our consideration in this appeal. After a comprehensive review of the law, the Judge held that the doctrine of unconscionability forms part of the law of Singapore, and that the DOT ought to be set aside because it was procured by unconscionable conduct. As we shall elaborate upon below, while we agree with the Judge that the DOT ought to be set aside for unconscionability, our reasons differ slightly.

Parties' arguments

115 The Appellants argue that the Judge erred in changing the test as set out in *Cresswell v Potter* [1978] 1 WLR 255 ("*Cresswell*") by expanding it to include the general conception of oppression or abuse of confidence. They further contend that the Judge erred in finding on the facts that the Husband was suffering from acute grief amounting to a "special disability" or "special disadvantage" because both sides' experts allegedly agreed that his bereavement did not impair the functioning of his mind. They also argue that this was not a transaction at an undervalue and that the creation of a trust by a father over all his assets for his child cannot be said to shock the conscience of the court.

116 The Husband seeks to uphold the Judge's decision to expand the test as set out in *Cresswell* to capture infirmities beyond poverty and ignorance. He contends that it was acknowledged in *Cresswell* (at 257) that the essential inquiry was whether there were "circumstances of oppression or abuse of confidence" that would invoke the doctrine. And on the facts, the Husband stresses that it is not his case that he lacked the requisite mental capacity to execute the DOT, but that he was suffering from acute grief that compromised his understanding of the DOT. This was compounded by the fact that the DOT

was a "drastic, uncommon and abnormal mechanism" [emphasis in original omitted] that constituted a transaction at an undervalue.

Our decision

(1) The meanings of "unconscionability"

117 As commentators have noted, "unconscionability" is a ***protean*** and ***slippery*** concept that means different things in different contexts: see Charles Rickett, "Unconscionability and Commercial Law" (2005) 24 U Queensland LJ 73 at 74 and 81–82. Its intuitiveness as a moral notion belies and undermines the Herculean task of *delimiting* its *parameters* as a ***legal*** doctrine. It is thus appropriate to begin with an important distinction, namely, that the concept of "unconscionability" has at least two meanings within the law.

118 The ***first*** is "unconscionability" as a ***rationale***. In this regard, it can be construed in the layperson's sense of, say, a contract being perceived as being unfair (*cf* the seminal article by Prof S M Waddams, "Unconscionability in Contracts" (1976) 39 MLR 369, although the learned author did hope for the broader development of the *doctrine* of unconscionability in the concluding part of the article). Such a sense is not far removed from, and at least overlaps with, the concept of "unconscionability" that forms the basis for a number of legal doctrines. Put simply, the concept of "unconscionability" as a *rationale* refers to *that spirit of justice and fairness underlying or undergirding* a particular substantive legal *doctrine* (*eg*, the doctrines of undue influence and duress). It therefore cannot, *ex hypothesi*, be the *doctrine* itself.

119 To be even more specific, the concept of "unconscionability" as a *rationale* refers to the spirit of justice and fairness that is embodied in the maxim that "one is not permitted to take unfair advantage of another who is in a position

of weakness" (see in this connection *Undue Influence and Unconscionable Dealing* at para 15-003). However, whilst attractive – and even persuasive – as a *rationale*, it can be immediately seen that it is rather general and even vague when one attempts to utilise the concept of "unconscionability" as a legal *doctrine*. This, in turn, leads to ***uncertainty and unpredictability***, which is an especial concern in commercial transactions (where at least the *perception* is that the law ought to be certain and predictable).

120 Indeed, the concept of "unconscionability" as a *legal* ***doctrine*** constitutes the ***second*** meaning of "unconscionability". It has its historical roots in fact situations which, by any reasonable standard, would be termed grossly unfair, regardless of whether they are viewed from a layperson or a lawyer's perspective. Such fact situations are *truly egregious* and, hence, do not engender any sense of that uncertainty and unpredictability that we referred to towards the end of the preceding paragraph. But it is one thing to argue that the *doctrine* of unconscionability does not lead to uncertainty and unpredictability in ***clearly egregious*** *fact situations*; it is an entirely different matter altogether to argue that the *doctrine* of unconscionability ***always (or at least almost always)*** leads to certainty and predictability. Undoubtedly, even the seemingly trite proposition that there are factual matrices which are clearly egregious ***begs the question*** for it does not answer the root question of the inquiry – under what circumstances is a transaction so unfair as to be unconscionable?

121 In other words, the ***chief weakness*** of the doctrine of unconscionability is that it is a *rather* ***general and vague doctrine*** that ***does not furnish sufficient legal criteria*** *in order to enable the court to apply it so as to arrive at a just and fair result in the case at hand.* This is especially the case in fact situations that are *not obviously egregious*. This is a very significant, even fundamental,

weakness simply because the *vast majority* of cases are *not*, by their very nature, *obviously egregious* in nature. At *this* particular point, the ***doctrine*** of unconscionability begins, with respect, to break down simply because it is riddled with a lack of legal clarity which (in turn) simultaneously fails to provide the requisite legal guidance whilst engendering uncertainty as well as unpredictability in the process – with the result that it ***lacks the universality that a doctrine must necessarily have***. As we have seen, it can deal with *clarity* with ***only*** the ***most egregious*** *fact situations* (although, as we shall see, the ***legal or normative*** *formulation* would ***necessarily*** have to be ***extremely narrow and specific***).

122 Let us attempt to summarise our analysis thus far. There are at least ***two*** distinct meanings of the concept of "unconscionability". The ***first*** relates to "unconscionability" as a ***rationale***. Inasmuch as such an approach towards the concept of "unconscionability" is a mere *general underlying justification* for *a quite different doctrine*, there can be few objections. However, the ***second*** distinct meaning of "unconscionability", *viz*, "unconscionability" as a ***doctrine***, is much more problematic. It is by no means clear precisely what *legal criteria* it embodies and this *lack of legal guidance* will therefore lead to *uncertainty as well as unpredictability* – at which point it might be argued that situations in which the *doctrine* of unconscionability might potentially apply to might, indeed, be dealt with *better by* ***alternative*** *legal doctrines that are* ***more established*** *from a legal point of view – for example, undue influence* and *duress*. This is *yet another* difficulty which, in our view, afflicts any *doctrine* of unconscionability. At this particular juncture, however, the concept of "unconscionability" might still serve a limited function – *as a* ***rationale*** (which is, in fact, the ***first*** *meaning* of "unconscionability" canvassed above).

123 It might be said in response to this aforementioned difficulty that "[i]n the quest for justice, there can never be too many strings to the doctrinal bow": Andrew B L Phang and Goh Yihan, *Contract Law in Singapore* (Wolters Kluwer Law & Business, 2012) ("*Phang & Goh*") at para 732. That may be true on a *conceptual* level, but the argument that there is no harm in embracing the *doctrine* of unconscionability as an ***additional*** legal string to one's legal bow does *not really address the difficulties set out above* (for example, whether it is, to take the pictorial depiction further, ***too loose a legal string*** which, as we have already mentioned, might *lead to uncertainty and unpredictability*). The difficulty, as we shall see, is in determining the ***limits*** of the doctrine such that it does not upset the fundamental pillar of ***certainty*** underlying the common law, while being careful not to restrict its reach to the point that it becomes "virtually impossible for weaker parties to secure protection" (see Nelson Enonchong, "The Modern English Doctrine of Unconscionability" (2018) 34 JCL 211 ("*Enonchong*") at p 217).

124 We should pause to note, however, that whilst we have drawn a distinction between the concept of "unconscionability" as a rationale on the one hand and the concept of "unconscionability" as a doctrine on the other, it will come as no surprise that in so far as the *latter* is concerned, there will be *an* ***overlap*** *(and perhaps, on one view at least, even a* ***coincidence****)* with the *former*, inasmuch as "unconscionability" as a ***doctrine*** will ***necessarily embrace*** "unconscionability" as its underlying ***rationale***.

125 However, at this particular juncture, we discern a *clue* as to why "unconscionability" as a *doctrine* is (as we have emphasised above) *too general, and even vague and loose*, a doctrine. ***To the extent that such a doctrine is virtually indistinguishable from its very general – and even commonsensical***

– rationale, it is not surprising in the least that, as a doctrine, it is simply too general to furnish that guidance as well as certainty and predictability that a substantive doctrine ought to provide. For a similar conundrum in a different context, consider the doctrine of good faith and, in particular, the decision of this Court in *Ng Giap Hon v Westcomb Securities Pte Ltd and others* [2009] 3 SLR(R) 518 at [60], where it was held that, given the fledgling nature of that doctrine and the consequent need for much clarification even on a theoretical level, and given the fact that the case law appeared to be in a state of flux, the court would ***not*** endorse an implied duty of good faith (in the form of a term implied *in law*) in the Singapore context until the theoretical foundations and the structure of the doctrine were settled, even if it might, in an appropriate fact situation, be possible to imply such a term *in fact*. In this regard, we may also refer to the decision of this Court in *The One Suites Pte Ltd v Pacific Motor Credit (Pte) Ltd* [2015] 3 SLR 695 at [44].

126 The challenge, therefore, is to distil the general rationale of unconscionability into a legally workable doctrine. To that end, it is instructive to revisit the historical roots of the doctrine.

(2) The doctrine of unconscionability

(A) THE NARROW DOCTRINE OF UNCONSCIONABILITY

127 The *doctrine* of unconscionability has its *historical roots* in what have been termed ***improvident transactions*** or ***bargains*** (see David Capper, "The Unconscionable Bargain in the Common Law World" (2010) 126 LQR 403 ("*Capper (2010)*") at p 403). These were situations where expectant heirs were *exploited* by the other party and deprived of their respective inheritances. In essence, the doctrine sprang from the perceived need to "prevent improvident persons from spending or ruining their estates before they come to them, though

no proof of actual fraud or imposition" is made out (see *Earl of Chesterfield v Janssen* (1750) 2 Ves Sen 125 at 149; M Cope, *Duress, Undue Influence and Unconscientious Bargains* (The Law Book Company Limited, 1985) at para 224; and John Phillips, "Protecting Those in a Disadvantageous Negotiating Position: Unconscionable Bargains as a Unifying Doctrine" (2010) 45 Wake Forest LR 837 at p 840). This strand of cases (emanating, apparently, sometime during the seventeenth to nineeenth century in *equity* (see *Capper (2010)* at p 403)) was picked up later in the nineteenth as well as twentieth centuries in order to constitute what we will hereafter term "***the narrow doctrine of unconscionability"***.

128 Before proceeding to consider these cases, we note that the Husband referred to the doctrine of unconscionability in the context of performance bonds at the hearing before us. We should stress that our focus in the present case *excludes* the doctrine of unconscionability in so far as it applies in the context of *performance bonds*. The doctrine in the latter context relates to a *quite different* situation where the court is concerned specifically with contracts that provide "security for the *secondary* obligation of the obligor to pay damages *if* it breaches its primary contractual obligations to the beneficiary" [emphasis in original]: see *JBE Properties Pte Ltd v Gammon Pte Ltd* [2011] 2 SLR 47 at [10]. Whilst unconscionability in that context bears ***some*** resemblance to unconscionability in relation to fact situations such as that in the present appeal (see, *eg*, *BS Mount Sophia Pte Ltd v Join-Aim Pte Ltd* [2012] 3 SLR 352 at [19]), it is somewhat different both in *application* and in *focus* (see also generally *The Law of Contract in Singapore* at para 12.221 and *Phang & Goh* at para 733).

129 We now proceed to examine the historical roots of the ***narrow doctrine of unconscionability***, which as mentioned has traditionally been limited to the well-defined categories of expectant heirs and improvident transactions (see [127] above). The narrow doctrine in its most contemporary form can be traced to the "celebrated decision" of *Fry v Lane* (1888) 40 Ch D 312 ("*Fry*") (see *Capper (2010)* at p 403). In *Fry*, the plaintiffs were "poor, ignorant men" who sold their reversionary interests in their uncle's estate to the defendant for a total of £440 in 1878. Their reversionary interests were subject to their aunt's life tenancy, and when their aunt passed away in 1886, it was discovered that their interests were each worth £730. Kay J held in the plaintiffs' favour and set aside the transactions. In reaching his decision, he held as follows (see *Fry* at 322):

> The result of the decisions is that where a purchase is made from a poor and ignorant man at a considerable undervalue, the vendor having no independent advice, a Court of Equity will set aside the transaction.
>
> …
>
> The circumstances of poverty and ignorance of the vendor, and absence of independent advice, throw upon the purchaser, when the transaction is impeached, the onus of proving, in Lord *Selborne's* words, that the purchase was "fair, just, and reasonable."
>
> [emphasis in original]

130 There was apparently no further development of the narrow doctrine until 80 years later – in *Cresswell*. In that case, the plaintiff and the defendant were a married couple who bought a plot of land. They eventually divorced after it was discovered that the plaintiff was having an affair. Thereafter, the plaintiff sold her portion of the land to the defendant in consideration for an indemnity against the liabilities under the mortgage. Approximately two years later, the defendant sold the land for a profit of £1,400. The plaintiff sued the defendant seeking to set aside their agreement, contending that it was a transaction at an

undervalue. In finding for the plaintiff and setting aside the transaction, Megarry J considered *Fry* and set out the following factors for invoking the narrow doctrine: (see *Cresswell* at 257 and 259–260):

> The judge [in *Fry*] thus laid down three requirements. What has to be considered is, first, whether the plaintiff is poor and ignorant; second, whether the sale was at a considerable undervalue; and third, whether the vendor had independent advice. I am not, of course, suggesting that these are the only circumstances which will suffice; thus there may be circumstances of oppression or abuse of confidence which will invoke the aid of equity. But in the present case only these three requirements are in point. Abuse of confidence, though pleaded, is no longer relied on; and no circumstances of oppression or other matters are alleged.
>
> …
>
> At the end of the day, my conclusion is that this transaction cannot stand. In my judgment the plaintiff has made out her case, and so it is for the defendant to prove the transaction was "fair, just, and reasonable." This he has not done. The whole burden of his case has been that the requirements of [*Fry*] were not satisfied, whereas I have held that they were.

131 At this juncture, it is worth noting that although Megarry J found that the narrow doctrine applied on the basis of the plaintiff's poverty and ignorance, he also stressed that these factors are not exhaustive, noting that "there may be circumstances of oppression or abuse of confidence which will invoke the aid of equity". Although these observations are technically *obiter dicta* because the case was ultimately decided within the confines of the doctrine as set out in *Fry*, they would eventually pave the way for a ***broader*** doctrine of unconscionability (see in this respect *Enonchong* at p 213 where the author makes the point that *Cresswell* marked an expansion of the meaning of poverty and ignorance; see also *Phang & Goh* at para 738 where it was observed that Megarry J's decision is in substance similar to later English cases that take a broader view of the doctrine).

(B) THE BROAD DOCTRINE OF UNCONSCIONABILITY

132 Let us now turn to consider briefly what we would hereafter term "***the broad doctrine of unconscionability***". The ***broad*** *doctrine of unconscionability* is perhaps best exemplified by the leading High Court of Australia decision of *The Commercial Bank of Australia Limited v Amadio and Another* (1983) 151 CLR 447 ("*Amadio*") (see also J W Carter, *Contract Law in Australia* (7th Ed, LexisNexis Butterworths Australia, 2018) ("*Carter*") at ch 24, especially at paras 24-10−24-12; N C Seddon and R A Bigwood, *Cheshire & Fifoot Law of Contract – 11th Australian Edition* (LexisNexis Butterworths Australia, 2017) ("*Seddon and Bigwood*") at ch 15, especially at paras 15.5−15.9; and Nicholas Bamforth, "Unconscionability as A Vitiating Factor [1995] LMCLQ 538)). In *Amadio*, Deane J, set out the parameters of this doctrine as follows (at 474):

> The jurisdiction [of courts of equity to relieve against unconscionable dealing] is long established as extending generally to circumstances in which (i) a party to a transaction was under a special disability in dealing with the other party with the consequence that there was an absence of any reasonable degree of equality between them and (ii) that disability was sufficiently evident to the stronger party to make it *prima facie* unfair or "unconscientious" that he procure, or accept, the weaker party's assent to the impugned transaction in the circumstances in which he procured or accepted it. Where such circumstances are shown to have existed, an onus is cast upon the stronger party to show that the transaction was fair, just and reasonable …

133 As alluded to above, the ***broad*** *doctrine of unconscionability* as set out in *Amadio* is, in our respectful view, phrased in ***too broad a manner inasmuch as it affords the court too much scope to decide on a subjective basis and ought therefore to be rejected***. Undoubtedly, notwithstanding Mason J's emphasis that mere inequality of bargaining power is insufficient to invoke the doctrine successfully (see *Amadio* at 462; Ashley Black, "Unconscionability, Undue

Influence and the Limits of Intervention in Contractual Dealings: *Commercial Bank of Australia Ltd v Amadio* (1986) 11 Sydney LR 134 ("*Ashley Black*") at p 139), we observe that the *Amadio* formulation comes dangerously close to the ill-founded principle of "inequality of bargaining power" that was introduced in *Lloyd's Bank v Bundy* [1975] QB 326 (see *Enonchong* at p 227). We hasten to add that it is ***not*** simply a matter of ***linguistic form***. As the late Lord Denning aptly put it, "[w]ords are the lawyer's tools of trade" (see Alfred Denning, *The Discipline of Law* (Butterworths, London, 1979) at p 5). The reason for this is clear; as the learned Master of the Rolls observed (*ibid*):

> The reason why words are so important is because words are the vehicle of thought. When you are working out a problem on your own – at your desk or walking home – you think in words, not in symbols or numbers. When you are advising your client – in writing or by word of mouth – you must use words. There is no other means available.

134 Given the view stated in the preceding paragraph, it is not surprising that there has – in the Singapore High Court at least – been *a* ***resounding rejection*** *of the* ***broad*** *doctrine of unconscionability* for essentially *the* ***same*** *reasons as those proffered in the preceding paragraph* (see, for example, the Singapore High Court decisions of *Lim Geok Hian v Lim Guan Chin* [1993] 3 SLR(R) 183 at [44]–[48]; *Pek Nam Kee and another v Peh Lam Kong and another* [1994] 2 SLR(R) 750 at [131]; *Jumabhoy* at [194]–[198] (affirmed, *Jumabhoy (CA)* (but the issue of unconscionability was not raised on appeal)); and *EC Investment Holding Pte Ltd v Ridout Residence Pte Ltd and another (Orion Oil Ltd and another, interveners)* [2011] 2 SLR 232 at [62]–[66] (affirmed, *EC Investment Holding Pte Ltd v Ridout Residence Pte Ltd and others and another appeal* [2012] 1 SLR 32 (but the issue of unconscionability was not raised on appeal)). One possible decision of the Singapore High Court which might have arguably adopted the ***broad*** *doctrine of unconscionability* is *Fong*

Whye Koon v Chan Ah Thong [1996] 1 SLR(R) 801 ("*Fong Whye Koon*"). However, in our view, that case is an outlier. We also note that the authors of *The Law of Contract in Singapore* observed (at para 12.219) that whilst *Fong Whye Koon* "suggests a broader approach towards the doctrine of unconscionability", "[a] close perusal of the judgment … does not (unfortunately) clearly confirm that the broader approach ought to prevail in the local context".

135 We note, however, that even as the English courts have also purported to shift away from the narrower rubric in relation to improvident transactions, the manner in which they have done so does, with respect, give rise to concern inasmuch as the *resultant formulations* ***tend to adopt the same broad language that was utilised in*** **Amadio**. For example, in the English High Court decision of *Multiservice Bookbinding Ltd and Others v Marden* [1979] 1 Ch 84 ("*Multiservice Bookbinding*"), Browne-Wilkinson J (as he then was) observed as follows (at 110):

> I therefore approach the second point on the basis that, in order to be freed from the necessity to comply with all the terms of the mortgage, the plaintiffs must show that the bargain, or some of its terms, was unfair and unconscionable: it is not enough to show that, in the eyes of the court, it was unreasonable. In my judgment a bargain cannot be unfair and unconscionable unless one of the parties to it has imposed the objectionable terms in ***a morally reprehensible*** *manner*, that is to say, in a way which affects his conscience.
>
> The classic example of an unconscionable bargain is where advantage has been taken of a young, inexperienced or ignorant person to introduce a term which no sensible well-advised person or party would have accepted. But I do not think the categories of unconscionable bargains are limited: the court can and should intervene where a bargain has been procured by unfair means.
>
> [emphasis added in italics and bold italics]

136 With respect, the use of the phrase "a morally reprehensible manner" might be said to introduce *even more* subjectivity into the entire process. That notwithstanding, *Multiservice Bookbinding* has been cited with approval in subsequent English cases. For example, in the English High Court decision of *Alec Lobb (Garages) Ltd v Total Oil Great Britain Ltd* [1983] 1 WLR 87 ("*Alec Lobb*"), Peter Millett QC (as he then was), after citing *Multiservice Bookbinding*, proceeded to observe thus (at 94–95):

> It is probably not possible to reconcile all the authorities, some of which are of great antiquity, on this head of equitable relief, which came into greater prominence with the repeal of the usury laws in the 19th century. But if the cases are examined, it will be seen that three elements have almost invariably been present before the court has interfered. First, one party has been at a serious disadvantage to the other, whether through poverty, or ignorance, or lack of advice, or otherwise, so that circumstances existed of which unfair advantage could be taken: see, for example, *Blomley* v. *Ryan* (1954) 99 C.L.R. 362, where, to the knowledge of one party, the other was by reason of his intoxication in no condition to negotiate intelligently; secondly, this weakness of the one party has been exploited by the other in some morally culpable manner: see, for example, *Clark* v. *Malpas* (1862) 4 De G.F. & J. 401, where a poor and illiterate man was induced to enter into a transaction of an unusual nature, without proper independent advice, and in great haste; and thirdly, the resulting transaction has been, not merely hard or improvident, but overreaching and oppressive. Where there has been a sale at an undervalue, the undervalue has almost always been substantial, so that it calls for an explanation, and is in itself indicative of the presence of some fraud, undue influence, or other such feature. In short, there must, in my judgment, be some impropriety, both in the conduct of the stronger party and in the terms of the transaction itself (though the former may often be inferred from the latter in the absence of an innocent explanation) which in the traditional phrase "shocks the conscience of the court," and makes it against equity and good conscience of the stronger party to retain the benefit of a transaction he has unfairly obtained.

Millett QC's decision was affirmed, with some additional remarks on the issue, by the English Court of Appeal in *Alec Lobb (Garages) Ltd and Others v Total*

Oil (Great Britain) Ltd [1985] 1 WLR 173 at 182–183 and 188–189, *per* Dillon LJ and Dunn LJ, respectively.

137 In the English Court of Appeal decision of *Credit Lyonnais Bank Nederland NV v Burch* [1997] 1 All ER 144, Millett LJ (as he then was) made similar observations again, as follows (at 152–153):

> Miss Burch did not seek to have the transaction set aside as a harsh and unconscionable bargain. To do so she would have had to show not only that the terms of the transaction were harsh or oppressive, but that 'one of the parties to it has imposed the objectionable terms in a morally reprehensible manner, that is to say, in a way which affects his conscience' (see *Multiservice Bookbinding Ltd v Marden* [1978] 2 All ER 489 at 502, [1979] Ch 84 at 110 per Browne-Wilkinson J and *Alec Lobb (Garages) Ltd v Total Oil GB Ltd* [1983] 1 All ER 944 at 961, [1983] 1 WLR 87 at 95, where I pointed out that there must be some impropriety, both in the conduct of the stronger party and in the terms of the transaction itself, but added that 'the former may often be inferred from the latter in the absence of an innocent explanation').
>
> In the present case, the bank did not obtain the guarantee directly from Miss Burch. It was provided to the bank by Mr Pelosi, who obtained it from Miss Burch by the exercise of undue influence. In such a context, the two equitable jurisdictions to set aside harsh and unconscionable bargains and to set aside transactions obtained by undue influence have many similarities. In either case it is necessary to show that the conscience of the party who seeks to uphold the transaction was affected by notice, actual or constructive, of the impropriety by which it was obtained by the intermediary, and in either case the court may in a proper case infer the presence of the impropriety from the terms of the transaction itself.

In this connection, reference may also be made to the English Court of Appeal decision of *Portman Building Society v Dusangh and others* [2000] 2 All ER (Comm) 221 ("*Portman Building Society*").

138 Given the fact that the ***current*** English formulation of what is *supposed to be* the ***narrow*** *doctrine of unconscionability* is, as we have just seen, ***no***

different (in substance at least) *from the* ***broad*** *doctrine of unconscionability*, could it be then said that there is, legally speaking, ***no via media*** between the *narrow* doctrine of unconscionability on the one hand and the *broad* doctrine of unconscionability on the other? Put simply, would any attempt at shifting away from the *narrow* doctrine of unconscionability ***necessarily and inexorably*** lead the court to the *broad* doctrine of unconscionability? If, as we have indicated above, it would be unwise for this Court to endorse the ***broad*** *doctrine of unconscionability*, then is this Court then ***necessarily*** *constrained* to endorse, instead, the ***narrow*** *doctrine of unconscionability in its* ***original form***?

139 Before proceeding to examine this specific issue, however, we note that a leading scholar in the field has recently interpreted the legal criteria set out in *Alec Lobb* (see [136] above) as being ***overly strict*** compared to that set out in *Fry*: see *Enonchong* at p 217. This is principally because of the requirement in *Alec Lobb* that the defendant's conduct be "morally reprehensible". This criticism would suggest that despite being, as we have observed above, *broader* than *Fry*, *Alec Lobb* is in fact *narrower and stricter* than *Fry* at least in some respects. With respect, however – and leaving aside for the moment the objection from excessive subjectivity – we are of the view that that requirement of "morally reprehensible" conduct was intended merely to emphasise that the defendant's conduct had to be ***more*** than the mere taking advantage of the plaintiff in a situation of *inequality of bargaining power*. When read in that light, the formulation in *Alec Lobb* is, in substance, no different from that in *Amadio* (*cf* the situation of ***statutory*** *unconscionability* in the Australian context pursuant to s 21 of the Australian Consumer Law, in relation to which there is presently controversy as to whether "a high degree of moral obloquy" is the correct standard to apply: see *Seddon and Bigwood* at xii and para 15.16; *Carter* at para 24-19).

(3) The suggested way forward

140 In our view, it is possible to modify the original elements of the ***narrow*** doctrine of unconscionability without necessarily descending down the slippery slope into what is, in substance, the broad doctrine of unconscionability.

141 In so far as the first requirement laid down in *Fry* and *Cresswell* is concerned, in ***addition to*** considering whether or not the plaintiff is poor and ignorant, we would ***also*** include situations where the plaintiff is suffering from *other* forms of ***infirmities – whether physical, mental and/or emotional*** *in nature*. The inquiry in these respects would, of course, be ***an intensely fact-sensitive*** *one*. A correlative point would be that ***not every*** infirmity would *ipso facto* be sufficient to invoke the *narrow* doctrine of unconscionability. It must have been of sufficient gravity as to have ***acutely*** affected the plaintiff's ability to "conserve his own interests" (see the High Court of Australia decision of *Blomley v Ryan* (1956) 99 CLR 362 at 381). Such infirmity must also have been, or ought to have been, evident to the other party procuring the transaction. However, we would ***not mandate*** the second and third requirements in the aforementioned two cases (*viz*, whether the sale was at a considerable undervalue and whether the vendor had independent advice, respectively) although they would certainly be ***very important factors*** that the court would take into account. Indeed, in a typical improvident transaction in which the sale was at a considerable undervalue and the plaintiff vendor had not received any independent advice, it would be extremely difficult, to say the least, for the defendant to demonstrate that the transaction concerned was nevertheless fair, just and reasonable. Looked at in this light together with the fact that *Fry* and *Cresswell did*, in fact, relate to improvident transactions, our view does not really differ, in substance, from that adopted in those two cases.

142 In summary, and at risk of oversimplification, the ***narrow doctrine of unconscionability*** applies in Singapore. To invoke the doctrine, the plaintiff has to show that he was suffering from an infirmity that the other party exploited in procuring the transaction. Upon the satisfaction of this requirement, the burden is on the defendant to demonstrate that the transaction was fair, just and reasonable. In this regard, while the successful invocation of the doctrine does not require a transaction at an undervalue or the lack of independent advice to the plaintiff, these are factors that the court will invariably consider in assessing whether the transaction was improvident.

143 It is important, though, to reiterate that the application of the criteria of *infirmity* must *not* be *overly broad*, lest we be led back, in effect, to the *broad* doctrine of unconscionability. It is also important to note that although there might be overlaps between our approach and the *broad* doctrine of unconscionability – at least because the latter would, by its very nature, encompass situations falling within the former – the *broad* doctrine of unconscionability still goes further than our approach because it may potentially encompass fact situations where the "special disability" concerned (see *Amadio*, *per* Deane J at [132] above) is something ***broader*** than the type of ***infirmity*** we referred to in the preceding paragraph. That said, an *overly broad application* of the narrow approach we have endorsed might assist in *stretching* our narrow approach to cover a fact situation that is *not* intended to fall within it. We therefore find it imperative to caveat at this stage that our approach ought ***not*** to be utilised in such a manner.

144 In this vein, it also ought to be emphasised – lest it be said that our proposed approach to the *narrow* doctrine does not differ from the *broad* doctrine – that our approach is to be applied through the *lens* of cases

exemplifying the narrow doctrine (*eg*, *Fry* and *Cresswell*) rather than those embodying the broad doctrine (*eg*, *Amadio* and *Alec Lobb*). This starting point, in our view, distinguishes the narrow doctrine ***subtly but significantly*** from the broad doctrine, and represents a middle ground based on ***practical application*** rather than ***theoretical conceptualisation***. Indeed it might, in our view, be possible at this juncture to go further and argue that the ***broad*** doctrine of unconscionability is, with respect, an ***historically flawed*** *doctrine.* Let us elaborate.

(A) AN (HISTORICAL) MISSTEP IN THE LAW?

145 Save for the consensus that the equitable doctrine of unconscionability was developed between the seventeenth and eighteenth century, its ***precise*** historical origins might be lost in time (see K L Fletcher, "Review of Unconscionable Transactions" (1972) 8 U Queensland LJ 45 at 48). That notwithstanding, we can begin our analysis with what *appear* to be two separate and distinct doctrines which emerged in ***equity*** sometime during the eighteenth century. What historical evidence is available suggests that neither preceded the other and that both emerged around the same time (although, it appears, both emerged *only after* the passing of the UK Statute of Frauds 1677 (Cap 3) (see A W B Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (Clarendon Press, 1987) at p 537)).

(a) The *first* related to a situation where there was ***an existing relationship of trust and confidence*** between the parties – often emanating from ***an existing relationship of a certain type*** (including that of solicitor and client). This is what we have come to term today not only as ***undue influence*** *but also* as ***"Class 2" undue influence***.

(b) The *second* related to a situation which we have already referred to as ***improvident transactions***. More particularly, these were situations where there did ***not*** exist ***a relationship of trust and confidence*** between the parties. These often encompassed, in fact, situations where expectant heirs were *exploited* by the other party in what may not inaccurately be termed *harsh dealing*. It will be recalled that we have referred to this particular doctrine as "***the narrow doctrine of unconscionability"*** (at [129] above). Nevertheless, having regard to the fact that the ***narrow*** doctrine was formulated at or around the same time as ***Class 2 undue influence***, we are of the view – on further reflection – that this doctrine was ***not*** a ***separate doctrine*** of ***unconscionability*** as such but, rather, ***was another species of undue influence*** – what we have come to term today as ***Class 1 undue influence***.

146 If this analysis is accepted, this would also explain *why* ***Class 1 undue influence*** *looks* ***so very similar to*** *the* ***narrow doctrine of unconscionability*** (which relates to improvident transactions) (see in this connection the observations of Jonathan Morgan in *Great Debates in Contract Law* (Palgrave Macmillan, 2nd Ed, 2015) ("*Great Debates*") at p 211). And, if so, the reference to the ***narrow doctrine of unconscionability*** is a reference to ***what is, in form as well as substance, a redundant doctrine*** (in the sense that it would make perfectly good sense as well as make for less confusion to simply refer to such a doctrine as ***Class 1 undue influence***). We would add that the analysis just proffered draws historical support from Prof David Ibbetson's magisterial treatise, *A Historical Introduction to the Law of Obligations* (Oxford University Press, 1999), where the learned author observes as follows (at p 209):

> Chancery's procedures allowed it to look more closely at whether defendants' impaired mental capacity had undermined their voluntariness. Lunatics' contracts would routinely be set aside,

> for example, though not those of the merely simple-minded. There was some suggestion that more transitory weaknesses such as drunkenness could also nullify contractual intent, but the court was not receptive to such arguments unless clear fraud was also involved. *The court was more generous in extending duress from its narrow Common-law base into situations where one party had exercised an* ***undue influence*** *over the other. This was relatively straightforward where there was* ***a relationship of power, trust, or confidence between the parties****, such as between trustee and beneficiary, parent and child, or attorney and client; it smacked of fraud for the dominant party to take advantage of the weaker. It was less willing to intervene where there was* ***no prior relationship*** *between the parties: relief was regularly granted where moneylenders and the like had* ***taken advantage of indigent but prodigal expectant heirs****, even when they might have been thought old enough to look out for their own interests—a 40-year-old proctor from Doctors' Commons, inaptly named Wiseman, successfully obtained relief—but there was a reluctance to extend it much further than this.* The careful approach is well exemplified by the remarks of Lord Thurlow L.C. in *Fox* v. *Mackreth:* 'The Court will not correct a contract, merely because a man of nice honour would not have entered into it; it must fall within some definition of fraud; the rule must be drawn so as not to affect the general transactions of mankind.' [emphasis added in italics and bold italics]

147 There are, indeed, yet further legal implications if (but only if) the analysis in the preceding paragraph is accepted. And it is this: That the ***expansion*** of the ***narrow*** doctrine of unconscionability was ***historically flawed inasmuch as it proceeded from a non-existent doctrine of unconscionability*** (which, as we have sought to explain in the preceding paragraph, was, in fact, ***Class 1 undue influence***).

148 In fairness, though, we accept that it was always open to the courts to formulate, of its own accord, a ***broad*** doctrine of unconscionability. However, without the benefit of an initial legal platform, so to speak (in this instance, the ***narrow*** *doctrine of unconscionability*), such a formulation is, with respect, ***flawed*** because it does ***not*** contain or embody – ***in and of itself*** – the elements of principle accompanied by a datum level of ***certainty and predictability***. Put

simply, the ***broad*** doctrine of unconscionability looks very much like ***a broad discretionary legal device which permits the court to arrive at any decision which it thinks is subjectively fair in the circumstances*** – or, at least, does not provide the sound legal tools by which the court concerned can *explain* how it arrived at the decision it did based on principles that could be applied to *future* cases of a similar type. Indeed, this is precisely why we have (as noted above at [134]) – in the *Singapore* context – a consistent stream of High Court decisions which ***eschew*** *the* ***broad*** *doctrine of unconscionability* for precisely the reason which we have just noted (*ie*, ***broad and unbridled discretion***). In the circumstances, we, too, ***eschew and reject the broad doctrine of unconscionabilty*** and declare that it does *not* represent the law in the *Singapore* context.

(B) A REDUNDANT DOCTRINE?

149 What, then, of the ***narrow*** *doctrine of* ***unconscionability***? ***If*** it is, indeed, ***redundant*** simply because it is ***but another way of describing Class 1 undue influence***, should we not likewise ***eschew and reject*** the ***narrow doctrine of unconscionability***? We see much force in this argument. However, since acceptance of the *narrow* doctrine of unconscionability would ***not*** lead to any obvious *legal anomalies* ***and*** since it has been *generally accepted across the Commonwealth* (see, for example, *Undue Influence and Unconscionable Dealing* at paras 15-002–15–007), we see no reason to take special pains to declare that it is no longer part of Singapore law. Indeed, from the perspective of ***substance*** at least, it might ***not make a difference*** whether a plaintiff who is seeking to set aside a particular transaction invokes ***Class 1 undue influence or the narrow doctrine of unconscionability***. However, given ***the myriad of possible fact situations*** that might come before the courts, it may not be prudent to *completely* rule out situations where the application of these doctrines to the

same fact situation *might* lead to ***different*** *results (*although this is, as we explain below at [152], likely to be extremely rare). Indeed, the hypothesis just proffered in relation to the historical development of, and consequent relationship between, ***Class 1 undue influence*** and the ***narrow*** doctrine of ***unconscionability*** (at [145]–[148]) above) ***cannot*** be *accepted* ***unreservedly*** for the following very basic as well as fundamental reason.

150 It will be recalled that both the doctrines of undue influence (including Class 1 undue influence) as well as the narrow doctrine of unconscionability have their roots in ***equity***. This is a point of the first importance simply because the development of *equitable* principles in the early *case law* did not analyse as well as classify these doctrines in the forms we recognise them *today* (*cf* P S Atiyah, *The Rise and Fall of Freedom of Contract* (Clarendon Press, Oxford, 1979) at pp 146−149, especially at p 148). For example, categories such as Class 1, Class 2A and Class 2B undue influence were developed only later on in the more *modern* case law. And the development of the ***broad*** doctrine of unconscionability is an even more recent development. To that we might add that, *in contrast with the common law*, principles of equity developed in a quite different manner. This is not surprising as principles of equity were developed in order to *supplement* the common law and mitigate the perceived strictness of the common law rules (see, *eg*, John McGhee QC (ed), *Snell's Equity* (Sweet & Maxwell, 33rd Ed, 2015) ("*Snell*") at para 1–002). Not surprisingly, therefore, the focus of courts exercising their equitable jurisdiction was much more on the justice and fairness of *the* ***specific*** *case at hand* (in contrast to the simultaneous development of ***general*** *principles* applicable to all future cases of a similar type (see also the reference by this Court in *Ang Sin Hock v Khoo Eng Lim* [2010] 3 SLR 179 to what was described (at [79]) was "the (derogatory) proverbial reference to justice as measured by 'the length of the

Chancellor's foot'"; see *Snell* at para 1–008; *cf Snell* at paras 1–011, 1–013 and 1–014 on the later development of equity). Hence, the various classifications and categories only emerged later on in the more modern case law.

151 That having been said, it is undoubtedly the case that Class 1 undue influence and the *narrow* doctrine of unconscionability ***often do overlap to a considerable extent or may even be coincident with or identical to each other***, (as the facts of this very case illustrate). In this regard, it has been argued that undue influence is ***different from*** the doctrine of unconscionability inasmuch as the former is *plaintiff*-sided whereas the latter is *defendant*-sided: see, *eg*, Peter Birks and Chin Nyuk Yin, "On the Nature of Undue Influence" in Jack Beatson and Daniel Friedman (eds), *Good Faith and Fault in Contract Law* (Clarendon Press, 1995) at ch 3; *Amadio*, *per* Mason J at 461; *Thorne v Kennedy* [2017] HCA 49 at [16]−[29] and [86] and [92], *per* Kiefel CJ and Bell, Gageler, Keane and Edelman JJ and [86] and [92], *per* Gordon J, although the learned judges did not really elucidate the precise *relationship* as such amongst the various doctrines: see [30] and [115]; and *Portman Building Society* at 233, *per* Ward LJ. However, it has been persuasively argued that the plaintiff-sided and defendant-sided perspectives are either descriptively inaccurate or two sides of the same coin and, if so, undue influence is *not* different from the doctrine of unconscionability: see, *eg*, Rick Bigwood, "Undue Influence: 'Impaired Consent' or 'Wicked Exploitation'?" (1996) 16 OJLS 503 as well as James Devenney and Adrian Chandler, "Unconscionability and the Taxonomy of Undue Influence" [2007] JBL 541.

152 However, even if we *assume* that Class 1 undue influence and the *narrow* doctrine of unconscionability *overlap* (as opposed to being coincident with or identical to) each other, we are of the view that *the degree of overlap*

would be so extensive as to result in both doctrines being virtually coincident with or identical to each other. This is because, first, in cases where ***Class 1 undue influence*** can be pleaded successfully, there would ***necessarily*** *be* ***unconscionable conduct as well***. Certainly, as will be seen (see [154]–[155] below), the present case provides a vivid example of the overlap between the two doctrines. Next, whilst it is *possible* that there could be situations of ***unconscionability*** where advantage has been taken of the plaintiff *without the overt exercise of influence*, such situations would be ***extremely rare*** indeed – particularly if we take into account the fact that *the line between a (**passive**) act of taking advantage of the plaintiff and an (**overt**) act of influence* can be ***a very fine one*** indeed. Indeed, it is ***difficult to imagine*** a situation ***in real life*** where an unconscionable act by the defendant which takes advantage of the plaintiff is somehow ***not*** *accompanied by* some *overt* act that *facilitates* the defendant in his or her taking advantage of the plaintiff. Nevertheless (and to recapitulate), our hypothesis (to the effect that the *narrow* doctrine of unconscionability is ***coincident with or identical to*** *Class 1 undue influence*) remains just a hypothesis, at least for the time being – until such time when we receive detailed arguments that would enable us to arrive at a definitive conclusion on this particular issue. ***In the meantime, the law relating to unconscionability in the Singapore context is the narrow doctrine of unconscionability, as modified in the manner stated above at [141]–[144].***

153 In our view, there is no need, at this particular juncture, to consider the *possible linkages or relationships* amongst the doctrines of duress, undue influence and unconscionability, or whether two or more of these doctrines ought to be *merged* from a legal point of view. This is because, having found that the DOT in this case ought to be set aside on the basis of undue influence, there is, strictly speaking, no need to explore this more novel issue. We note,

moreover, that the doctrine of *duress* was not invoked in this case. But there is a more fundamental reason why there is no need to explore the aforementioned issue, and that is that such an issue arises only ***if*** we accept a ***broad*** doctrine of unconscionability. Given the fact that we have ***not*** accepted such a broad doctrine of unconscionability (but have instead accepted a ***narrow*** doctrine of unconscionability), there is, *ex hypothesi*, no need to consider this more novel issue. However, in order to settle this particular issue in a definitive manner, we will address this more novel issue in a ***coda*** to this judgment, in which we proceed on the *assumption* (which, as mentioned, we do ***not*** in fact accept) that a ***broad*** *doctrine of unconscionability* is indeed viable in the first place).

(4) Applying the law

154 We now turn to apply the aforementioned legal principles to the facts of this case. In our judgment, the Judge was correct to set aside the DOT on the basis of unconscionability. This result should be unsurprising given the overlap between "Class 1" undue influence and the doctrine of unconscionability, which we have alluded to (see [151] above). Certainly, our finding that the Husband suffered from acute grief that impaired his ability to make decisions and made him susceptible to influence is of central relevance here. In our view, the impairment of his mental state was of such gravity that it constitutes an ***infirmity*** that the Wife ***knew*** about and took ***advantage of*** by leveraging on his sense of isolation. Indeed, it will be recalled that the Wife knew that he was in no state of mind to execute a will (see [80] above), much less a trust that immediately divests him of all his assets.

155 We note further that the Husband had no independent advice and the DOT was *clearly* a transaction at an undervalue, both of which weigh ***heavily*** in favour of a finding of unconscionability. We note that voluntary dispositions

would almost always be transactions at an undervalue, but the point to be made in this case is that the DOT was by no means a reasonable way of providing for the Son *especially* when one takes into account the circumstances in which it was executed. We stress that the absence of independent advice and the characterisation of a transaction as being at an undervalue are ***not*** mandatory elements to be satisfied (see [141] above). However, as this case demonstrates, the presence of these factors will often ***underscore and highlight the exploitation of an infirmity that renders a transaction improvident***. Indeed, it is also for these reasons that we agree with the Judge that the DOT was by no means fair, just and reasonable.

156 Accordingly, we affirm the Judge's decision to set aside the DOT on the basis of unconscionability.

Conclusion

157 For the reasons set out above, the appeals are dismissed with costs to the Husband. We fix costs at a global sum of $60,000 (inclusive of disbursements) for both appeals to be borne by the Wife. There will be the usual consequential orders.

Coda – an umbrella doctrine?

158 As we have already noted above (at [153]), given the fact that we have decided that only a ***much narrower*** doctrine of unconscionability ought to apply, the issue as to whether or not the doctrines of duress, undue influence and unconscionability should be merged to constitute a new legal doctrine under an umbrella doctrine of unconscionability does not arise. Indeed, a ***prerequisite*** for even the consideration of such a merger of doctrines is that the ***broad*** doctrine of unconscionability is legally viable to begin with because it is only

by accepting the existence of this ***broad*** *doctrine* in the first place that the court has ***a sufficiently broad legal "umbrella" under which the doctrines of duress and undue influence could conceivably come under***. Put another way, the ***narrow*** doctrine of unconscionability is ***unable, by its very nature***, to constitute *a sufficiently broad legal "umbrella"* under which the doctrines of duress and undue influence could conceivably come under. But *this does* ***not*** *mean that the narrow doctrine of unconscionability is* ***unrelated*** *to* the doctrines of duress or undue influence. As we shall see (at [170]–[172] below), the narrow doctrine of unconscionability ***overlaps (or may even be coincident) with*** *the doctrines of duress and undue influence*.

159 However, let us *assume*, for the sake of argument, that a ***broad*** *doctrine of* ***unconscionability*** exists (which, for the avoidance of doubt, is a proposition that we do *not*, in fact, endorse). If so, are there persuasive arguments that the doctrines of duress and undue influence ought to be ***merged*** *together with such a doctrine, such that the broad doctrine of unconscionability constitutes* ***a single umbrella doctrine***?

160 Before considering whether such persuasive arguments exist, it might be apposite to set out the relevant ***background*** to this inquiry. We note again that the doctrine of duress was not invoked in the present case but we include a discussion of it because it is an *integral* part of this *broader* approach. In the discussion that follows, we use the term "unconscionability" to refer to the ***broad*** doctrine of unconscionability, unless otherwise indicated.

The relevant background

161 In the context of ***the present case***, the issue of linkages or relationships amongst the doctrines of duress, undue influence and unconscionability was

raised for the consideration of the Judge by the citation of two articles, namely, Andrew Phang, "Undue Influence – Methodology, Sources and Linkages" [1995] JBL 552 ("*Phang*") and *Capper (2010)* ([127] above). There was in fact an earlier article by the latter author on this subject: see David Capper, "Undue Influence and Unconscionability: A Rationalisation" (1998) 114 LQR 479 ("*Capper (1998)*").

162 We also pause to note four related points by way of preliminary observation. The first is that *Phang* raises the point in its ***most extended*** *form* (*viz*, the merger of all three doctrines of duress, undue influence and unconscionability under the single umbrella of unconscionability). The two articles by Prof Capper (*viz*, *Capper (1998)* and *Capper (2010)*) propose a similar but more modest merger between two of the three doctrines, by subsuming undue influence within unconscionability.

163 The second related point is that *Phang* was written by a member of the present *coram* whilst he was in legal academia prior to joining the bench. This prompts the question of what is the status and/or persuasiveness (if any) of such material that has been written in the *extrajudicial* sphere.

164 The third related point is that there is a wealth of other articles, not cited to the court below, which also undertook various explorations of the relationship among the doctrines of duress, undue influence and unconscionability: see, *eg*, *Capper (1998)*; Matthew D J Conaglen, "Duress, Undue Influence, and Unconscionable Bargains – The Theoretical Mesh" (1999) 18 NZULR 509; and Alexander J Black, "Undue Influence and Unconscionability in Contracts and the Equitable Remedy of Rescission in Canada" (2011) 17 New England J Int'l & Comp Law 47 (where only the relationship between undue influence and unconscionability was considered in the Canadian context). What,

perhaps, is even more surprising is the fact that earlier this year (*ie*, almost *a quarter of a century* after *Phang* was published), there appeared yet another article in a leading academic journal on the subject: see Marcus Moore, "Why Does Lord Denning's Lead Balloon Intrigue Us Still? The Prospects of Finding A Unifying Principle for Duress, Undue Influence and Unconscionability" (2018) 134 LQR 257.

165 The fourth – and final – related point is of no small significance. It is that the *relevant background* consists *wholly* of *academic articles*. This is not surprising in view of the fact that what is being proposed here is *novel*. More importantly, perhaps, it is *normative* in character inasmuch as it proposes *new* principles of *law* altogether. However, it also signals the need for ***caution*** on the part of this Court. Unlike academic articles which float ideas as well as concepts of every stripe with no immediate or direct ***practical*** consequences, the law laid down by the courts constitute the law of the land which carries with it immediate and direct practical consequences and implications on those bound by the law and the parties before the court. This is not surprising for the mission of the former is to stimulate thought as well as ideas. The mission of the latter, however, is rather more modest: it is to resolve the dispute between the specific parties and to attempt, in the process, to lay down the relevant legal rules and principles as clearly and as coherently as possible for application in future cases. As this Court observed in *Lee Tat Development Pte Ltd v MCST Plan No 301* [2018] 2 SLR 866 (at [12]), the need is for "'wise spirits' instead of 'bold spirits'". At this juncture, it might be apposite to first elaborate on the second point made at [163] above. That concerns the status or persuasiveness (if any) of academic articles, which are necessarily written in the *extrajudicial* context, to the evaluation of the practical status or viability of the argument contained therein in the *judicial* sphere.

Extrajudicial pronouncements are not binding on the courts

166 It is commonsensical and obvious that *extra*judicial pronouncements are ***not*** binding on the *courts*. We can, perhaps, do no better than to quote and endorse the following observations made by Lord Sumption in response to various essays on his extrajudicial lectures (see Lord Sumption, "A Response" in N W Barber, Richard Elkins and Paul Yowell (gen eds), *Lord Sumption and the Limits of the Law* (Hart Publishing, 2016) at ch 12 at p 213):

> … ***[T]here is no point comparing my lectures with my judgments on these issues and finding inconsistencies between them. Of course they are inconsistent. As a judge, I am not there to expound my own opinion. My job is to say what I think that law is. By comparison, in a public lecture, I am my own master. I can allow myself the luxury of expressing approval or dismay about the current state of the law. You might wonder whether, in the highest court of the land, which is bound by no precedent even of its own, there is any difference between my own opinion and my exposition of the law. I have to tell you that there is and that it matters. The personal opinions of the judges in the Supreme Court are only one element in the complex process of decision-making, and not necessarily the most important one.*** Statutes bind judges absolutely, within the limits of interpretative licence. Established principle, reflected in existing case law, may not strictly bind them, but it is of fundamental significance. Even when the Supreme Court changes the law, it ought to do so within the framework of existing principle, unless there are particularly strong reasons for a more radical approach. Moreover, the Supreme Court's decisions are made collectively. Of course, a judge may dissent or he may concur for different reasons. This can be personally satisfying. But it is not much of a service to the public. It can also leave the ratio of the decision unclear, perhaps the worst sin that an appellate court can commit, short of actually getting the answer wrong. [emphasis added in bold italics]

167 Indeed, Lord Sumption was speaking of extrajudicial views expressed *while he was a judge*. His observations would apply, *a fortiori*, to an article written *when the author concerned was not even a judge yet*, as is the situation with the article concerned in the present appeal, namely *Phang* ([161] above).

Undoubtedly, the article concerned would ***not*** be binding on this Court; it would not even be influential by dint of its provenance alone, save to the extent that it contained persuasive arguments that might be of assistance to the court. Therefore, it cannot be begun to be argued that the views expressed in an *extra*judicial context in *Phang* (to the effect that there ought not only to be a broad doctrine of unconscionability but also that that doctrine ought to constitute an umbrella doctrine subsuming the doctrines of duress and undue influence) are inconsistent with the views of this Court. Certainly, it has been observed by this Court in *Chua Chian Ya v Music & Movements (S) Pte Ltd (formerly trading as M & M Music Publishing)* [2010] 1 SLR 607 ("*Chua Chian Ya*") at [17] and [24] (with the *coram* delivering the decision including the author of *Phang*) as follows:

> 17 Broadly speaking, covenants in restraint of trade are *prima facie* unenforceable unless the contractual provisions are shown to be reasonable, taking into account the interests of both the parties concerned and the public. Specifically, the application of this doctrine to employment contracts is well established (see generally the decision of this court in *Man Financial (S) Pte Ltd v Wong Bark Chuan David* [2008] 1 SLR(R) 663, where the doctrine was examined). This doctrine was applied to contracts between songwriters and music publishers in the seminal House of Lords decision of *A Schroeder Music Publishing Co Ltd v Macaulay* [1974] 1 WLR 1308 ("*Schroeder Music Publishing*"), a case which Chua relied upon heavily. However, it should be noted, at the outset, that that particular case involved an extremely one-sided contract. Indeed, the case involved such an extreme fact situation that it is often referred to by advocates of ***a broader (and distinct) doctrine of unconscionability, not least because of Lord Diplock's speech therein (even though such a doctrine has yet to take root in the Commonwealth in general and in Singapore in particular*** (see, for example, the High Court decision of *Wellmix Organics (International) Pte Ltd v Lau Yu Man* [2006] 2 SLR(R) 117 at [72] and the decision of this court in *Sandar Aung v Parkway Hospitals Singapore Pte Ltd* [2007] 2 SLR(R) 891 at [39]; although *cf* the Australian position as embodied in, for example, the leading High Court of Australia decision of *The Commercial Bank of Australia Limited v Amadio (*1983) 151 CLR 447)).

> …
>
> 24 We would respectfully endorse the approach taken by Parker J in [*Panayiotou v Sony Music Entertainment (UK) Limited* [1994] EMLR 229] as briefly outlined above. ***It is important, however, to emphasise that this does not entail the adoption of a broader doctrine of unconscionability – the legal status of which is still in a state of flux in the Commonwealth in general and in Singapore in particular (see above at [17]).*** In any event, it is unnecessary for the purposes of the present appeal to deal with the question of whether there is (or ought to be) a broader doctrine of unconscionability (although we note that there is local case law endorsing a narrower equitable jurisdiction proscribing specific (and improvident) bargains (see, for example, the High Court decisions of *Lim Geok Hian v Lim Guan Chin* [1993] 3 SLR(R) 183 and *Pek Nam Kee v Peh Lam Kong* [1994] 2 SLR(R) 750; and *cf* the (also) High Court decision of *Fong Whye Koon v Chan Ah Thong* [1996] 1 SLR(R) 801, which demonstrates that the line between a broader doctrine of unconscionability and this (narrower) equitable jurisdiction might be blurred)). This is because the situation in *Panayiotou* was, in fact, precisely the situation which obtains in this appeal. Chua's case did not involve the broader doctrine of unconscionability, but focused instead on the court's common law jurisdiction to declare a contract unenforceable as a restraint of trade. Although Chua sought to invoke *Schroeder Music Publishing* ([17] *supra*) in aid of her case, she relied on that particular precedent from the perspective of the doctrine of restraint of trade only.

For the reasons we have already set out above, we have not only preferred the tentative views expressed in *Chua Chian Ya* to those expressed in *Phang* but also elaborated upon these views in adopting a much more modest doctrine of unconscionability (*viz*, the ***narrow*** *doctrine of unconscionability*) instead.

168 With the above observations in mind, let us now turn to the arguments in favour of a new umbrella doctrine of unconscionability and then proceed to evaluate them in light of logic, principle, fairness as well as practicality.

Possible virtues of a new umbrella doctrine

169 The arguments in favour of a new umbrella doctrine of unconscionability find their force principally from the linkages across the doctrines of economic duress, undue influence, and unconscionability: see *Capper (2010)* at pp 416–419; *Phang* at pp 565–566; and *Phang & Goh* at para 756). We pause to note at this juncture that the linkages across the three doctrines have been recognised by this Court in *Gay Choon Ing v Loh Sze Ti Terence Peter and another appeal* [2009] 2 SLR(R) 332 at [112], although the discussion therein centred around the concept of consideration and did not address directly the question of whether there ought to be an umbrella doctrine of unconscionability.

170 As we have already seen, there are close linkages between ***undue influence*** and ***unconscionability***. Their similarities were noted in *Amadio*, although Mason J attempted to distinguish the two doctrines by observing as follows (at 461):

> Although unconscionable conduct in this narrow sense bears some resemblance to the doctrine of undue influence, there is a difference between the two. In the ***latter*** the will of the innocent party is ***not independent and voluntary because it is overborne***. In the ***former*** the will of the innocent party, even if independent and voluntary, is the result of the ***disadvantageous position in which he is placed and of the other party unconscientiously taking advantage of that position***. [emphasis added in bold italics]

171 It has been said, however, that this distinction is flawed. To begin with, commentators are quick to point out that criticisms, *eg*, by Prof Patrick Atiyah of the "overborne will theory" – which presupposes some form of involuntary automatism – in relation to economic duress apply with equal force with respect to undue influence: see *Phang* at p 567; Andrew Phang & Hans Tjio, "Drawing Lines in the Sand? Duress, Undue Influence and Unconscionability Revisted:

R v Attorney-General of England and Wales" (2003) 11 RLR 110 ("*Phang & Tjio*") at p 118; see also Andrew Phang, "Whither Economic Duress? Reflections on Two Recent Cases" (1990) 53 Modern Law Review 107 at p 109; see also *Great Debates in Contract Law* at p 195 for a discussion of Prof Atiyah's criticism. Moreover, it is incorrect to suggest that undue influence is not concerned with the defendant's actions: see *Phang* at pp 567–568. Certainly, as its name suggests, the doctrine of ***undue*** influence seeks to address situations where ***illegitimate forms of pressure*** are applied by the defendant to influence the plaintiff into entering into certain transactions. This is especially evident where "Class 2" undue influence is concerned, for it supposes a pre-existing relationship of trust and confidence, which in turn assumes that the plaintiff is in a ***disadvantaged position*** flowing from the trust and confidence reposed in the defendant. *Capper (2010)* summarises why it is flawed to draw a distinction between undue influence and unconscionability on the basis that the former is premised on defective consent and the latter is based on unconscionable conduct (at pp 417–418):

> The most serious attempt to distinguish the unconscionable bargain from undue influence was in an essay by Professor Birks and Dr Chin about the nature of undue influence. This essay acknowledged that both undue influence and the unconscionable bargain could do most of the work of the other. The difference lay in undue influence's concentration upon the claimant's defective consent and the unconscionable bargain's concern with the defendant's unconscionable conduct. Undue influence should be seen as a claimant-sided form of relief and the unconscionable bargain as defendant-sided. This theory of undue influence should not be accepted for two principal reasons. ***First, an analysis of undue influence cases reveals that undue influence is concerned with the unconscionable conduct of the defendant***. This is most clearly revealed by the way that the House of Lords in *Royal Bank of Scotland v Etridge (No. 2)* restated presumed undue influence as the drawing of an evidential inference from the relationship of the parties and the nature of the transaction that undue influence had actually taken place. ***Secondly, the proposition that contract law affords relief to a party***

> ***simply on the ground of her defective consent is contrary to the basic principle that a contracting party should not be deprived of a bargained-for advantage unless the bargaining process fell short of societal standards of freeness and fairness.*** [emphasis added in bold italics]

172 ***Duress*** and ***undue influence*** are also very similar in substance. The former doctrine requires a transaction to have been procured by the *illegitimate pressure* that is exerted by one party over the other. This illegitimate pressure takes the form of a threat that is accompanied by a demand for a promise which (if satisfied) nullifies that threat, with the other party agreeing to the promise as he perceives that threat as real (see generally *The Law of Contract in Singapore* at para 12.006). This tells us the two objectionable elements which duress is concerned with. These are (a) the nature of the pressure (*ie*, is the threat, or the demand accompanying the threat, made in such a manner as to render the pressure *illegitimate*?); and (b) the impact of the threat on the person at whom the threat is directed, specifically whether the threat so affected him as to *coerce* his will: see *The Law of Contract in Singapore* at para 12.007 and 12.029−12.093 for a detailed rendition of these principles. There are various categories of duress, including duress to the person, to goods, as well as (in its more modern form) economic duress: see generally *The Law of Contract in Singapore* at paras 12.013−12.027. The following direction by Sir J P Wilde to the jury in *Hall v Hall* (1868) LR 1 P & D 481 (at 482) on the question of undue influence (which was made as far back as 1868 in relation to an action to set aside a will) might also be usefully noted (provided it is also borne in mind that there now exists the doctrine of ***economic*** *duress* which does not necessarily entail the use, or threatened use, of force):

> … ***[P]ressure*** of whatever character, whether acting on the fears or the hopes, if ***so exerted as to overpower the volition without convincing the judgment***, is a species of restraint under which no valid will can be made. ***Importunity or threats***, such as the testator has not the courage to resist,

> ***moral command asserted and yielded*** for the sake of peace and quiet, ***or of escaping from distress of mind or social discomfort***, these, *if carried to a degree in which the free play of the testator's judgment, discretion or wishes, is* ***overborne****, will constitute* ***undue influence****, though no force is either used or threatened*. In a word, a testator may be led but *not driven*; and his will must be *the offspring of his own volition, and not the record of some one else's*. [emphasis added in italics and bold italics]

173 Not surprisingly, given the close linkage between (at least Class 1) undue influence and duress, there is also a very close relationship between duress and unconscionability (*cf* also the New South Wales Court of Appeal decisions of *Equiticorp Finance Ltd (in Liq) v Bank of New Zealand* (1993) 32 NSWLR 50 at 106–107, *per* Kirby P (as he then was and dissenting, albeit not on this particular point) and *Australia & New Zealand Banking Group v Karam and Others* (2005) 64 NSWLR 149 at [57] and [62]; *cf* Rick Bigwood, "Throwing the Baby out with the Bathwater? Four Questions on the Demise of Lawful-Act Duress in New South Wales" (2008) 27 U Queensland LJ 41). Put broadly, both doctrines are in essence about the use of illegitimate pressure or the exploitation of an infirmity to form a transaction that the court will not uphold. Viewed from this perspective, a persuasive argument can be made that the distinctions across these three doctrines are more apparent than real. As Deane J noted in *Amadio* (at 474):

> Undue influence, like common law duress, looks to the quality of the consent or assent of the ***weaker*** party… Unconscionable dealing looks to the conduct of the stronger party in attempting to enforce, or retain the benefit of, a dealing with a ***person under special disability*** in circumstances where it is not consistent with equity or good conscience that he should do so. [emphasis added in bold italics]

174 On the back of these conceptual similarities and linkages, various commentators have advocated in favour of an umbrella doctrine of unconscionability (see, *eg*, *Ashley Black* at pp 148–149; *Capper (1998)* at

p 503; *Capper (2010)* at p 418; *Phang & Tjio* at p 118; and *Phang* at p 568). The heart of the various arguments can be distilled into one of *conceptual neatness*. More than just that, however, it has also been argued that a merger of these doctrines will also bring clarity and perhaps even certainty to the law. In particular, it has been observed that these doctrines "are often pleaded together in a variety of permutations" (*Phang & Tjio* at p 118). To that extent, there is force behind the argument that a merger would simplify the law instead of obfuscating their similarities such that "[c]ases might be better argued because litigants and their advisors would better understand what issues around which evidence and argument had to be organised" (see *Capper (1998)* at p 503).

Our views

175 As already emphasised right at the outset of the present coda, the issue as to whether there ought to be a new umbrella doctrine of unconscionability (under which the doctrines of duress and undue influence can be *subsumed*) does not even arise in the first place since we have only endorsed a ***narrow*** *doctrine of unconscionability* as such. However, *even if* we were prepared to endorse a ***broad*** *doctrine of unconscionability*, we would ***still have rejected the suggestion of a new umbrella doctrine of unconscionability***.

176 Whilst subsuming the doctrines of duress and undue influence under an umbrella doctrine of unconscionability might be ***theoretically elegant***, it is (and this is the important point) ***practically problematic*** inasmuch as there do not appear to be ***practically workable legal criteria*** that could be utilised by the courts to determine what amounts to unconscionable behaviour that vitiates a contract. Indeed, the fundamental problem which led to this Court's rejection of the ***broad*** doctrine of unconscionability appears yet again – *that the broad doctrine of unconscionability has no workable legal criteria and therefore*

permits (and may actually lead to) ***excessive subjectivity*** *on the part of the court that in turn leads to* ***excessive uncertainty and unpredictability***. In our view, the excessive use of discretion in a subjective sense (the consequence of which would be to *unravel* the contract concerned) would *undermine the sanctity of contract to an unacceptable degree.*

177 Put simply, ***the exception would have undermined the rule***. Given that the "rule" in this particular context (*viz*, sanctity of contract) is not a mere *theoretical* concept but is, in fact, ***fundamental*** **to** ***the conduct of daily commerce in all its multifarious forms*** (not merely in execution but also in guidance as well as prediction), the need to maintain "legal stability" in so far as this rule is concerned is of the first importance. However, as is the case with virtually all areas of the law, ***exceptions*** exist in order to ensure that certainty and predictability do not become ossified in a way that leads to injustice as well as unfairness in certain specific situations. By their very nature and function, though, such exceptions ***must be legally limited or constrained in a principled manner***. And herein, in our view, lies the ***nub*** of the problem – the ***broad*** *doctrine of unconscionability* ***is not so limited***. Viewed in this light, the (fundamental) difficulty is not only *practical* ***but also*** *theoretical* as well.

178 That being said, could it be argued that the broad doctrine of unconscionability could be appropriately limited or constrained by incorporating the ***existing*** *legal criteria* contained in duress and/or (especially) undue influence? As we have examined above, the linkages between these doctrines render it an extremely attractive solution at first blush. However, when it is examined more closely, we are of the view that it unfortunately does not pass legal muster.

179 We acknowledge that ***duress*** and ***Class 1 (or actual) undue influence*** are very similar in substance. There is *also* a very close relationship between the doctrine of ***(certainly Class 1 and, possibly, Class 2B) undue influence*** and the doctrine of ***unconscionability***. However, what is crucial for present purposes is the fact that *the* ***existing*** *legal criteria* for both duress as well as undue influence relate to ***narrower and more specific*** fact situations which are *also* covered by the narrow (and *not* the broad) doctrine of unconscionability. Indeed, as discussed above, the ***existing*** *legal criteria* for both duress as well as undue influence ***are heavily correlated to (if not coincident with)*** the legal criteria for the narrower doctrine of unconscionability: see above at [170]−[173]. Hence, if *the* ***existing*** *legal criteria* for both duress as well as undue influence are utilised to ***limit or constrain*** the broad doctrine of unconscionability, ***what we would be left with would be the narrow doctrine of unconscionability***. Put simply, the legal criteria just mentioned could not, *ex hypothesi*, be utilised as legal criteria for the ***broad*** doctrine of unconscionability; these legal criteria, if applied to the broad doctrine of unconscionability, would, instead, *cause the broad doctrine of unconscionability to* ***collapse back*** *into the narrow doctrine of unconscionability*. We would then be back to *square one*, so to speak, inasmuch as we would find ourselves *back to* ***the broad and vague legal criteria*** in relation to the ***broad*** doctrine of unconscionability – which was precisely the reason that led us to ***reject*** the ***broad*** *doctrine of unconscionability* in the first place.

180 To ***summarise***, in the ***absence*** of ***principled as well as practical legal criteria*** that would enable an umbrella doctrine of unconscionability (that *subsumes* within itself the doctrines of duress and undue influence) to ***function in a coherent as well as practical manner,*** it is our view that such a novel as

well as radical shift towards such an umbrella doctrine should *not* be undertaken. As we have seen, the ***broad*** *doctrine of unconscionability* that constitutes the ***premise as well as basis*** for such umbrella doctrine *might not even be viable in the first place* because it might possibly be historically flawed and, if so, would therefore *not* have been developed in a coherent and principled manner. Put simply, what could, in the final analysis, pass legal muster as ***a coherent and principled doctrine of unconscionability was – at best – a narrow one.***

Andrew Phang Boon Leong Judge of Appeal	Steven Chong Judge of Appeal	Belinda Ang Saw Ean Judge

Chan Seng Onn Judge	Quentin Loh Judge

Suresh s/o Damodara, Ong Ziying Clement and Khoo Shufen Joni (Damodara Hazra LLP) for the appellant in Civil Appeal No 3 of 2018;
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Michael Hwang SC and Rachel Ong Yue Qing (Michael Hwang Chambers LLC) (instructed), Lee Hwee Khiam Anthony, Loh Wai Mooi and Wang Liansheng (Bih Li & Lee LLP) for the respondent in Civil Appeals Nos 3 and 5 of 2018.
