JURISDICTION TO AWARD EQUITABLE DAMAGES IN SINGAPORE[1]

This article considers whether there is a jurisdiction to award damages in equity in Singapore. It argues that despite a recent case that seems to decide the contrary, it is still possible to argue that there is such a jurisdiction. But in the interests of certainty, it is suggested that there should be legislation to confirm the jurisdiction.

I. INTRODUCTION

THE right to damages is usually associated with the common law. The term "damages" is used to describe the compensatory monetary award of a court to a party who has suffered loss, provided such loss results from an infringement of a legal right or the breach of a duty recognised by the common law. It is commonly said that an award of damages is a legal remedy, *i.e.,* a remedy awarded by the common law courts before the fusion of law and equity.[2]

There is little doubt that a court of equity could, before the fusion of law and equity, award monetary compensation for loss caused by the breach of fiduciary obligations.[3] In the early 19th century, it was asked in England whether a court of equity could also award damages. At first sight, the question may seem irrelevant now after fusion, as the court can in any case exercise the powers of a common law court. The fusion of law and equity allowed both courts to apply the rules of the common law and equity, regardless of the nature of the original proceedings. But it did not allow common law damages to be awarded for the breach of a right recognised only in equity.

With the passing of the Chancery Amendment Act (more commonly known as Lord Cairns' Act) in 1858[4] the Chancery was given the express power to grant damages in lieu of or in addition to an order for specific performance or injunction. The power conferred was wide enough to cover most situations involving equitable rights. The attention moved to the effect of the Act itself. Instead of "whether", the question became "when" and then "how" damages could be awarded in equity.

No equivalent of Lord Cairns' Act was ever passed as legislation in Singapore. It was not imperial legislation that was expressly extended to the colony of Singapore.[5] The Act only became law in

1 I am grateful to Dr. Andrew B. L. Phang and Mr. George S. S. Wei for their comments on an earlier draft of this article. Responsibility for the article remains my own.
2 By the Judicature Acts of 1873 and 1875 in England and the present s. 3 of the Civil Law Act, Cap. 43, 1985 (Rev. Ed.) in Singapore.
3 See Chapter 22, Hanbury and Maudsley, *Modern Equity* (12th ed., 1985) by Jill Martin.
4 Now s. 50 of the U. K. Supreme Court Act 1981. Unless the context indicates otherwise, any future reference to the "Act" will be to this Act.
5 Singapore was then a British colony.

England in 1858; *i.e.,* after 1926, the date on which all existing English law became the law of the colony of Singapore by virtue of the Second Charter of Justice.[6]

The 1887 case of *Tan Seng Qui* v. *Palmer*[7] contains dicta to the effect that Lord Cairns' Act was applicable in the Straits Settlements then. Recently, in *Shiffon Creations (Singapore) Pte. Ltd.* v. *Tong Lee Co. Pte. Ltd.*[8], Thean J. held that the Singapore courts do not have any such jurisdiction, distinguishing *Palmer* on the ground that the statutory provision upon which the dicta were based does not exist here anymore.[9]

The object of this article is to consider whether a Singapore court has the jurisdiction to grant damages in equity. *Shiffon* will of course have to be examined. English law will also be considered as the pre-1858 rules of equity are part of the law of Singapore, and an argument based on the reception of these rules may allow equitable damages to be awarded here. Finally, it will be argued that the position in Singapore is such that it would be sensible to legislate.

II. ENGLISH LAW

A. *Statutory Power*

In 1858, Lord Cairns' Act[10] was passed in England. Section 2 of the Act provided:

> "In all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction..., or for the specific performance of any covenant, contract, or agreement, it shall be lawful for the same court, if it shall think fit, to award damages to the party injured either in addition to or in substitution for such injunction or specific performance, and such damages shall be assessed in such manner as the court shall direct."

One obvious, and possibly, the only intended effect of the section was to allow a court of equity to award common law damages to a party who had first come to equity for equitable relief. Fusion had not yet been achieved, and the section enabled a court of equity to give any appropriate and necessary legal relief without the need for separate proceedings. It allowed a court of equity to award damages for breach of contract (a common law remedy) if for some reason the plaintiff had chosen to ask for an equitable remedy like specific performance first. If it could not or declined to do so, the party who asked for specific performance would have had to go to a common law court for damages if damage had also been suffered.[11] The effect of the section was in this sense procedural.

[6] Letters patent establishing the Court of Judicature at Prince of Wales Island, Singapore, and Malacca, in the East Indies, dated 27 November 1826. See *R.* v. *Willans* (1858) 3 Ky. 16 for an analysis of the Charter. The reception was subject to certain exceptions, for which see *R.* v. *Willans* and Bartholomew, in the introduction to the *Tables of the Written Laws of Singapore (1972)*.
[7] (1887) 4 Ky. 251, at p. 257.
[8] [1988] 1 M. L. J. 363.
[9] Section 10 of Ordinance III of 1878.
[10] 21 & 22 Vict. c. 27.
[11] But see *Phelps* v. *Prothero* (1855) 7 De. G. M. & G. 722, 44 E. R. 280.

The wording of the section however went further. It enabled the court to also award damages for the infringement of an equitable right. The effect of the section will be discussed in the next section.

After fusion, the Act was repealed, probably on the mistaken impression that its effect was purely procedural.[12] The juridiction was however still exercised despite the repeal, on the ground that there was a savings clause in the repealing Act.[13] Any doubts there may have been about such interpretation of the savings clause became immaterial in 1981 when it was finally reinstated in the U. K. statute book as section 50 of the Supreme Court Act 1981.

B. Inherent Power

Even without Lord Cairns' Act, there is an argument that the Chancery has an inherent jurisdiction to grant damages. The argument was not strongly canvassed after the enactment of the Act as it was easier to simply ask the court to exercise an express statutory power. There are contrary views on this inherent jurisdiction.[14] It might first of all be asked why the Act was necessary if there was such a jurisdiction.

In *Phelps* v. *Prothero*,[15] decided in 1855 (before Lord Cairns' Act), it was actually held that the plaintiff who had first come to equity was bound to put his legal rights under the control of the same court. He could not proceed to the common law for damages without the leave of the court he had already submitted his case to. In effect, the plaintiff was bound to submit his claim for common law damages to the court of equity. Turner L. J. had no doubt that "it was competent for [the court] to have ascertained the damages."[16] *Phelps* is a clear case of common law damages being awarded by a court of equity. Whether it represented the accepted view of lawyers of the day is difficult to ascertain. The passage of Lord Cairns' Act in a sense prevented the case from being reconsidered judicially, and could have been intended to prevent any contrary view being taken by judges.

At a more basic level, the question relating to jurisdiction cannot be meaningfully considered unless the concept of "damages" is made clear. It cannot be disputed that equity could and did make various money orders that were compensatory in nature. It may be that some of these were really restitutionary, for example, when trust property had been appropriated.[17] But in a very broad sense, the obligation imposed is to restore the trust or principal (to whom an obligation recognised in equity is owed) to the same position that it or he would be without the breach. The aim can be to restore or to compensate.[18]

12 Statute Law Revision and Civil Procedure Act 1883, s. 3 and the Schedule.

13 Section 5. There are a few cases interpreting the section in this manner. The most notable is *Leeds Industrial Co-operative Society* v. *Slack* [1924] A.C. 851.

14 Spry argues that there was such a jurisdiction in *Equitable Remedies* (3rd ed. 1984), Chapter 7. Meagher, Gummow and Lehane go so far as to say that Lord Cairns' Act was superfluous and unnecessary in *Equity, Doctrines and Remedies* (2nd ed. 1984), at p. 605. *Contra:* J. A. Jolowicz, "Damages in Equity - A Study of Lord Cairns' Act" (1975) 34 C. L. J. 224, at p. 231.

15 (1855) 7 De G. M. & G. 722, 44 E. R. 280.

16 (1855) 7 De. G. M. & G. 722, at p. 734, 44 E. R. 280, at p. 285.

17 See *Re Dawson* [1966] 2 N. S. W. L. R. 211, *per* Street J.

18 See Davidson, "The Equitable Remedy of Compensation" (1982) 13 M. U. L. R. 349.

When a fiduciary is in breach of his fiduciary obligations, the remedy is an order to account for profits made and or to make good any loss to the principal.[19] The order to make good any loss to the principal is a form of "damages" for breach of an obligation, even if the term "damages" is used in practice only to describe the common law remedy that is compensatory.[20]

So whether or not damages can be awarded in equity must depend first of all on what is meant by "damages". If the term is confined to common law damages, the position before Lord Cairns' Act was that common law damages for the infringement of common law rights were available in a court of equity if the award was not the sole object of the bill.[21] It is stated in *Fry on Specific Performance*[22] that with time the practice was disowned and a distinction drawn between compensation and damages.[23]

The case law reflects this change. Despite some earlier cases where damages were awarded in equity, it was said in *Todd* v. *Gee*[24] that the equitable jurisdiction to award relief on terms was very different from an award of damages. Conflicting dicta can also be found in some cases as to whether there was a jurisdiction to award damages in equity.[25] *Fry's* historical explanation puts the cases in perspective. If it is accepted, conflicting dicta would be explained by a change of the law with time.

C. Two Concurrent Jurisdictions?

If there was an inherent jurisdiction to award damages in equity, the passage of Lord Cairns' Act did not abrogate it. The Act itself, for practical reasons, would be resorted to first, but unless there is any provision in it precluding the continued exercise of the inherent jurisdiction, the inherent jurisdiction should survive. This point does not seem to have been taken up in any reported cases, probably because the Act is wide enough to cover most cases. It should

19 See Hanbury, *op. cit.*, Chapter 22; Hayton, *Underhill and Hayton: Law Relating to Trusts and Trustees* (14th ed., 1987), Chapter 20. Sometimes there will be a proprietary remedy as well. *Nocton* v. *Lord Ashburton* [1914] A. C. 932 is one example of a case where a solicitor was liable to compensate for breach of a fiduciary obligation. Lord Haldane used "compensation" and "damages" without distinction, though he suggested that the measure of damages for breach of an equitable obligation may not always be the same as for deceit or negligence.

20 Meagher, *op. cit.,* para. 2301. See *Fry on Specific Performance* (6th ed. 1921) paras. 1297-8.

21 *City of London* v. *Nash* (1747) 3 Atk. 512; *Higginbottan* v. *Hawkins* (1872) L. R. 7 Ch. App. 676; *Morgan* v. *Lariviere* (1875) L. R. 7 H. L. 423; see Story, *Equity Jurisprudence* (3rd English edition 1920), paras. 794-96b; G. R. Northcote, *Fry on Specific Performance* (6th ed. 1921), para. 1298.

22 *Op. cit,* para. 1298.

23 One example of this distinction is when specific performance of a contract is ordered with compensation because the subject matter of the contract is not as contracted by the parties. See Harpum, "Specific Performance With Compensation as a Purchaser's Remedy - A Study in Contract and Equity" (1981) 40 C. L. J. 47, especially at p. 70. Also see *Yeo Brothers Co. (Pte.) Ltd.* v. *Atlas Properties (Pte.) Ltd.* [1988] 1 M. L. J. 150.

24 (1810) 17 Ves. Jun. 273, at p. 277, 34 E. R. 106, at p. 107.

25 *E. g. Proctor* v. *Bayley* (1889) 42 Ch. D. 390, at pp. 398- 401; *Leeds Industrial Co-operative Society* v. *Slack* [1924] A. C. 851 per Viscount Finlay. More recently, in *Grant* v. *Dawkins* [1973] 1. W. L. R. 1406, [1973] 3 All E. R. 897, the question was left open while in *Oakacre* v. *Claire Cleaners (Holdings) Ltd.* [1982] Ch. 197, [1981] 3 All E. R. 667 it was acknowledged that there was a jurisdiction to deal with the whole case, including the award of common law damages.

theoretically be possible for a party who has failed in a plea under the Act to pursue a plea for damages under this inherent jurisdiction.

However, it is not desirable to revive this inherent jurisdiction. To do so will require reference to pre-1858 case law that does not provide clear rules as to the assessment of the damages. The law of damages was not well developed then. Damages were in fact sometimes simply assessed by a jury. Also, the fact that the jurisdiction would be based on equitable principles may open the gate for the development of a set of rules different from those at common law, a development that has been avoided with respect to Lord Cairns' Act.[26]

It could lead to damages being discretionary in equity[27] and ultimately result in two sets of rules for the assessment of damages. Such a development is not desirable. If any of the rules of the common law for assessing damages are inadequate to do justice, the more sensible response is to adapt or remodel them rather than to leave them and develop a separate set of rules that will not apply all the time.[28]

The most probable reason why no attempt has been made to invoke the inherent jurisdiction is that the Act is so wide that any bar to its plea would probably have the same effect *vis-a-vis* the inherent jurisdiction.

III. SIGNIFICANCE OF DAMAGES IN EQUITY

The right to damages in equity is not without significance. Broadly, three points can be considered.

A. Procedural

Prior to fusion, two actions were necessary if both legal and equitable remedies were sought. *Phelps* v. *Prathero*,[29] if accepted, may have achieved the same procedural result as Lord Cairns' Act. But before it could be reconsidered, the Act was passed. Law and equity are also administered concurrently in Singapore today.[30] The question whether common law damages can be awarded in equity in Singapore today is therefore of no consequence.

26 *Johnson* v. *Agnew* [1980] A. C. 176, [1979] 1 All E. R. 883, overruling *Wroth* v. *Tyler* [1974] Ch. 30, [1973] 1 All E. R. 897 on the basis of the assessment of damages in substitution for an order for specific performance under Lord Cairns' Act.

27 Common law damages are not discretionary.

28 This may be the reason for the decision in *Johnson* v. *Agnew* [1980] A. C. 367, where the House of Lords chose to relax the breach date rule for the assessment of damages at common law rather than to develop a different rule under the power conferred by Lord Cairns' Act. In *Nocton* v. *LordAshburton* [1914] A. C. 932, Viscount Haldane suggested that the measure of damages in equity may not always be the same as in a common law action without explaining "why" and "how". It does not take much to imagine the consequences of the development of this dictum. But even *after Johnson,* Barwick C. J. sitting in the High Court of Australia in *Wenham* v. *Ella* (1972) 27 C. L. R. 454 suggested that damages in equity may sometimes be greater than that at law without explanation.

29 (1855) 7 De. Gm. & G. 722, 44 E. R. 280.

30 S. 3, Civil Law Act, Cap. 43, 1985 (Rev. Ed.).

B. Assessment on a Different Basis

It was once thought that the assessment of damages under the Act was on a basis different from the common law. Under the common law, damages are generally assessed at the date of breach and not the date of judgment. The Act referred to damages in addition to or in substitution for an injunction or specific performance. In order for the damages to be in substitution for specific performance, they have to be equal to the value of specific performance. As specific performance is awarded at the end of the trial, the damages awarded should accordingly be assessed at the same date. Such an approach was in fact adopted by Megarry V.C. in *Wroth* v. *Tyler*.[31]

It is not possible to tell if this result was intended by the drafters, but it is certainly a plausible interpretation of the words used in the Act. The same argument however does not apply to damages awarded in addition to any of the equitable remedies as it would not be in place of an equitable remedy that is awarded on the day of the judgment. Despite this, the court in *Grant* v. *Dawkins*[32] assessed damages in addition to specific performance at the date of the judgment as well.[33]

The House of Lords in *Johnson* v. *Agnew*[34] did not agree with Megarry V. C. in *Wroth* v. *Tyler* that damages are assessed on a different basis under the Act. Lord Wilberforce with whom the rest of their Lordships agreed said:

> "If this establishes a different basis from that applicable at common law, I could not agree with it, but in *Horsier* v. *Zorro* [1975] Ch. 302, 316 Megarry J. went so far as to indicate his view that there is no inflexible rule that common law damages must be assessed at the date of the breach."

What their Lordships did was to accept a more flexible common law rule rather than a different one for equity. They saw no reason for awarding damages differently from the common law. Their Lordships effectively prevented a separate set of rules being developed for equitable damages, at least in so far as the Act is concerned.

C. Equitable Right not Recognised by the Common Law[35]

The Act gives the power to award damages in addition to or in lieu of an injunction or specific performance. This is subject to the court having the "jurisdiction to entertain an application for an injunction ... or... specific performance". There are rights recognised in equity that are not recognised by the common law. If a right is recognised in equity and the court has jurisdiction to hear the application for an in-

[31] [1974] Ch. 30, [1973] 1 All E. R. 897; followed in *Grant* v. *Dawkins* [1973] 3 W. L. R. 1406, [1973] 3 All E. R. 897 and *Malhotra* v *Choudhury* [1980] Ch. 52, [1979] 1 All E. R. 186. The practical effect of this approach is to give the plaintiff the benefit of any increase in the value of the subject matter of the litigation.

[32] *Supra.*

[33] See the criticisms and comments of Austin, Note in (1974) 48 A. L. J. 273 and Pettit, Note in (1974) 90 L. Q. R. 297.

[34] [1980] A. C. 367, at p. 400, [1979] 1 All E. R. 883, at p. 896.

[35] See generally Jolowicz, "Damages in Equity - A Study of Lord Cairns' Act" (1975) 34 C. L. J. 224 and Meagher, Gummow & Lehane, *Equity Doctrines and Remedies* (2nd ed. 1984), Chapter 23.

junction or specific performance, it can award damages to compensate for loss caused by the infringement of that right even though damages would not be available at common law.[36] So, for example, if there is an action for an injunction based on the doctrine of *Tulk* v. *Moxhay*[37] to prevent the breach of a covenant which the plaintiff is not a party to, damages can be awarded even though they would not be available at law because of the lack of privity of contract.[38]

Also if there is a contract for the sale of land which does not satisfy the writing requirement of section 4 of the Statute of Frauds,[39] damages can be awarded even though there is no right at law,[40] provided that there is sufficient part performance to take the case outside the statue in equity.[41] Damages can be awarded so long as there is a right recognised in equity and the court has jurisdiction to entertain the application.[42] Without the Act, damages cannot be granted in such cases unless the inherent jurisdiction is invoked and developed to cover them.[43]

The fact that the Act empowered the courts to grant damages that could not have been granted before the passage of the Act has been acknowledged judicially by the House of Lords in *Leeds Industrial Co-operative Society* v. *Slack*[44] where it was accepted that damages for future damage can be awarded.[45] At common law, no action can be brought until a right has been infringed and loss caused, whereas equity does not require a breach before granting relief.[46] The wording of the Act allowed damages to be in lieu of an injunction or specific performance. Both of these remedies can relate to the future and damages in place of them should therefore also compensate for such future loss.[47] Not all plaintiffs will want damages for future losses, especially when the loss is difficult to quantify. But if the loss is

36 Damages would not be available in a common law court as the right would not be recognised by it.

37 (1848) 2 Ph. 774.

38 See also *Eastwood* v. *Lever* (1863) 4 De G. J. & S. 114, 46 E. R. 859. *Wrotham Park Estates Co.* v. *Parkside Homes Ltd.* [1970] 2 All E. R. 321 is an interesting case where the power to award damages allowed the court to avoid a mandatory injunction that would have made no economic sense.

39 29 Car. 2, c. 3. The statute is law in Singapore: *Revely & Co.* v. *Kam Kong Gay* (1840) 1 Ky. 32.

40 This was one of the reliefs sought in *Tan Seng Qui* v. *Palmer* (1887) 4 Ky. 251 and *Lavery* v. *Pursell* (1888) 39 Ch. Div. 508, but see the view of Chitty J. in *Lavery,* at p. 518.

41 *Lester* v. *Foxcroft* (1701) Colles P. C. 108. See Megarry, *The Law of Real Property* (5th ed. 1984), at pp. 587-99.

42 There are other examples of such rights, *e.g.* breach of confidential information (which has not been treated as a common law tort) and other contractual or proprietary rights that are void at law but not in equity.

43 Damages have been awarded for breach of confidence, but it is not clear whether common law damages are being awarded. See *Seager* v. *Copydex Ltd.* [1967] 1 W. L. R. 293. *Cf. Saltman Engineering Co. Ltd* v. *Campbell Engineering Co. Ltd.* [1963] 3 All E. R. 413n.

44 [1924] A. C. 851.

45 But see the dissents of Lords Sumner and Carson who were not prepared to so hold in the absence of plainer language.

46 *Hasham* v. *Zenab* [1960] A. C. 316. The view of the majority in *Leeds* was accepted again by the House of Lords in *Johnson* v. *Agnew* [1980] A. C. 367, though their Lordships did not accept that the damages can be assessed on a different basis. See also *Oakacre Ltd.* v. *Claire Cleaners (Holdings) Ltd.* [1982] Ch. 197, [1981] 3 All E. R. 667.

47 But see the speech of Lord Upjohn in *Redland Bricks* v. *Morris* [1970] A. C. 652, [1969] 2 All E. R. 576, and the criticism of it by Jolowicz, "Damages in Equity - A Study of Lord Cairns' Act" (1975) 34 C. L. J. 224 and Pettit, "Lord Cairns' Act in the County Court: A Supplementary Note" (1977) 36 C. L. J. 369. The speech was not considered in *Hooper* v. *Rogers* [1975] Ch. 43.

predictable and likely to recur, much inconvenience will be avoided by a once-and-for-all award.[48]

This power to award damages gives the court an additional option that can sometimes result in a fairer result. If the right infringed is not a common law right, the court might otherwise have no option but to award specific performance or an injunction, even when the harm to the plaintiff is not significant. If it did not grant equitable relief the effect would be to allow the defendant to avoid any real liability as common law damages will at best be nominal. But if it granted such equitable relief, the cost to the defendant may be disproportionate to the loss to the plaintiff.

This point is well illustrated by the case of *Wrotham Park Estates Co.* v. *Parkside Homes Ltd.*[49] where an enforceable covenant not to build without prior approval was breached. The breach of the restrictive covenant did not result in any diminution in property values in the estate. Loss was therefore nominal. Granting a mandatory injunction would have meant the demolition of some completed works, or have put the plaintiff in a very strong bargaining position. But not to grant any relief would have meant that the defendant could continue to breach the covenant as there was no privity of contract. So the award of damages equal to what the plaintiff could reasonably demand for releasing the covenant was a good compromise that took into account the interests of all parties concerned, including prospective purchasers from the defendants. Such a compromise would not be possible if damages cannot be awarded for the breach of equitable rights.

IV. WHEN THERE IS JURISDICTION UNDER THE ACT

The decision in *Leeds*[50] does not allow a court to decide as it likes, though the literal words of the section are wide enough to allow it. There are statements by judges denying that the Act has revolutionised the remedy of damages[51] and it has been stressed that the Act does not allow damages whenever the court thinks fit.[52] The obvious reason for such an approach is the fear of an untrammelled discretion.

In order to limit and define the power, the courts have resorted to a restricted interpretation of the words *"jurisdiction to entertain an application for an injunction* ... or ... *specific performance"*. In the early years of the Act it was held that there was no jurisdiction to entertain an application unless the court could and would actually grant an injunction or specific performance on the facts of the case. So when specific performance could not be granted because of impossibility, it was held that the court did not have the jurisdiction to entertain the

[48] *Pride of Derby & Derbyshire Angling Assn. Ltd.* v. *British Celanese Ltd.* [1953] Ch. 149 is an example of how a series of actions can be avoided.

[49] [1970] 2 All E. R. 321.

[50] [1924] A. C. 851.

[51] *E.g. Sefton (Earl)* v. *Tophams Ltd. & Capital and Counties Pty. Ltd* [1965] Ch. 1140, at p. 1169, [1964] 3 All E. R. 867, at p. 894, *per* Stamp L. J.

[52] *Lavery* v. *Pursell* (1888) 39 Ch. Div. 508, at p. 519; *Procter* v. *Bailey* (1889) 42 Ch. D. 390, at pp. 399-400.

application[53] even though on a literal reading of the words, it would be difficult to say the court could not *entertain* any application,[54] if the action has been duly commenced.

The approach that is accepted today draws a distinction between bars that affect jurisdiction and those that affect discretion. There must first of all be some right recognised in equity. Once such right is established, the question is whether the court can grant an injunction or specific performance if it wants to. In *Sayers* v. *Collyer*[55] Fry L. J. drew such a distinction between acquiescence that is a total bar (because it results in there being no infringement of a right) and that which makes the court incline towards damages instead.

This approach produces a better result than the "would have" test and can be found again in the recent judgment of Russell L. J. in *Hooper* v. *Rogers*[56] where it was said that the test is whether the judge could have (and not would have) made an order, however unwise that may seem in the context of the facts. This "could have" test preserves the need for a right recognised in equity and gives the judge the discretion to decide between damages and equitable relief.[57] It is however necessary to distinguish between factors that affect jurisdiction and those that affect discretion and some cases may have to be reconsidered in this light[58] since they may have not been decided on the basis of this distinction.

Though the "could have" test is certainly an improvement over the "would have" approach, it will still not allow damages to be awarded in some situations where it may be desirable to be able to do so. Such a situation would arise when: (1) there is a right in equity not recognised by the common law, i.e. no right to common law damages; and (2) the court cannot order specific performance[59] or grant an injunction even if it wants to, however unwise it may be to dp so;[60] and (3) the court cannot order specific performance or grant an injunction because of factors that do not relate to illegality or public policy (for

53 *Ferguson* v. *Wilson* (1886) L. R. 2 Ch. App. 77; *Lavery* v. *Pursell*(1888) 39 Ch. Div. 508. See also *Soames* v. *Edge* (1860) Johns 669, 70 E. R. 588 where it was held that the court would not have the jurisdiction if the action is simply for the specific performance of a building contract as it could not enforce such a one. The case itself might be decided differently today since some building contracts can be enforced: see Jones & Goodhart, *Specific Performance* (1986), at pp. 140-44. An Australian interpretation of the Act can be seen in *King* v. *Poggioli* (1923) 32 C. L. R. 222, where Starke J. cites *Elmore* v. *Pirrie* (1887) L. T. 333 and *Durell* v. *Pritchard* [1865] L. R. 1 Ch. 244 as authorities for the view that the plaintiff must first show that he is entitled to specific performance before he can get damages.

54 Jolowicz, "Damages in Equity - A Study of Lord Cairns' Act" (1975) 34 C. L. J. 224, at p. 240. A literal interpretation would only require a procedurally valid action.

55 (1885) 28 Ch. D. 103.

56 [1975] Ch. 43, [1974] 3 All E. R. 417. See also the New South Wales case of *Madden* v. *Kevereski* [1983] 1 N. S. W. L. R. 304, at pp. 306-7.

57 For the principles upon which such discretion will be exercised see *Spry, op. cit.,* at pp. 601 -9. The leading statement of principle is that of A. L. Smith L. J. in *Shelfer* v. *City of London Electric Co.* [1895] 1 Ch. 287, at pp. 332-3.

58 For example, in *Price* v. *Strange* [1978] Ch. 337, [1977] 3 All E. R. 371 the question with respect to the lack of mutuality was left undecided.

59 In *Shiffon Creations (Singapore) Pte. Ltd.* v. *Tong Lee Co. Pte. Ltd.* [1988] 1 M. L. J. 363, Thean J. assumed that the time for impossibility is the issue of the writ, and not the pronouncement of judgment.

60 Equitable relief is not available if the contract in question cannot be performed. Another example is when confidential information is no longer secret at the time of the action. See *Proctor* v. *Bailey* (1889) 42 Ch. D. 390; *Malone* v. *Metropolitan Police Commissioner* [1979] 1 Ch. 344, at p. 360.

example, impossibility) and the plaintiff is not in any way responsible for the state of affairs that precludes such equitable relief.

The number of cases that will fit the three requirements are admittedly small. But there will be an indefensible distinction in the law if damages are available when specific performance is possible, but not when it is impossible for no fault of the plaintiff. If the law is such, a defendant who owes an equitable obligation to the plaintiff can escape any real liability by making it impossible for himself to perform before an action is brought, for example, by selling the subject matter to a *bona fide* purchaser for value without notice of the rights of the plaintiff.[61] This argument will not apply if the relief cannot be granted because to do so would be to order the performance of an illegal act or an act contrary to public policy. In such a case the public interest overrides any considerations of justice between the parties.

There does not seem to be any case where the inherent jurisdiction was invoked to fill this gap.[62] It should be noted that the jurisdiction under the Act is different from that under the court's inherent jurisdiction. Under the Act, damages are in substitution for or in addition to an equitable remedy. It is not so under the inherent jurisdiction, which would allow damages or compensation for the infringement of equitable rights. Some of the awards that are possible under the Act may not be possible under the inherent jurisdiction.

V. SINGAPORE LAW

Surprisingly, the jurisdiction to grant equitable damages was in issue in only two known local cases: *Tan Seng Qui* v. *Palmer*[63] and *Shiffon Creations (Singapore) Pte Ltd.* v. *Tong Lee Co. Pte. Ltd.*[64] In the report of the case of *Meng Leong Ltd.* v. *Jip Hong Ltd*[65] it is stated that the judge awarded "damages in lieu of specific performance", but a reading of the case will show that the contract there was valid and enforceable in law and the jurisdiction exercised was not under the Act. *Palmer* is important because it contains strong *dicta* to the effect that the local court *had* the jurisdiction conferred by the Act, while *Shiffon* says that the present courts do not have any such jurisdiction. Both cases will be discussed together with the potential sources of the jurisdiction in Singapore.

A. No Equivalent Local Legislation

There is no local statute that corresponds to the Act. The Act itself was not imperial legislation that was extended to the colonies.

[61] This will be so when there is a contract that is not enforceable at law but is enforceable in equity, *e.g.,* when there is a contract for the sale of land which does not satisfy the writing requirements of the Statute of Frauds but which has been part performed.

[62] But see the judgment of Chitty J. in *Lavery* v. *Pursell* (1888) 39 Ch. D. 508, at p. 518 where he said: "... it has never been decided, so far as I am aware, that the equitable doctrine of part performance can be made use of for the purpose of obtaining damages on a contract at law." Chitty J. then went on to consider the jurisdiction under the Act, and after deciding that the Act did not give him the required jurisdiction, did not consider the question of inherent jurisdiction.

[63] (1887)4 Ky. Rep 251.

[64] [1988] 1 M. L. J. 363. Hereafter referred to as *Shiffon.*

[65] [1985] 1 All E. R. 120, at p. 121.

B. Section 5 of the Civil Law Act[66]

Section 5 of the Civil Law Act directs that English law for the time being is to be applied as the law of Singapore where certain questions of law are in issue. The list of issues includes various commercial matters and mercantile law generally. The section is very difficult to interpret[67] and even if it can direct the court to apply the English Act, not all possible situations will be covered as the section does not make an applicable English statute part of the law of Singapore for all purposes. Moreover, section 5 is of significance only in a commercial context and cannot be a substitute for a jurisdiction that applies generally.

There is also the problem posed by the fact that the English jurisdiction is now contained in The Supreme Court Act of 1981. Singapore has its own Supreme Court of Judicature Act[68] and the application of English law under section 5 is subject to local legislation. Section 5 (2) (c) states that section 5 is not to introduce into Singapore "any provision contained in any Act of Parliament of the United Kingdom where there is a written law in force in Singapore corresponding to that Act." The Singapore Supreme Court of Judicature Act corresponds to the U. K. Act even though it does not deal with identical detail. Section 5 (3) (b) reinforces this argument as it states that a written law shall be regarded as corresponding if the purpose or purposes of the written law (and not of any particular provision of the Act in question) are similar. The similar purpose is of course to define and limit the powers of the supreme courts of each jurisdiction. It might also be argued that a power expressly conferred upon a specific court in the U. K. cannot in any event be applied here in Singapore where that court does not exist.

C. The Second and Third Charters of Justice[69]

It has been judicially accepted that the Second Charter of Justice made the law of England as on the 27th day of November 1826 the law of Singapore, in so far as it is applicable, and subject to any modifications that are necessary in view of local conditions.[70] Lord Cairns' Act was passed in 1858 and is not therefore part of the law of Singapore by virtue of the general reception of English law.

The Second Charter established a single court; the Court of Judicature at Prince of Wales' Island, Singapore and Malacca.[71] It also defined the jurisdiction of the court and directed English law to be

66 Cap. 43, 1985 (Rev. Ed.).

67 There are two Privy Council decisions on how it is to be interpreted: *Seng Djit Hin* v. *Nagurdas Purshotumdas & Co.* [1923] A. C. 444; *Shaik Sahied Bin Abdullah Bajerai* v. *Sockalingam Chettiar*[1933] A. C. 342. The approaches of the two are not consistent with each other. See Soon & Phang, Chapter 2, *The Common Law in Singapore and Malaysia* (1986, Edited by A. Harding) and Y. L. Tan, "Characterisation in Section 5 of the Civil Law Act", (1987) 29 Mal. L. R. 289.

68 Cap. 322, 1985 (Rev. Ed.).

69 Both Royal Letters Patent dated 27 November 1826 and 12 August 1855 respectively.

70 *R.* v. *Willans* (1858) 3 Ky. 16.

71 There was an earlier Charter, commonly referred to as the First Charter of Justice, 1807, which applied only to Prince of Wales Island and therefore will not be considered here. All three were then separate British colonies.

applied in both civil and criminal proceedings.[72] The case law has accepted that the court established was directed to apply English law at the date of the Charter.[73]

The Charter gave the court the same jurisdiction and authority as, *inter alia,* the Court of King's Bench, High Court of Chancery, Court of Common Pleas and Exchequer.[74] The use of "jurisdiction and authority" suggests that the court was intended to be an all in one equivalent of the various courts in England at the time.[75] The Charter also directed the court to decide civil cases according to "justice and right". "Justice and right" has been interpreted to mean English law.[76] Even without the "justice and right" clause, it is arguable that the conferment of the jurisdiction of the various courts must carry with it the powers that the courts possessed, which in turn must be based on the law they would have applied. If it did not, the detailed jurisdiction clause would be unnecessary as there would be no need to confer the same specific jurisdiction to hear cases unless the judgment was also to be the same as that the courts specified would have made.[77]

"Jurisdiction" in the modern context may be usually associated with the right to hear a case as opposed to a power to do things. In a wider context, it can mean the power to hear, try and decide a case according to the law.

Even though Lord Cairns' Act did not become part of the law of Singapore as a result of the Charter, the principles of equity did. Being part of the law of England in 1826, the principles of equity were "received" and accordingly became part of the law of Singapore. If there was a right to damages in equity in England then, it would have been received as well. Even if the right was granted by a court in England under an inherent jurisdiction. A jurisdiction to do something is a power to do the same. If a court has the power to do a particular thing, it follows that the law sanctions that as a legal or (in this case) equitable right. So if there was a jurisdiction to award equitable damages, there was an equitable right to equitable damages. The fact that the power was of a specific court does not make it any the less part of the law. In any case, at the time of the Second Charter, the court was given the powers of the High Court of Chancery in England. It may be that some *of* the rules of equity were unsuitable for local conditions and were either not received or received with modification,[78] But the right to equitable damages is of general policy and does not infringe upon the customs, religions and culture of the local inhabitants.[79]

[72] See pp. 21 and 31 of the 1827 print of the Charter. The application of English law in civil matters was not explicitly stated in the Charter.
[73] See R. v. *Willans,* (1858) 3 Ky. 16. A contrary view has been expressed: M. Gopal, "English Law in Singapore: The Reception That Never Was" [1983] 2 M. L. J. xxv. See the reply of A. Phang, "English Law in Singapore: Precedent, Construction and Reality or "The Reception That Had To Be" [1986] 2 M. L. J. civ.
[74] P. 21 of the 1827 print of the Charter.
[75] The *Judicature Acts* came much later in the century. The jurisdiction was too small to support or require the same set of courts that existed in England.
[76] See *R.* v. *Willans* (1858) 3 Ky. 16, at pp. 25-6.
[77] See the argument of A. Phang, *op. cit.*, at p. cix.
[78] See H. Chan, *An Introduction To The Singapore Legal System* (1986), at pp. 7-11, generally on the qualifications to the reception of English law.
[79] These are two qualifications to reception. See *Yeap Cheah Neo* v. *Ong Cheong Neo* (1875) L. R. 6 P. C. 381, *Khoo Hoot Leong* v. *Khoo Cheong Yeok* [1930] A. C. 346. Most of the instances when the qualifications were invoked involved matters relating to the personal law of the inhabitants.

The Third Charter of Justice was passed in 1855. It reconstituted the Court of Judicature established by the Second Charter.[80] The Third Charter contained a jurisdiction clause similar to that of the Second Charter and it also had a similar direction to the Court to decide according to "justice and right".[81] It might be asked if it reintroduced the law of England as at 1855. It is generally accepted that it did not because it reconstituted the court rather than established a new one.[82]

D. The Courts Ordinances

Through the years, several changes were made to the structure of the courts in Singapore. It is necessary to trace some aspects of these changes here because, for some time, they continued the use of "powers" clauses that conferred the powers of the English courts on the local courts. As the courts were given the power of the Court of Chancery when Lord Cairns' Act was law in England, the question is whether the relevant court accordingly became vested with the same power to award damages in equity.

1. Ordinance V of 1868.

With time, the court structure that existed with the passing of the Third Charter became unsuitable.[83] In 1868 a Supreme Court Ordinance was passed.[84] It abolished the Court of Judicature set up and reconstituted by the two previous Charters; and established the Supreme Court of the Straits Settlements.[85] The court comprised three divisions, with one each sitting in Singapore, Penang and Malacca.[86] All law in force was continued.[87] The Ordinance drew a clear distinction between the jurisdiction to hear a case and the other general powers of the court. Section 29 referred to jurisdiction to hear a case[88] while section 23 stated that

> "The court shall have such jurisdiction and authority as the Court of Queen's Bench and the Justices thereof, and also as the Court of Chancery and the Courts of Common Pleas and Exchequer respectively, and the several Judges, Justices and Barons thereof respectively have and may lawfully exercise in England, in all Civil and Criminal actions... subject to the laws of the colony..."

[80] The three divisions of the court were reduced to two, with one sitting in Singapore and Malacca, and the other in Prince of Wales Island (now the island of Penang): see p. 4 of the Charter. Each division had its own recorder.
[81] Pp. 12 and 22 of the Third Charter respectively.
[82] *R. v. Willans* (1858) 3 Ky. 16, at p. 37. See Braddell, *The Law of the Straits Settlements* (1982 Rep.), at pp. 34-6. It should be noted that similar jurisdiction clauses are found in the Courts Ordinances of 1868, 1873 and 1878. They are discussed below.
[83] The reasons for the changes to the court structure from to time will not be discussed in this article.
[84] Ord. V. of 1868.
[85] The colony of Singapore was then part of the Straits Settlements.
[86] S. 10. The Straits Settlements comprised these three colonies.
[87] S. 4.
[88] Based on the presence of the defendant in the colony, *etc.*

This "powers" provision is similar to that used in the Second and Third Charters. Similar provisions were adopted in subsequent Courts Ordinances.[89]

2. Ordinance V of 1873

Some further changes were made in 1873 when the Courts Ordinance 1873[90] was passed. A Court of Appeal was constituted. Section 44 conferred the same powers as section 23 of the 1868 Ordinance. Aside from section 44, nothing else in the Ordinance can be taken to indicate the law to be applied by the court.

3. Ordinance III of 1878

The Courts Ordinance 1878[91] was passed after the fusion of law and equity in England. The Supreme Court was once again reconstituted.[92] Section 10 of the Ordinance conferred the same powers as the previous Ordinances. Since fusion had been effected in England, the reference in section 10 was only to the jurisdiction and authority of the High Court of Justice in England. The effect was the same. The Supreme Court was to have the powers of the various divisions of the English High Court. This section can be said to have effected the formal fusion of law and equity in Singapore. Any division of the English High Court could then administer both the rules of law and equity concurrently and section 10 conferred the same power on the Supreme Court of the Straits Settlements.[93] The traditional view is

[89] *Quaere* whether the 1868 Ordinance re-introduced English law into Singapore. The argument against re-introduction by the Third Charter is based on the fact that it merely reconstituted the existing courts. This argument may not apply to the Ordinance here as it established a new court, but one important difference between this Ordinance and the Second Charter is the absence of a "justice and right" clause. If the powers provision is sufficient by itself to import English law, the whole idea of general reception haying occured at the time of the Second Charter only must be re-examined. A detailed discussion is beyond the scope of this article.

[90] Ordinance V of 1873.

[91] Ordinance III of 1878.

[92] S. 2.

[93] *Quaere:* Whether formal fusion was necessary in Singapore. The Second and Third Charters, and the Ordinances of 1868 and 1873 all conferred the power to administer the rules of law and equity on one single court and not two separate ones. As one single court could administer both sets of rules, one of the features of fusion would have already been achieved. There was no express preference rule, *i.e.* that the rules of equity were to prevail over the common law. But it can be argued that no such rule was needed since equity recognised the rules of the common law and the court in deciding a case would have had to give effect to all the rules of the law that it had a duty to administer - including the rules of equity.

S. 10 can be said to have achieved the same result as s. 1 and s. 2 of the Civil Law Ordinance 1878 (IV of 1878), which is the present s. 3 of the Civil Law Act,Cap. 43, 1985 (Rev. Ed.). It can be argued that sections 1 and 2 were unnecessary, though they put the matter beyond doubt. In reality both of them were passed on the same day, 7 May 1878. See *Khoo Hock Leong* v. *Lim Ang Kee* (1888) 4 Ky. 353 for the traditional view that it was the Civil Law Ordinance that effected fusion.

The lawyers of the day saw the Court of Judicature established by the Second Charter as being made up of separate "sides" for law and equity *etc.* even though the Charter did not say so. The drafting of the Civil Law Ordinance is testimony to this. See *Lim Chye Peow* v. *Wee Boon Tek* (1871) 1 Ky. 236, at pp. 237-8, where a clear distinction was drawn between the court's civil and ecclesiastical jurisdictions. A more detailed examination of this question is beyond the scope of this article.

that fusion was effected by the Civil Law Ordinance, which was in reality passed at the same time.[94]

E. Tan Seng Qui v. *Palmer*

In 1887, *Palmer* v. *Tan Seng Qui*[95] was decided. Pellereau J. suggested, *obiter,* that he could award damages in equity as if Lord Cairns' Act was law in the Straits Settlements.[96] In *Palmer* the plaintiff contracted to buy land from the defendant. The plaintiff signed an agreement but not the defendant. The plaintiff was let into possession but was subsequently turned out by the defendant. The plaintiff then sued for specific performance or damages, and the return of his deposit. The defendant argued that the plaintiff was in breach of contract and pleaded section 4 of the Statute of Frauds. The defendant also counterclaimed for damages, and wanted to retain the deposit.

On the facts, Pellereau J. found for the defendant. The plaintiff was held to have been in breach of contract. The plaintiffs claim for damages therefore did not have to be decided. But as it was argued, the judge went on to consider it. The plaintiffs right was not in law since the defendant had not signed any document.[97] But he had a right in equity because there was sufficient part performance. As to damages for a breach of such a right, he said:

> "I incline to think that the damages that this Court can award are the same as in England under Lord Cairns' Act... The High Court of Justice... still has that power. Our Ordinance 3 of 1878, section 10, confers on this Court the same jurisdiction as was possessed at that time by the High Court of Justice in England and as that Court can give damages, it would seem that this Court can do so too."[98]

He observed that section 10 was not qualified and that "the fulness of jurisdiction of the High Court of Justice in England in civil and criminal actions and suits would seem by that section to be vested in this court. I do not however, decide this point as it becomes unnecessary to do so, owing to my finding on the facts."[99]

Planter is a significant case because it expressly suggests that a post-1826 English statute can have the force of law in the Straits Settlements simply because the court possessed the powers of the English courts. The caution of Pellereau J. is understandable. Such a literal reading of section 10 would result in the assumption of powers that would have the effect of importing legal and equitable rights from England. It has already been argued that a power to grant a form of relief means that there is corresponding right at law or in equity.[100]

If the dicta in *Palmer* are accepted section 10 would be another major "reception of English law" provision. It is not clear whether the

94 See previous note.
95 (1887) 4 Ky. 251.
96 His Lordship was sitting in the Penang Division of the Supreme Court of the Straits Settlements.
97 Because of s. 4 of the Statute of Frauds, 29 Car. 2, c. 3.
98 (1887) 4 Ky. 251, at p. 257.
99 (1887) 4 Ky. 251, at p. 258.
100 See part C of this section, above.

jurisdiction referred to is that existing at the date of the Ordinance, *i.e.* 1878, or the corresponding jurisdiction at the time of judgment. The wording would suggest that it is to be that at the corresponding time, while it has been decided with respect to the Second Charter that such reception is as at the date of the instrument. Pellereau J. did not deal with this point directly, but he seemed to have assumed that it is to be the jurisdiction for the time being when he went out of the way to observe that the English courts still had the jurisdiction at the time of the trial.[101] However, he also referred to the power at the time of the passing of the Ordinance.

Palmer does not adopt the same approach as some earlier cases,[102] though they can be distinguished on the facts. The English Probate Act 1857,[103] a post-1826 Act, was held not to apply in the Straits Settlements by Wood J. in *Allee* v. *Saman*,[104] *and* by Sheriff J. in the later case of *In the goods of Ismail*.[105] Both were distinguished in *Palmer* on the ground that there was already provision by a local Ordinance[106] for the administration of estates: and it did not incorporate the jurisdiction to assign an administration bond as did the corresponding English Act.[107] Though this distinction is defensible, it is not to be found in the cases themselves. The actual effect of the powers provision was in reality never considered in detail by any of the cases.

The major problem with the approach in Palmer is the view that the Third Charter of Justice did not re-introduce English law as at 1855, the date of the Third Charter of Justice. There is a clear statement in *R.* v. *Willans*[108] that the Third Charter merely reconstituted the court set up by the Second Charter. The "powers" provision relied upon in *Palmer* is not materially different from the jurisdiction clauses in the Charter. Not only does Palmer take a different approach, it in fact supports the argument for the continuing reception of English law!

Amazing and far-reaching as it may seem, it can be argued that continuing reception made more sense than cut-off reception. This is certainly so from the colonial perspective from which colonial legislation should be seen. Unless an active legislative body is set up at the same time, cut-off reception will mean a mandate to apply law that will eventually become English legal history. It must however be accepted that the consequences of accepting such an argument today are probably sufficient to ensure that no contemporary judge will accept it.

In *Shiffon Creations (Singapore) Pte. Ltd.* v. *Tong Lee Co. Pte. Ltd.*,[109] Thean J. when faced with *Palmer,* and a similar "powers"

[101] (1887) 4 Ky. 251, at p. 257. Lord Cairns' Act had by then been repealed but judges continued to apply the jurisdiction on the basis of a savings clause: see *Leeds Industrial Co-operative Society Ltd.* v. *Slack* [1924] A. C. 851, at p. 863.
[102] But also see *In the Goods of Lebby Long* (1879) 2 Ky. Ecc. Cases 27; and *Lim Chye Peow* v. *Wee Boon Tek* (1871) 1 Ky. 236 where a literal interpretation of s. 23 was adopted, at pp. 237, 8.
[103] 20 & 21 Vic., c. 77.
[104] (1879) 1 Ky. 480, at p. 481.
[105] (1886) 4 Ky. 187.
[106] (1887) 4 Ky. 251, at p. 258.
[107] S. 83 of the Probate Act 1857.
[108] (1858) 3 Ky. 16, at p. 37.
[109] [1988] 1 M. L. J. 363.

provision[110] said, without analysing the implications, that he was "inclined to say that on the basis of that section the court would have the jurisdiction conferred by section 2 of Lord Cairns' Act."[111] He even went further, and said that it was astonishing that the jurisdiction was taken away by subsequent legislation. However, the case is not strong authority for the simple reason that none of the technical arguments raised here was considered.

Section 10 would not have the effect that *Palmer* suggests if it, and its predecessors, were intended purely as provisions that allowed the courts to grant whatever relief the litigants were entitled to under the law of the Straits Settlements. It should be borne in mind that in England, the rules of the common law and equity were administered by specific courts and legislation was passed on the basis that the relevant courts of the land were to administer them.

When the same rules of law are adopted for another jurisdiction, it is necessary to make it clear that the courts of the adopting jurisdiction have the power to administer such rules as if they are the courts of the parent jurisdiction. For example, if there is a right to damages for loss suffered as a result of a tort in English law, the jurisdiction that adopts such a rule of law should also confer the power to award damages on its own courts.

This explanation would make the "powers" provisions in all the prior enactments merely procedural in effect. The same result can be achieved by the use of a more explicit jurisdiction clause that makes it clear that the court can hear, try, decide and grant whatever relief that the litigants may be entitled to under the law. This explanation would also avoid the adoption of an interpretation that would result in the general importation of English law after 1826.

If it was really intended to import English law in 1878, it is unlikely that such a subtle device would have been used. One would at least expect a "justice and right" clause. After the uncertainty as to the applicability of English law under the Second Charter of Justice, general reception would not have been effected by a less than explicit statement.[112] Strangely, there is no fully reasoned judicial finding on this, but the consequence of accepting the argument to the contrary would move most contemporary judges to accept the traditional view that reception only occurred in 1826.[113]

If the above discussion is correct, the suggestion in *Palmer* must be wrong and an inherent jurisdiction would be the only basis for equitable damages in Singapore.

[110] S. 17 (a), Courts Ordinance, Cap. 3, 1955 (Rev. Ed.). The case will be discussed later.
[111] [1988] 1 M. L. J. 363, at p. 370.
[112] *R.* v. *Willans,* was decided in 1858, well before the 1878 Ordinance. See A. Phang, "Of Cut Off Dates and Domination: Some Problematic Aspects of the General Reception of English Law in Singapore" (1986) 28 Mal. L. R. 242 for a general discussion of cut-off dates. At pp. 243-6, the writer discusses the effect of the three Charters, but he does not consider the later Courts Ordinances. In practice, the reception of English law was usually effected expressly. See A. Phang, *op. cit.* generally on this.
[113] See A. Phang, op. cit., at p. 244 and the cases cited at note 11 therein.

F. The Position under the Supreme Court of Judicature Act[114] *and Shiffon Creations (Singapore) Pte. Ltd. v. Tong Lee Co. Pte. Ltd.*[115]

Singapore is now an independent republic with its own Supreme Court.[116] Though all law in force was continued as law on independence[117] the original courts could not, from the point of view of sovereignty, be retained. The Supreme Court of Singapore[118] which was established in 1969 is not, theoretically, a reconstitution of its immediate predecessor in time, the Federal Court.[119] The legal effect of the change was considered by Thean J. in *Shiffon.*

In *Shiffon,* a contract for the sale of a factory was made. Under it, the sellers were to procure relevant planning approval in order to obtain sub-division approval, which in turn was required for the issue of subsidiary strata titles. The sellers failed to obtain the relevant approval. The plaintiffs had signed a similar contract with the sellers after taking an assignment of the benefit of the original contract. The plaintiffs accordingly sued, asking for specific performance and damages. Before the conclusion of the trial, the relevant approvals had been given, and an instrument of transfer and a duplicate subsidiary certificate of title were delivered. So the only issue left for determination was that of damages. The defendants relied on clause 11 of the agreement, an exemption clause which exempted them from liability for delay in obtaining such approval.[120]

The exemption clause was clear in its scope, and Thean J. accepted that it covered the breach in question.[121] It was argued by the plaintiff that the court could award damages in lieu of specific performance, *i.e.* damages in equity. It was further argued that the exemption may have been a bar to an action at law, but not in equity. Thean J. agreed that the exemption did not apply to an application for specific performance, and hence by implication, also not to damages in lieu of it. He expressed the view that he was disposed to award such damages if he had the jurisdiction.

It is arguable that the agreement should be taken into account in awarding damages in equity: equitable damages should not be a substitute for a general rule against unfair contracts. But because

114 Cap. 322, 1985 (Rev. Ed.). The discussion here will focus on the Supreme Court of Singapore. The Subordinate Courts in Singapore have most of the same powers as the Supreme Court and for our purposes, no material difference exists. See the Subordinate Courts Act, Cap. 321, 1985 (Rev. Ed.) generally, and ss. 32 and 52 particularly. The two sections refer to the jurisdiction to give equitable relief.

115 [1988] 1 M. L. J. 363.

116 Established by Act 24 of 1969, now Cap. 322, 1985 (Rev. Ed.). This was four years after separation from Malaysia.

117 The Constitution of the Republic of Singapore, Art. 162. This is subject to consistency with the independent status of Singapore.

118 The Supreme Court comprises the High Court, the Court of Appeal and the Court of Criminal Appeal: s. 7 of the Supreme Court of Judicature Act, Cap. 322, 1985 (Rev. Ed.).

119 Singapore was part of the Federation of Malaysia from 1963 to 1965. The Federal Court was the highest judicial tribunal in Malaysia short of the Judicial Committee of the Privy Council.

120 The relevant parts of the clause read: "… any delay in obtaining such approval… shall not… be a ground for any action claim or demand for damages by the Purchaser against the vendor".

121 The U. K. Unfair Contracts Terms Act 1977 was not pleaded. The application of this Act in Singapore can best be described as uncertain.

Thean J. went on to hold that he did not have the jurisdiction, this point cannot be said to have been conclusively decided.

It should however be noted that the plaintiffs were asking the court to award damages *in lieu of specific performance* and not simply to award damages for the infringement of a right recognised by equity *per se.* If it had been the latter, clause 11 would probably have been a bar as the plaintiffs would be claiming damages. The jurisdiction sought was the precise jurisdiction under Lord Cairns' Act. So the court had to decide if it applied here. In this sense, the judgment does not strictly decide on the general availability of equitable damages. This is supported by Thean J.'s conclusion: "I am therefore of the opinion I have no jurisdiction - the equitable jurisdiction conferred by Lord Cairns' Act - to award damages in lieu of specific performance in this case."[122] His Lordship's decision was based solely on the absence of any equivalent to section 10 of the Courts Ordinance 1878.

Prior to the independence of Singapore, the conferment of the powers of the English courts guaranteed that a local court would always have the power to give whatever relief that a person was entitled to under the common law and equity. So if the common law recognised a right to damages, the court would have the necessary power to award it. Any right at law or equity was matched by a corresponding power in the court deciding the case.

Just before Singapore joined Malaysia, the relevant "powers" provision was section 17 of the Courts Ordinance:[123]

> "The original civil jurisdiction of the High Court shall consist of-
> (a) jurisdiction and authority of a like nature and extent as are exercised by the Chancery and Queen's Bench Divisions of the High Court of Justice in England;"

The practice of conferring the powers of the English courts on local courts ceased on independence. Major parts of the Courts Ordinance, including section 17, were repealed by the Malaysian Courts of Judicature Act 1964.[124] No replacement "powers" provision will be found in it. Thean J. concluded in *Shiffon Creations*[125] that because no equivalent of section 17 existed after 1964, the jurisdiction no longer exists. However, no detailed analysis of the Supreme Court of Judicature Act of Singapore was carried out.

After separation from Malaysia, the Supreme Court of Judicature Act is the relevant Act to consider. Section 16 sets out the jurisdiction of the High Court to "try" a case. The various bases include, *inter alia,* the residence of the defendant and the place where the cause of action arose. Subsection 3 states that the High Court *"shall have such jurisdiction as is vested in it by any written law* which is in force in Singapore." [emphasis added] Section 16 is more than a jurisdiction to "hear" provision. The jurisdiction to try, as opposed to the jurisdiction to hear, can be construed to include the power to determine and grant any relief according to rights under the law.

122 [1988] 1 M. L. J. 363, at p. 371.
123 Cap. 3, 1955 (Rev. Ed.).
124 Act 7 of 1964 - a Malaysian Act. See ss. 23 (2) (d), 25 (1) (d), 80, and the Second Schedule.
125 [1988] 1 M. L.J. 363, at pp. 370-1.

The legislature adopted a "powers" provision that creates some difficulty. Section 18 states:

"18(1). The High Court *shall have all such powers as are vested in it by any written law for the time being in force in Singapore.*

(2). Without prejudice to the generality of subsection (1) of this section the High Court shall have the power to ..." [emphasis added]

Both section 16 (3) and section 18(1) suggest that the power of the High Court is to be that conferred by statute only. The Supreme Court of Judicature Act itself contains no equivalent of the wide "powers" provisions included in the earlier Courts Ordinances. Section 18 (2)[126] of the Act lists certain powers, for example, the power to partition land, issue the prerogative writs, enforce warrants for distress and to award interest. But it falls far short of listing all the powers that would be necessary to give effect to all the rules of the common law.[127] For example, the power to award damages is not included. No specific power to award damages is conferred by any statute, but it would clearly be unacceptable to conclude that the High Court does not even have the power to award common law damages.

The drafting could be due to a lack of understanding of the effect and role of the "powers" provisions of the earlier Courts Ordinances. They should have been replaced by a similarly wide general "powers" clause. One way to avoid the absurd result is to take the position that the two subsections do not exhaustively state the powers of the High Court; and the words "shall have" mean "shall also have" rather than "shall only have". But if this is so, much of section 18 (2) will be unnecessary. Some of the listed powers may have been included with the aim of limiting specific powers to the High Court to the exclusion of the Subordinate Courts,[128] but this is not true of all of them.[129]

If an interpretation that will avoid a gap in the powers of the Supreme Court is to be adopted, we will have to fall back on section 16 (1) and take the position that the jurisdiction to "try" is sufficient by itself to include all the necessary powers.[130] Section 16 (3) and section 18(1) would then only state the additional powers that the Supreme Court is to possess. They would not define all its powers.[131]

But even this position will not allow us to continue to apply Lord Cairns' Act[132] if it was applicable in 1887. No equivalent of section 10 of the Courts Ordinance 1878 exists today. The Act was never made part of the law of Singapore in any other way, and the repeal of the section took with it the jurisdiction. The Act will continue to apply only if section 10 had the effect of importing English law into Singapore in 1878.

126 S. 18(2) in the 1985 (Rev. Ed.) now incorporates the Schedule to the Act in the 1970 (Rev. Ed.).

127 An express power will normally be awarded by statute for rights created by statute. The problem will normally be confined to the common law and equity.

128 *E. g.,* the prerogative writs are not available in the Subordinate Courts.

129 The legislature could simply have listed the powers that are only to be exercised by the Supreme Court.

130 A right created by statute will normally be matched by an express power to give effect to it. *Quaere:* what happens when this is not done.

131 Another consequence of the interpretation that the High Court only has the powers conferred on it by statute will be that it cannot change or develop the common law since there is no statute that allows it to do so. If the narrow interpretation is not adopted, s. 18 (1) and s. 16 (3) would be used to confer new powers on the Supreme Court.

132 If Pellereau J. was correct on its applicability in *Tan Seng Qui* v. *Palmer* (1887) 4 Ky. 251, at p. 257.

This interpretation will however allow the exercise of the "inherent jurisdiction", as a right to damages in equity was made part of the law of Singapore in 1826, the year the Second Charter was passed.[133] But this will have to be based on section 16 of the Supreme Court of Judicature Act[134] read with section 3 of the Civil Law Act.

Thean J. in *Shiffon* declared that "the jurisdiction, to award damages in addition to or in lieu of injunction or specific performance is based on statute and is not a matter of inherent jurisdiction of the court."[135] It seems that his Lordship was only concerned with jurisdiction under Lord Cairns' Act, and was not making a general statement about damages in equity. So nothing in the case can be said to be a rejection of the argument that there is a right to equitable damages in Singapore. The technical argument based on reception was not raised in the case.

G. *The Civil Law Act*[136]

Section 16 of the Supreme Court of Judicature Act as interpreted above deals with powers generally. Equitable relief is still dealt with specifically by section 3 of the Civil Law Act. Originally section 1 of the Civil Law Ordinance 1878, it allows the concurrent administration of law and equity.[137] The intended effect of section 1 of the Ordinance (now section 3 of the Act) was purely procedural. It stated that the court could grant equitable relief which "heretofore" (the Ordinance) could only have been granted by the court on its equity side.

When the Ordinance was subsequently reprinted it was not possible to use the word "heretofore", so a reference to the date of commencement of the Ordinance was made in place of it.

The present section 3 (a) of the Civil Law Act 138 reads:

> "if any plaintiff or petitioner claims to be entitled to any equitable estate or right, or to any relief upon any equitable ground … which before the first day of January, 1879, could only have been given by the court on its equity side, *the court shall give such relief... as ought to have been given,* by the court, on its equity side, in a suit or proceeding for the same, or the like purpose, properly instituted before that date;"[139]

The complete history of the various Civil Law enactments need not be traced here.[140] But it must be pointed out that the new wording can be interpreted to mean that the court is to decide as the court would have

133 This approach does not require an analysis of whether the courts in Singapore have an inherent jurisdiction to do any act not specifically sanctioned by legislation. An analysis of this wider question will require a separate article.

134 Cap. 322, 1985 (Rev. Ed.).

135 [1988] 1 M. L. J. 363, at p. 370.

136 Cap. 43, 1985 (Rev. Ed.).

137 S. 1, Ord. 4 of 1878. But see the discussion of the effect of s. 10 of the Courts Ordinance 1878, above.

138 Cap. 43, 1985 (Rev. Ed.).

139 Emphasis added. S. 3(b) restates the same principle for a claim to equitable relief by a defendant.

140 The change first occurred in s. 4 of the Civil Law Ordinance (Ord. 8 of 1909) which referred to the commencement of the 1878 Ordinance. In the reprint of the laws of the Straits Settlements, the actual date of commencement, 1 Jan. 1879 was used (s. 3 of Ord. 111). Subsequent reprints of the Act continued the reference to the actual date.

on 1 January 1879. This is because it is to give "such relief.. . as ought to have been given". If this interpretation is adopted it will mean that equity would have been frozen in Singapore at that date, and that the subsequent repeal of a jurisdiction will not affect the power to apply it since the court is to apply the law as of an earlier date. So, if the *dicta* in *Palmer*[141] is correct, the court today will have the same jurisdiction to apply Lord Cairns' Act even though (1) the Act has not been re-enacted in Singapore, and (2) the same "powers" provision[142] does not exist anymore.

This result cannot have been intended. The section was intended to be procedural[143] and it must be implicit that the jurisdiction was to be exercised according to existing rights in law and equity. Some responsibility for the problem must lie with those responsible for updating the statute book. The section refers to the court as if it existed in 1879. The High Court of Singapore did not exist in 1879: only the Supreme Court of the Straits Settlements. The section should have been redrafted altogether when it was reprinted. Today, it may be more in place as part of the Supreme Court of Judicature Act.[144]

Section 3 of the Civil Law Act, when first enacted in 1878 as section 1 of the Civil Law Ordinance[145] was intended to be procedural in effect: to fuse the administration of law and equity. Section 1 (6) of the Ordinance (which corresponds to the present section 3 (g)) made it clear that the court "shall recognise and *give effect* to all legal claims... in the same manner as the same would have been recognised and given effect to if this Act had not been passed." [emphasis added]

Section 1 (7) of the Ordinance (which is now section 3 (h) of the Act) reads:

> "[T]he court ... and the Court of Appeal ... *shall grant,* either absolutely or on such reasonable terms and conditions as to it seems just, *all such remedies whatsoever as any of the parties thereto appear entitled to,* in respect of any and every legal or equitable claim properly brought forward by them respectively in such cause or matter; so that, as far as possible, all matters in controversy between the said parties respectively may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided." [emphasis added]

Both the sub-sections were originally intended to make it clear that the court could give effect to common law and equitable rights in one single action. The latter was explicit in mentioning the avoidance of multiple actions. Thean J. in *Shiffon* accepted the argument that subsection (h) does not confer any new jurisdiction, and is procedural in effect.[146] Neither subsection was intended to be a substitute for the "powers" provision that conferred the powers of the English courts on local courts.

141 (1887) 4 Ky. 251, at p. 257.
142 *I. e., s.* 10, Ord. III of 1878.
143 To fuse the administration of law and equity. See *Khoo Hock Leong* v. *Lim Ang Kee* (1888) 4 Ky. 353.
144 Cap. 322, 1985 (Rev. Ed.). Perhaps in s. 18 (2), or as a separate sub-section.
145 Ordinance IV of 1878.
146 [1988] 1 M.L.J. 363, at pp. 370-1.

Section 10 of the Courts Ordinance 1878[147] was the necessary provision at the time they were enacted. As was explained earlier, there is now no provision conferring the powers of the English courts on local courts. Looking at the words used in the two subsections, it might be asked if they, together with section 3 (a) and (b)[148] of the same Act are wide enough to be written laws (as referred to in section 18(1) of the Supreme Court of Judicature Act[149]) that confer the necessary power to the court to give effect to whatever the parties may be entitled to at law and equity.

If the history of the Ordinance is ignored, it is arguable that taken together, they are wide enough to be written laws that confer the necessary powers on the court to give effect to all existing legal and equitable rights. But to do so would be to ignore the fact that they were originally procedural in nature. A power to administer law and equity *together* would be converted into a power to give effect to all recognised law.

It is possible to argue that when the Ordinance became an Act of Parliament after independence, this conversion was in fact executed by Parliament. Parliament must be taken to have been aware of the law. The law was without a provision that referred to the powers of the English courts. No similar provision was enacted. The wording of the present section 3 was wide enough to do the same. And Parliament did not legislate further because section 3 was adopted as such.

This argument would make section 3 of the Civil Law Act the replacement for the earlier provisions that conferred the powers of the English courts on the local courts. It is attractive in that it will resolve the problems completely. But there is an element of fiction in the argument and it cannot be said that it is so strong as to put the matter beyond doubt. This argument was not considered in *Shiffon.*

H. Summary

Even if there was a jurisdiction to apply Lord Cairns' Act in 1887, it ceased to exist with the enactment of the Malaysian Courts of Judicature Act 1964. This will not be so only if English law was again "received" in 1878.

Despite *Shiffon,* it is possible, in Singapore, to fall back on the right to damages in equity based on the inherent jurisdiction of the English courts. To say that there is a right to equitable damages in Singaapore is not to say that the courts here have an inherent jurisdiction to assume powers not conferred by any statute. That would involve a wider discussion of the status and powers of a court created by statute.

It is not necessary to discuss the question of inherent jurisdiction in Singapore in detail here because there was a right to equitable damages in England in 1826, the year the Second Charter was passed. The reception of English law here made that right part of the law of Singapore. Whether or not the inherent jurisdiction itself was received

[147] Ordinance III of 1878.
[148] S. 3 (b) is the converse of s. 3 (a) in that it refers to defendants while s. 3 (a) deals with plaintiffs.
[149] Cap. 322, 1985 (Rev. Ed.).

as well is a much more difficult question that will need to be considered when there is a question of a power which is (1) not conferred by Singapore legislation and (2) unknown in England in 1826. It should be added that the Rules Committee of the Supreme Court of Singapore have taken the position that the High Court has an "inherent jurisdiction". Order 92, Rule 4 of the Rules of the Supreme Court 1970 states:

> "For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the Court to make an order as may be necessary to prevent injustice or to prevent an abuse of the process of Court."

While Order 92 deals only with procedural matters, it openly acknowledges that there is some form of inherent jurisdiction. If this means that the Court can do things that it is not specifically empowered to do, then it will be possible for this jurisdiction to be exercised by way of an award of equitable damages. There is nothing in the Supreme Court of Judicature Act[150] that allows this, and it can be argued that this Order is *ultra vires*. The Committee cannot confer upon itself an inherent jurisdiction.[151] The argument for this would be that since the Supreme Court of Singapore is a creation of statute, its powers have to be conferred by statute. This is a difficult question with far reaching consequences, and a separate article would be needed to deal with it in detail. But speculators may simply conclude that Order 92 was taken from the English rules without full consideration.

VI. STATUTORY CLARIFICATION

It has been argued that the jurisdiction under Lord Cairns' Act is a useful one. There will be a gap in the law if it does not exist.[152] Such a jurisdiction should exist in Singapore. It is a flexible jurisdiction that enables the courts to award damages for the breach of equitable rights. It allows the court to deal with future damages should the plaintiff want it to do so. It also gives the court the option of awarding damages when it feels that an injunction or an order for a specific performance would not be appropriate.[153]

Even if the courts here can award equitable damages because a right to equitable damages was made part of the law of Singapore in 1826, it is questionable whether this vaguely defined right should be relied upon today. Some disadvantages in relying on such a jurisdiction have already been pointed out.[154] The jurisdiction was not developed in England as a result of the passage of Lord Cairns' Act, and its existence is not even considered to be clear by the English case law.[155] Fry gives a convincing explanation for the conflicting cases[156]

[150] *Ibid.*
[151] The Rules of the Supreme Court 1970 were passed under the authority of s. 80, Supreme Court of Judicature Act, Cap. 322, 1985 (Rev. Ed.).
[152] See section III, above.
[153] *Ibid.*
[154] See section II, above.
[155] See *Grant* v. *Dawkins* [1973] 1 W. L. R. 1406, [1973] 3 All E. R, 897, and note 25, above.
[156] See section II, part B, above. Basically, he attributes it to a change of attitude. He used the word "disowned" to describe it.

but it has not been judicially accepted. In any case it is even less clear which approach a local court would adopt.

Any uncertainty as to the existence of such a right may discourage litigation. *Shiffon* is clear authority, even if it can be shown not to have considered all the possible arguments. Consequently, judicial acknowledgement of a right to damages in equity may not be made for some time. Any such uncertainty will tend to work in favour of defendants during out of court negotiations.

One solution to change or clarify the law is to legislate and adopt the present English jurisdiction. Section 50 of the U. K. Supreme Court Act 1981 has served litigants well. It may not cover all cases where equitable damages may be required.[157] But it is possible to encounter any shortcomings by suitable drafting.

The alternative solution is to confer a simple power to award damages for the infringement of equitable rights. A decision will have to be made as to whether it is to be discretionary or not. The assessment of such damages can be directed to be on the same basis as the common law. However, such a power will not cover the same ground as the English statutory jurisdiction, for example, when future damages are in issue. It will have to be made clear when damages are to be awarded instead of an equitable remedy. It is difficult to draft a power with specific details in mind and still leave a meaningful discretion for the court. But a loosely drafted discretion may not be interpreted as intended.

Between the two, the adoption of the English jurisdiction[158] seems the obvious choice. An established body of case law will come with it. If a new provision is locally drafted, its application may be uncertain for some time until an adequate body of judicial opinion is available. If most of the features of the English jurisdiction are to be incorporated anyway, more reason will be found to adopt it. Such a provision would be in place in the Civil Law Act[159] (perhaps as a new section 3A); or the Supreme Court of Judicature Act.[160]

Without legislation, much will depend on the judicial acceptance of the arguments put forward here. Even more will depend on whether litigants are willing to ask the judiciary to distinguish or reverse *Shiffon*;[161] and to probe into some key questions on the reception of English law in Singapore and the definition of the powers of the Supreme Court. One section cannot be too much to ask for.

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157 See section IV, above.

158 S. 50 of the U. K. Supreme Court Act 1981 reads: "Where the Court of Appeal or the High Court has jurisdiction to entertain an application for an injunction or specific performance, it may award damages in addition to, or in substitution for, an injunction or specific performance."

159 Cap. 43, 1985 (Rev. Ed.).

160 Cap. 322, 1985 (Rev. Ed.), perhaps in s. 18 (2).

161 Under the present rules on *stare decisis,* only the Court of Appeal and the Privy Council can reverse *Shiffon.*

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