Singapore Journal of Legal Studies
[1994] 91 – 110

THE POWERS OF THE SUPREME COURT OF SINGAPORE IN AWARDING DAMAGES AND INTEREST

This article examines the powers of the Supreme Court of Singapore in awarding damages and interest. The powers were recently clarified and expanded by amendments to the Supreme Court of Judicature Act. The changes are examined with reference to the law prior to the amendments, and some suggestions are made for the exercise of the new powers.

I. INTRODUCTION

THE powers of the Supreme Court of Singapore to award damages and interest were recently clarified and expanded.[1] First, a general power to award damages was confirmed by legislation. Second, the legislation conferred specific independent new powers to –

- (i) award damages in addition to, or in substitution for, an injunction or specific performance;
- (ii) award interim damages before judgment or the actual assessment of damages;
- (iii) award further damages on the realization of contingencies that are identified at the time of an earlier award of personal injuries damages by a court; and
- (iv) order damages to be paid in "periodic instalments" instead of a lump sum.

Third, the power to award interest was extended to cover all situations where debts are paid late, whether before or after the commencement of legal proceedings. The changes will be examined in turn.

The powers of the Supreme Court of Singapore (hereafter "Supreme Court") prior to the amendments were set out in section 18 of the Supreme Court of Judicature Act.[2] Section 18(1) stated that the High Court "shall

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1 The powers of the Supreme Court discussed here are also available to the Subordinate Courts by virtue of ss 32 and 52 of the Subordinate Courts Act, Cap 321, 1985 Rev Ed, recently amended by the Subordinate Courts (Amendment) Act 1993, No 15 of 1993.

2 Cap 322, 1985 Rev Ed.

have all such powers as are vested in it by any written law". Section 18(2) expressly listed a non-exhaustive set of powers. It has been pointed out that the list did not cover all practically necessary powers, for example, the power to give effect to all rights at law, including the power to award damages.[3] No statutory provision which gives such a power can be found, unless the statutory power to hear and try a case is sufficient to confer the power to award any remedies that the parties may be entitled to under the law. This "savings" approach would, however, make most of section 18(2) unnecessary.

The Supreme Court of Judicature (Amendment) Act 1993 (the Amendment Act),[4] better known for establishing a separate Court of Appeal, also amends, *inter alia,* section 18. A new section 18 first restates the principle that the court shall have all powers as are vested in it by law.[5] An inclusive list of specific powers is once again provided as in the original section, but in a Schedule rather than within the section itself. The section states that the court shall have the powers set out in the First Schedule to the Act (which is inserted by the same amending Act), such powers to be exercised according to any written law or Rules of Court relating to them.[6] The new First Schedule lists more powers than previously found in section 18, and notably includes a general power to grant all reliefs and remedies at law and equity.[7]

The amendments to the Act were followed by amendments to the Rules of the Supreme Court (hereafter RSC).[8] Some of the changes made by the amendments to the RSC relate to powers in the new First Schedule of the Supreme Court of Judicature Act (hereafter SCJA).

II. General Power to Award Damages as well as Damages in Equity

> Paragraph 14, First Schedule of the SCJA:
> Power to grant all reliefs and remedies at law and in equity, including damages in addition to, or in substitution for, an injunction or specific performance.

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3 Soh Kee Bun, "Jurisdiction to Award Equitable Damages in Singapore" (1988) 30 Mal LR 79, especially at 97-98.

4 No 16 of 1993.

5 S 18(1).

6 Ss 18(2) and 18(3) respectively.

7 Paragraph 14.

8 The Rules of the Supreme Court (Amendment No 2) Rules 1993, S 278/93. There is a parallel amendment for the Subordinate Courts: The Rules of the Subordinate Courts (Amendment No 2) Rules 1993, S 279/93.

This paragraph of the new First Schedule makes it clear that the Supreme Court has the power to grant all reliefs and remedies at law and equity. This would of course include the power to award damages. The power to grant all remedies available at law and equity is now clearly distinct from the power to hear and decide cases under the "jurisdiction to hear and try" provisions of the Act.

The power to award "damages in addition to, or in substitution for, an injunction or specific performance" is based on Lord Cairns' Act.[9] Prior to the amendment, the availability of equitable damages in Singapore was uncertain. In the *Shiffon* case, both the High Court and the Court of Appeal discussed but did not decide whether there was a jurisdiction to award damages in equity in Singapore.[10] The similar wording of the new statutory power effectively makes the case law on the English statutory equivalent relevant here for purposes of interpretation. The new power paves the way for damages to be awarded for the infringement of rights that are recognized in equity but not at common law. It was observed in *Johnson* v *Agnew*[11] that the statutory jurisdiction allows damages to be awarded which could not have been before. Examples include damages in lieu of a *quia timet* injunction (as under common law, damages cannot be awarded before actual damage is suffered); and damages for the breach of a restrictive covenant to which the defendant was not a party (which did not pass at law, and which was not actionable at common law because of the lack of privity of contract).[12]

One notable issue on the jurisdiction is whether it allows damages to be awarded on an expanded definition of "compensation" if not on a non-compensatory basis. In *Wrotham Park Estate* v *Parkside Homes*[13] the court awarded damages in lieu of a mandatory injunction, a portion of the profit made by a builder who built in breach of a covenant not to build without permission. The loss to the plaintiff was nominal as the value of the estate was not diminished, yet a significant amount of damages was awarded.

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9 21 & 22 Vict, c 27. The jurisdiction is presently stated in s 50 of the UK Supreme Court Act 1981. See Soh, *supra*, note 3.

10 *Shiffon Creations (Singapore) Pte Ltd* v *Tong Lee Co Ltd* [1988] 1 MLJ 363 (HC), [1991] 1 MLJ 65 (CA). The Court of Appeal inclined strongly towards the view that the jurisdiction under Lord Cairns' Act was inadvertently repealed in Singapore (see a more complete discussion in Soh Kee Bun, *supra*, note 3). The court also observed that even though there seemed to be some case law on a general jurisdiction to award damages in equity which was independent of the statutory jurisdiction, its scope was uncertain and indeterminate because the cases were not developed after Lord Cairns' Act was passed. Since Lord Cairns' Act covered most of the cases ever likely to need such a jurisdiction, it was not surprising that litigants did not subsequently rely on the less certain equitable jurisdiction.

11 [1980] AC 67.

12 *Ibid*, at 400.

13 [1974] 1 WLR 798.

The case therefore seems to allow for substantial damages to be awarded on the basis of the gain (*ie*, the profit) to the wrongdoer rather than the loss to the plaintiff. If that is in fact the basis of the award, it would be a departure from the loss-based compensation approach of the common law. However, it has been said by the House of Lords in *Johnson* v *Agnew*[14] that Lord Cairns' Act does not allow damages to be assessed on a basis different from the common law. Despite the strong statement from the House of Lords, the decision in *Wrotham* itself seems to stand and, recently, the English Court of Appeal in *Surrey County Council* v *Bredero Homes*[15] agreed with the award in *Wrotham* even though it also held that the common law basis for the award of damages had not been changed by *Wrotham*. It is not possible to deal comprehensively with the issue here, but it should be pointed out that it is theoretically possible for local courts, who are not in any case bound by the English decisions, to develop a restitutionary form of damages here.

III. Interim Payments

> Paragraph 15, First Schedule of the SCJA:
> Power to order a party in a pending proceeding to make interim payments to another party or to a stakeholder or into court on account of any damages, debt or other sum, excluding costs, which he may subsequently in the proceedings be adjudged liable to pay.

This widely drafted power covers several situations, the most obvious of which being the situation where the defendant has already been found to be liable, but the amount of damages has not been assessed. Under this power, a defendant may be ordered to make interim payments on damages which he "may" be adjudged liable to pay. This power is potentially far reaching in that a defendant who has not been proved to be legally liable may also be ordered to pay some money to the plaintiff.[16] The need for the power would be greater in systems where there is a long waiting period for a trial or hearing. With trial dates within the same year being possible now, it has already been commented by practitioners that this new power is not as important as it would have been some years ago. However, there will be cases where a plaintiff may need money almost immediately, before any formal assessment of damages.

The power is clearly intended to meet cases of pressing need on the part of the plaintiff. However, this has to be balanced with fairness to the

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14 *Supra*, note 11.

15 [1993] 3 All ER 707. See also *Stoke-on-Trent County Council* v *Wass* [1988] 1 WLR 1406.

16 At common law, there is no such right. There is also no inherent jurisdiction to make interim awards: *Moore* v *Assignment Courier* [1977] 1 WLR 638.

defendant who may not have been legally proved on a balance of probabilities to be liable for that amount, if any. One potential problem to avoid is an application for interim damages turning into a quick mini-trial of all the substantive issues. The RSC helps to clarify the scope of the power.

Order 29, Rule 11 of the RSC[17] limits the scope of the power by stipulating three situations for the exercise of the power in respect of damages: (i) when the defendant has already admitted liability; (ii) when the plaintiff has already obtained judgment for damages to be assessed; and (iii) if the plaintiff would obtain substantial damages if the action were to proceed to trial.

In any one of these situations, the court *may* make an interim order of such payment "as it thinks just, not exceeding a reasonable proportion of the damages which in the opinion of the Court are likely to be recovered by the plaintiff." The first two situations are not difficult to justify. In 1984, Lord Scarman in *Jamil bin Harun* v *Yang Kamsiah*[18] suggested that legislation was in order when he noted the lack of power to order an interim payment in cases where liability had already been admitted.

The third situation, however, raises a difficult issue as it effectively requires the court to consider not just the probability of success at the actual trial, but success in recovering substantial damages. This can only be done if issues of defences and contributory negligence are also considered. In theory, a court could practically try the case to determine if the plaintiff "would" succeed at the trial. However, this could not have been intended by Parliament as an application for interim damages would then become a deciding trial without the benefit of a full trial. In view of the potential problems, and the fact that a court should not conduct a mini-trial to determine actual liability, it is likely that the third situation will apply only when the case against the defendant is one which, on the examination of the pleadings alone, can be said to be very obvious and strong. However, if the plaintiff can show such a strong case, summary judgment would usually be possible under Order 14 of the RSC,[19] in which case the second situation would then be applicable.

Cases of pressing financial need on the part of the plaintiff *per se* do not (as should be the case) find any assistance here. In fact, the Rules do not refer to "need" at all. However, when one of the listed situations is present, the court is not obliged to make an order, but "may" make an order

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17 As amended by S 278/93. There are also rules for payments in respect of sums other than damages in Order 29 Rule 12. The Rules that deal with interim payments are based on UK legislation: see the UK Administration of Justice Act 1969 (s 20); SI 1980/1010, UK Rules of the Supreme Court Order 29 Rules 10-17.

18 [1984] 1 MLJ 217.

19 In fact, Order 29 Rule 10(2) allows such an application to be included in a summons for summary judgment under Order 14.

if it thinks fit. Financial need would be an obvious factor that a court would consider.

In summary, despite the wide wording of the basic power in the Supreme Court of Judicature Act, the effect of the Rules is that an order for interim damages will not be made against a defendant unless he is, generally speaking, liable to pay some damages.

The Rules also provide that in actions for personal injuries, no order for interim payment can be made unless the defendant is either insured or has the means to make such a payment.[20] This provides some protection for defendants. With such a means test, defendants in personal injuries cases (where large sums can be involved) are less likely to be too seriously affected in the event of a mistake. However, ability to pay does not mean ability to lose the same, and it is not clear why the qualification only applies to personal injuries cases. The position could perhaps be explained if the main concern is really with road accidents, where there would in most cases be an insurance company with a financial interest in the legal outcome.

Once an interim order is made, it is important not to prejudice the mind of a judge who subsequently hears the actual case. The disclosure of the existence of an interim damages order is generally not allowed until all questions as to liability are finally settled.[21] Repayment of all or part of an interim payment can be ordered when a court gives a final judgment or order, or grant the plaintiff leave to discontinue or withdraw his claim.[22] There is no way to ensure that any order for repayment can in fact be satisfied. The money may already have been spent, and the plaintiff may have no assets of sufficient value. This risk has to be balanced against the needs of the plaintiff. Considering the circumstances under which an order for interim damages can be made, the possibility of an injustice to defendants is in reality quite limited. In theory, a court could also consider the difficulty of recovering an interim payment in deciding whether to order an interim payment. However, if this factor is given too much weight, a major reason for the existence of such an order would be defeated. Parties who are already in financial need may not be able to repay the interim award if required to do so in the future.

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[20] Order 29 Rule 11(2). The UK provision (also Order 29 Rule 11(2)) upon which this is based includes "a public authority". Even though there is no express mention of "public authority" in the Singapore Rules, all "public authorities" are practically included since all such "public authorities" will have the financial means to pay. This would bring them within the provision indirectly.

[21] Order 29 Rule 15.

[22] Order 29 Rule 17.

IV. Provisional Damages

> Paragraph 16, First Schedule of the SCJA:
> Power to award in any action for damages for personal injuries, provisional damages assessed on the assumption that a contingency will not happen and further damages at a future date if the contingency happens.

Contingencies can mean a difficult choice for a potential litigant who has suffered personal injury. Time limitation of actions and financial need may force the litigant to commence an action without waiting, with the cost of some speculation at the trial as to his condition in the future. Damages for any future condition must be proved on a balance of probabilities at the trial. Once a judgment has been awarded, it is not possible to return to court to ask for more damages on the basis of changed conditions as the issue of the defendant's liability would have been settled.[23] For example, a plaintiff who is told by his doctor that he may develop a certain condition in the future may be forced to bring an action without waiting to confirm the diagnosis. If the injured party is in financial need, he may be forced to litigate even if limitation is not a problem. In court, he will have to try to convince the court that he would in fact develop the condition. If he fails, he will not obtain any damages for such loss even if after the trial, he does in fact suffer it.[24] On the other hand, if he succeeds in convincing the court that he would develop the condition and receives compensation for it, he would be over-compensated if he subsequently does not suffer from it.

The new power[25] to award damages on a contingent basis helps those who may not want to "wait and see" before suing, and those who for some reason need to obtain judgment first.[26] There is much to be said for one-off finality, but justice may not be served if this principle is rigidly adhered to. Under this new power, sometimes referred to as a "wait and see" approach, the contingency must be identified at the trial. The court may award provisional damages on the basis that a contingency will not occur.[27] The order will allow an application for further damages should the named contingency occur. Unless the court otherwise determines, a time limit for an application

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23 If there is an appeal, an appeal court may be willing to take fresh evidence and award damages on the basis of what is known at the time of the appeal.

24 For some illustrations of the problem, see *Jones* v *Griffith* [1969] 1 WLR 795; *Hotson* v *Fitzgerald* [1985] 1 WLR 1036; *Hotson* v *East Berkshire Area Health Authority* [1987] AC 750.

25 It seems to be loosely based on s 35A of the UK Supreme Court Act 1981, which was inserted there by s 6(1) of the UK Administration of Justice Act 1982.

26 The interim payments option discussed earlier is an alternative.

27 The plaintiff must plead a claim for provisional damages: Order 37 Rule 8(1)(a).

will be specified. Any such time limit can be extended if an application is made by the plaintiff before the expiry of the time period.[28] No upper time limit for such extensions is set by the legislation.

An application for provisional damages can only be pleaded by a plaintiff.[29] A defendant cannot ask for it when, for example, loss of future earnings is in question, and the life span or working life of the plaintiff is (naturally) unclear. No "wait and see" approach is allowed in such circumstances. It is not immediately clear why a defendant is not allowed to ask for a contingent order under any circumstances. One possible explanation is that it may be abused by defendants, who may use it as a bargaining tool. Also, to allow both parties access to such orders would bring the power very close to one allowing orders to be generally reviewable on the basis of changing circumstances. This would create many problems in terms of lack of finality. In theory, a defendant would want such an order only when the contingency can be proved by the plaintiff on a balance of probabilities. Only an irrational defendant would ask for such an order when the plaintiff cannot prove the contingent event on a balance of probabilities. If the plaintiff can in fact prove the contingent event on a balance of probabilities, the case would have been proved, and it is unlikely that a court would (even if a defendant could apply for one) make a contingent order instead of awarding damages on the basis of what has been proved. In fact, if it can be proved on a balance of probabilities, the event cannot be described as "contingent". However, it should be noted that in real life, parties to litigation cannot be sure of what will eventually be proved at the trial, and a court could simply make such a contingent order without deciding whether the contingent has been proved on a balance of probabilities.

The word "contingency" is not defined or restricted, and it is not literally confined to medical conditions. This means that it is theoretically possible for the plaintiff to raise contingencies based on changes in the value of money, for example, by reference to events like "inflation not exceeding 5% per annum". However, it is not likely that such contingencies were ever intended to come within the power, even though a court could interpret the power this widely.

Under the power, the damages can only be increased (*ie*, "further damages"), and a court cannot award damages on the basis that a plaintiff would not be cured, and later order a refund or reduction should the contingency of being cured materialize.

A court is not empowered to initiate such an order because the plaintiff's application for one is a prerequisite. As such, it may be prudent for plaintiffs in borderline situations to plead for such an order in the alternative. This

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28 See Order 37 Rules 7-10 (as amended by S 278/93) generally.

29 Order 37 Rule 8(1)(a).

will ensure that in the event of failure to prove a future condition on a balance of probabilities, there can still be a "wait and see" order.

Considering the nature of the power, it is not possible to set rigid rules on when such awards should actually be made. Obvious considerations include a credible case of sufficient probability. It may not be fair for a defendant to live with a potential liability for too long. The chance factor and the time factor are probably the two most important considerations. If, for example, the medical evidence is that there is a low 1% chance of a condition developing, it would not be right for the court to make a contingent order. A mere chance should be sufficient. However, it would also be unfair to require too high a degree of probability because the plaintiff would in such a case be already in a position to prove his claim immediately.

V. Periodic Instalment Payments

> Paragraph 17, First Schedule of the SCJA:
> Power to order damages assessed in any action for personal injuries to be paid in periodic instalments rather than as a lump sum.

At common law, liability to pay damages is in the form of lump sums.[30] The District Court had for some time, a power under section 43 of the Subordinate Courts Act[31] to order money to be paid in instalments. However, the High Court did not then have an equivalent power, and it did not have a general power to order payments in instalments even if undue hardship would be suffered by the defendant. The reason for the absence of the power in the High Court is not clear. It may be that it was originally intended for poor judgment debtors who could not pay in full, and for whom proceedings like seizure and sale or bankruptcy were not considered meaningful. The High Court now has the power, after assessing damages in personal injuries actions, to order damages to be paid in instalments. This is not a power to review awards from time to time based on changing circumstances like changes in the value of money. The power is confined to personal injuries litigation.

The role of the word "periodic" is not clear. The simplest interpretation would be that the payments must be at a regular fixed interval. However, there is no reason for this, as it would limit the flexibility that is created by the power. The defendant's money liability is assessed on a lump sum basis as before. The difference lies in the court being able to order or allow it to be paid in parts.

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[30] This is generally the accepted proposition. An authority for it can be found in *Burke* v *Tower Hamlets Health Authority*, The *Times*, 11 August 1989.

[31] Cap 321, 1985 Rev Ed. See Order 42 Rule 13 of the Rules of the Subordinate Courts, 1986 Ed. The position is re-stated in the 1990 Ed.

The power as drafted seems to be for the sole benefit of defendants who have been found liable to pay damages. The casual observer might question why such instalment payment should be allowed at all. If the plaintiff is entitled to it, he has invariably already "lost" that amount. It might be argued that in cases where the defendant does not have the required amount of liquidity, he should take a loan and pay the full amount to the plaintiff as the successful plaintiff should not be effectively made to lend money to the defendant. In real life, not all defendants would be able to raise a loan of the necessary amount, and even those who may have assets that can be liquidated may suffer undue harm and hardship in doing so. In some cases (for example, those involving personal injuries), the plaintiff may not actually need to spend the whole award immediately. In fact, if loss of future earnings is in question, the plaintiff has not actually "lost" his future earnings. The judgment creditor may even benefit from an instalment payment order because an immediate obligation to pay may sometimes result in the bankruptcy of the judgment debtor. On the whole, the extension of the power to the High Court is to be welcomed, but it should be sparingly used so as not to prejudice judgment creditors who may need the money in full.

There are no rules of court governing this power. As a matter of principle, the court should not require the judgment creditor to wait too long, and in cases of hardship on both sides, the judgment creditor should be favoured. It should also be pointed out that the judgment creditor may be exposed to the risk of the judgment debtor becoming insolvent.

The position of insurance companies here should be considered carefully. The power is confined to personal injuries litigation, and in most cases involving substantial sums, the real paymaster will be an insurance company. Even though the power falls far short of allowing a court to impose a long term financial provision scheme on the plaintiff, it can be used to regulate the flow of money to a plaintiff, albeit on the basis of a pre-determined lump sum. It can be expected that insurance companies will ask for large awards to be paid over an extended period of time. The risks of insolvency described earlier are limited when an insurance company is involved. There are advantages in a controlled release of money to the plaintiff. If sufficient money is released to meet all likely needs first, the plaintiff will be protected to a certain extent against immediate unwise spending, whether on himself or under pressure from those around him. The defendant will not have to pay large lump sums immediately, which might produce indirect benefits for premium paying motor vehicle owners. If the power were exercised purely on the basis of hardship to the defendant, then one would expect that it would not be exercised in favour of most insurance companies. The exercise of the power should not only be influenced by the position of the insurance company. The benefits of such an order to the plaintiff should be more important than those to the insurance company. Subject to the question of interest which will be dealt with next, such orders can also be used to afford limited protection to the plaintiff against the effects of inflation as well. However, such protection would probably be better provided with a lump sum payment to a third party who is then authorized to invest and release the money in instalments. This would involve higher administrative costs and quite different legislation.

One important issue that arises from this power is that of interest. If a plaintiff is entitled to \$100, and if it were to be paid in, say, two parts, it would be wrong to order \$100 to be paid in two equal parts of \$50 each. This is because \$50 would be paid "late". If payment of the full sum had been ordered and half of it not paid out immediately, there would have been interest on the outstanding judgment debt.[32] In fairness to the judgment creditor, any sum that is paid in instalments should carry interest at the judgment debt rate of interest. This is not expressly provided for in the Rules of Court or the Act, but it is possible to rely on Order 42, Rule 12 of the RSC which states that judgment debts should carry interest at 8% per annum (or such other rate as the Chief Justice may direct) until the judgment is *satisfied*.[33] An argument can be made that 8% is too high in terms of loss of use of money, but not if the emphasis is on the gain to the defendant, who might otherwise then have to borrow. A high rate can be justified here because it will discourage those who can really pay in full from asking for instalment payments.

The simple \$100 example leads to a more difficult mathematical problem. This problem can be illustrated by another example, where loss of future earnings is in question, and the court has decided on such damages to amount to \$100,000; based on a multiplicand of \$10,000 and multiplier of 10 years. The multiplier is actually based on a different and larger base figure, which is discounted to take into account factors like overlapping, other contingencies of life and the fact of advance payment (*ie*, in broad terms, the present value of future money). For example, a plaintiff may be crippled by an accident for which the defendant is liable. If the plaintiff cannot work as a result of the accident, and had 15 years of actual working life ahead of him, his yearly loss of \$10,000 will not be multiplied by 15. This is because the plaintiff might meet other mishaps, (for example, he might be killed or crippled in another accident). More important, the plaintiff would be immediately receiving damages to compensate for "lost salary" which he would have otherwise collected over a period of 15 years. In practice,

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32 Under Order 42 Rule 12 of the Rules of the Supreme Court, the rate is 8% or such rate as the Chief Justice may direct from time to time.

33 For a discussion of Order 42 Rule 12, see Soh Kee Bun "Interest on Judgment Debts in Singapore" (1988) 30 Mal LR 285, at 286-288, 293-297.

the figure of 15 will not be used by the court to compute the overall loss. A reduced or discounted figure, say, of 10 will be used.[34] The discount is supposed to take the mentioned factors into account. In such a case, it would be wrong for a court to simply allow the assessed damages of $100,000 to be paid in say, five equal instalments of $20,000 over five years. If this were done without the award of interest, the plaintiff would have suffered a discount for advance payment without enjoying full advance payment.

However, if interest were to be given, the court would be attempting to partially restore what it had earlier taken away. This would be done on a different, though more precise basis. There is very little doubt that the discounting which results in the multiplier is unavoidably arbitrary. It may not take too much to carry the fiction of arbitrary reduction further and assume that the award of interest for late payment under Order 42 produces a neutralizing result which is mathematically as correct as is humanly possible in such circumstances. There is no precise way to restore the arbitrary discount made for advance payment. However, should instalment payment be ordered over a fairly long period of time, say, of 10 years, an alternative approach would be not to discount for advance payment,[35] and not to award interest for late payment.

It is not clear if the court has the power to vary such orders. The power as drafted seems to be one-off, allowing an order to be made once only. It is also not clear if an order can be revoked if the judgment debtor does not pay an instalment on time. It may be desirable in some cases to allow for revocation (preferably automatic) so as to allow the judgment creditor to enforce the full outstanding judgment debt immediately. These matters can be dealt with in the RSC, but there is no reason why they cannot be developed as conditions and terms by the courts when such orders are made.

VI. Interest

> Paragraph 6, First Schedule of the SCJA:
> Power to direct interest to be paid on *damages, or* debts *(whether the debts are paid before or after commencement of proceedings)* or judgment debts, or on sums found due on taking accounts between parties, or on sums found due and unpaid by receivers or other persons liable to account to the Court. [Emphasis added.]

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34 In mathematical terms, it does not matter if 15 is used and the result of $150,000 then reduced to take into account the contingencies and the fact of advance payment. The courts have adopted the approach of discounting the number of lost years of working life.

35 However, in personal injuries cases, a discount may still have to be made for other contingencies. In the earlier example, a multiplier of 12 or 13 could be used instead of 10.

This power to award interest for late payment is essentially the same as the original power which it replaces,[36] except for the inclusion of the words within the brackets which establish the irrelevance of the time of repayment of a debt, and the availability of the power over damages and debts rather than just debts alone. The power as drafted literally allows a judge to award interest on a debt that remains unpaid at the time of judgment (hereafter "Case 3"[37] or "unpaid debt situation"). The words "whether the debts are paid before or after commencement of proceedings" mean that there is also a power to award interest in what can be referred to as "late paid debt situations", *ie,* when the debt is paid late after the commencement of proceedings, but before judgment in the plaintiff's favour (hereafter "Case 2"); and even when the debt is paid late, but prior to the commencement of proceedings (hereafter "Case 1").

It is necessary to consider the law on interest for the late payment of debts before examining the expanded power. This power has to be examined together with section 9 of the Civil Law Act[38] which also allows a court to award interest in a Case 3 situation. Before section 9 is examined, it is necessary to consider the position at common law.

In the absence of a contractual provision for interest to be paid, the common law position on damages for the late payment of a debt is that no interest will be awarded as damages for the late payment.[39] This basic position is established by *London, Chatham & Dover Railway* v *South Eastern Railway*.[40] An exception to the rule is when special damage is suffered. This is based on knowledge of special circumstances which comes under the second limb of *Hadley* v *Baxendale*.[41] Basically, this means that no loss of the use of money is assumed by the common law. This is an unrealistic position today, even in cases where no special plan to use the money can be shown. Legislation has long since changed the position by giving courts the power to award interest. In the United Kingdom, the power to award interest was established by section 3(1) of the UK Law Reform (Miscellaneous Provisions) Act of 1934. The UK jurisdiction was established here a few years later, in section 7A of the Civil Law Ordinance of 1940,[42]

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[36] The original s 18(2)(g), see *infra*.

[37] Illustrations as used by Lord Brandon in *President of India* v *La Pintada* [1984] 2 All ER 773, at 783-784.

[38] Cap 43, 1994 Rev Ed.

[39] The English Admiralty and Chancery courts have allowed interest. However, the powers do not apply in the most common contract debt situation. For a recent affirmation of the general law in Singapore, see *TKM (Singapore) Pte Ltd* v *Export Credit Insurance Corporation of Singapore (Limited)* [1993] 1 SLR 1041, especially at 1074-1076.

[40] [1893] AC 429.

[41] 156 ER 145. See *Wardsworth* v *Lydell* [1981] 1 WLR 598.

[42] Straits Settlements Ordinance 30 of 1940.

which is now section 9 of the Civil Law Act.[43] Section 9 of the Civil Law Act states:

> [i]n any proceedings tried in any court for the recovery of any debt or damages, the court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment:
>
> Provided that nothing in this section –
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> (a) shall authorise the giving of interest upon interest;
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> (b) shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise; or
>
> (c) shall affect the damages recoverable for the dishonour of a bill of exchange.

Section 9 does not come into consideration unless there is a trial and judgment is given,[44] and it covers a case where no payment has been made and a judge finds the defendant liable to pay the debt (*ie*, a "Case 3" situation). It does not cover Case 1 as the debt would, at common law, be discharged. It also does not cover Case 2 because the judge would not be awarding judgment on the principal sum, and there would be no judgment debt to add interest to.[45] The question of interest on a sum that is paid late, but before the commencement of an action, is still based on the common law (or any other relevant statutory provision). If there is no entitlement to interest at common law, there would be no cause of action to pursue once the debt is discharged. Also, if the sum is paid late even after an action has been commenced, it is questionable whether section 9 can be applied because there will be no judgment sum to which interest can be added.

The English courts have refrained from changing the often criticized common law position because the statutory position (on which our section 9 is based) did not cover all types of late payment. To change the common law position to the logical position which would cover all late payments

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43 Cap 43, 1994 Rev Ed.

44 A judge who awards summary judgment (where there is no trial in open court), has been held to come within the words of the statutory power: *Gardner Steel* v *Sheffield Brothers* [1978] 1 WLR 916 (CA).

45 *People's Park Development Pte Ltd* v *Tru-Mix Concrete (Pte) Ltd* [1982] 1 MLJ 3.

(*ie*, Cases 1, 2 and 3) would make the statutory provision (which does not cover all cases of late payment) superfluous.[46]

The position in Singapore is complicated by the presence of two statutory powers: one in the Supreme Court of Judicature Act and another in section 9 of the Civil Law Act. In general, section 9 is more specific, covers only Case 3, and contains restrictions (for example, against interest upon interest or compound interest) which are not found in paragraph 6 of First Schedule of the Supreme Court of Judicature Act.

Even prior to the enactment of the new paragraph 6 of the First Schedule, there was section 18(2)(g) of the Supreme Court of Judicature Act which gave the court "power to direct interest to be paid on debts, including judgment debts, or on sums found due on taking accounts between parties, or on sums found due and unpaid by receivers or other persons liable to account to the court." This power can be traced all the way back to 1934, to section 11(2)(h) of the Courts Ordinance of 1934,[47] which is in the same terms, except for the use of "jurisdiction" instead of "power". It is therefore a power that pre-dates section 9 of the Civil Law Act, which became law only in 1940. Of greater importance is the fact that it was made law in the same year that the UK Law Reform (Miscellaneous Provisions) Act of 1934 (upon which the present section 9 of the Civil Law Act was based) was made law. It follows that in 1934, the courts already had the jurisdiction to "direct interest to be paid on debts". If this were to be read literally, it would definitely cover a Case 3 situation, but not a Case 1 situation as the debt would be extinguished by payment. However, it might cover a Case 2 situation as it might be argued that there was a debt when the action was commenced.

An electronic search of a data-base for legal decisions of the Straits Settlements did not reveal any cases which explain, or illustrate the position or the practice in the 1930s. A few possible reasons could be offered for introduction of the UK jurisdiction in 1940. It might have been thought that the power in the Courts Ordinance did not alter the common law position (*ie*, it only allowed interest to be awarded, but only in cases where the common law or equity already allowed it);[48] or it was desired to narrow the jurisdiction with more specific legislation. The relationship between

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46 *La Pintada* v *President of India* [1985] AC 104; *President of India* v *Lips Maritime Corporation* [1988] AC 395. But the Australian courts have not seen the making of the statute superfluous as an obstacle: *Hungerfords* v *Walker* [1989] ALR 119, High Court of Australia. The UK statutory position has been widened to cover late payment after an action has been commenced, but prior to judgment: s 35A of the UK Supreme Court Act 1981 (inserted by s 15 of the UK Administration of Justice Act 1982). It still does not cover a Case 1 situation.

47 Straits Settlements Ordinance 17 of 1934.

48 This will be discussed later.

the two provisions does not seem to have been carefully considered before.

More than a decade ago, in *People's Park Development Pte Ltd* v *Tru-Mix Concrete (Pte) Ltd*,[49] the Court of Appeal was faced with a case that did not fall within section 9 of the Civil Law Act. The debt had been paid prior to the trial, and it was therefore not a sum for which judgment was given by the court. However, it awarded interest under what it referred to as an "additional power" in the Supreme Court of Judicature Act.[50] The fact that the powers overlapped (in respect of debts but not damages),[51] was not seen as problem, and whether the power in the Supreme Court of Judicature Act could be used even in a Case 3 situation (which is specifically covered by section 9 of the Civil Law Act) was not discussed. The court did not consider the historical origins of the two jurisdictions. In fact, the court seemed to assume that the power in the Supreme Court of Judicature Act was introduced later. The case does seem on a literal reading to allow for interest to be awarded in a Case 2 situation under the Supreme Court of Judicature Act. One could then conclude that on the legislation in force at that time, Case 3 would be covered by section 9 of the Civil Law Act, while Case 2 would be covered by the Supreme Court of Judicature Act. However, Case 1 would not be covered as there would be no debt (aside from special damages) at all if no action was commenced prior to late payment.

The *People's Park* decision is somewhat unusual as both parties actually went to court to inform the trial judge that the matter had been settled except for the question of interest; so it is arguable that there was still an issue for the court to deal with. The whole debt might not have been extinguished when the parties went to court as the payment was not made or accepted unconditionally; it was paid with the question of interest to be settled. Also, there was a debt when the action was initially commenced. The effect of the decision *vis-à-vis* a "pure" Case 2 situation is therefore not totally clear.

The new paragraph 6 of the First Schedule extends the power over damages as well and, more significantly, purports to change or clarify the position by expressly stating that there is a power to award interest "whether the debts are paid before or after the commencement of proceedings." The predecessor provision in section 18(2)(g) did not have these words. It would seem that interest can now be awarded in all situations where a debt is paid late, *ie*, cases 1, 2 and 3. This would be clearly wider than the position under section 9 of the Civil Law Act (which covers Case 3 only). However, this would seem to be an unusual way to amend the law as the more recent

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49 *Supra*, note 45.

50 The predecessor of the pre-amendment provision in s 18(2)(g) of the Supreme Court of Judicature Act. It was then in Cap 15 of the 1970 Rev Ed, and the power was specifically stated in para 7 of the First Schedule.

51 *Supra*, note 39.

jurisdiction in section 9 of the Civil Law Act was not amended.

On one view (the complementary powers interpretation), the chosen form of amendment to the Supreme Court of Judicature Act merely allows the court to award interest for late payment in all situations that already allow it under the common law, admiralty law, equity and section 9 of the Civil Law Act. Given the presence of section 9, this approach would treat the power within the Supreme Court of Judicature Act to be enabling, so that the court would have the power to award what parties are entitled to under the law. Unless section 9 of the Civil Law Act is similarly amended, the revised power in paragraph 6 would merely empower the court to give effect to existing law and does not change it. Under this approach, the reference to whether the debt is paid before or after the commencement of proceedings does not extend the present law. For example, it would clarify the position of an existing right to sue for special damages under the second limb of *Hadley* v *Baxendale*,[52] when the defendant knew that the plaintiff needed to use the money, and the defendant paid the sum late, after the plaintiff had in fact borrowed money, but before an action was commenced. However, such clarification is unnecessary, as the court would be awarding damages for damage suffered, and it would not need a power to award interest *per se*.

In addition, section 9 of the Civil Law Act says the court may award interest if it thinks fit. Paragraph 6 of the First Schedule is drafted along the same lines. Both provisions confer a power. Neither is drafted along the lines of automatic legal entitlement, and it is not easy to see one (section 9) as establishing a right which the other (paragraph 6) empowers the court to give effect to. Since section 9 itself gives the court a power, a further power to award the power is really unnecessary. The complementary powers interpretation is also not supported by the *People's Park Development* case, which sees the two as powers in themselves.

Another view (the distinct powers interpretation) sees the two as distinct and separate, covering different situations. Section 9 of the Civil Law Act would then only cover Case 3 (*ie*, unpaid debts) and the present power within the Supreme Court of Judicature Act would cover all other cases, including special damages, interest in equity as well as Case 1 and Case 2, but not Case 3. This can be supported by the fact that "debts" is qualified by "whether the debts are paid before or after commencement of proceedings", which can mean that it only covers late paid debts and not unpaid debts. This interpretation would have the result that some of the restrictions within section 9 (for example, against interest on interest)[53] would not apply

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[52] *Supra*, note 41.

[53] In present day circumstances, a general restriction against compound interest is unrealistic. The effect of the restriction can easily be avoided by awarding a higher rate of simple interest.

when the power in the Supreme Court of Judicature Act is exercised. Unusual results will have to be accepted under this approach. For example, a party who paid late before the trial might be liable to pay compound interest (as there is no such restriction in the Supreme Court of Judicature Act), but if he had still not paid at the time of judgment against him, only simple interest can be awarded under the Civil Law Act. It is unlikely that this was the intended result in the reform, but support for this view can be found in the approach of the *People's Park Development* case.[54]

The last approach (the alternative powers interpretation) is the simplest. Both powers are simple alternatives. The Civil Law Act can be used in Case 3 situations. The Supreme Court of Judicature Act extends the power, but it can also be used in a Case 3 situation covered expressly by section 9 of the Civil Law Act. The same unusual results as under the distinct powers interpretation would follow. In addition, a judge could award compound interest in a Case 3 situation by using the Supreme Court of Judicature Act instead of the Civil Law Act. The most significant result will be that section 9 will become practically superfluous as the Supreme Court of Judicature Act will cover Case 3 and more.

In summary, none of the interpretations can be said to be without difficulties, even though the general intention may have been to allow interest to be awarded in Case 1 and 2 situations. The most acceptable interpretation would be the distinct powers interpretation as it would not involve making section 9 of the Civil Law Act practically redundant. The most logical approach towards legislative clarification would be to have only one provision conferring a power to award interest.

In general, little argument will be required for including Case 2 within the statutory jurisdiction. Late payment would be encouraged otherwise. The position of Case 1 is not so clear. The law in the UK has been changed to cover Case 2 as well, but not Case 1, which remains outside the scope of the legislative jurisdiction. This is despite the recommendation of the UK Law Commission that Case 1 should be covered as well.[55] The UK position would seem, at first instance, to still encourage late payment because no interest will be payable in Case 1 unless there is special damage. There is an incentive to pay before one is sued, but there is no incentive to pay before the earlier contractual date for payment. However, this will not actually work so smoothly in real life because a debtor will not be in a position to accurately predict whether there will be special damage. It is also difficult

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A restriction against awarding interest on contractually agreed interest for late payment (until the trial) would of course be justified.

54 *Supra*, note 45.

55 Law Commission No 88. The amending legislation was s 15 of the UK Administration of Justice Act 1982 which in turn amended the UK Supreme Court Act 1981.

to predict the time an action would be commenced, if one were to be commenced at all.

There is an argument for not including Case 1 within the scope of the statutory jurisdiction. To allow interest to be awarded in Case 1 situation when the parties had not expressly provided for the payment of interest on late payment will result in a cause of action for interest which survives the extinguishment of the debt. This may impede the settlement of claims, for example, when the parties cannot agree on the interest rate. If Case 1 does not come under the statutory jurisdiction, such debtors need only tender the original capital sum. However, if Case 1 is covered, he will have to decide on how much interest to offer. The creditor may not find his interest offer (if any at all) acceptable. However, it has to be accepted that the inclusion of Case 1 would encourage payment on time, and the facilitation of settlement argument cannot really offset the uncompensated loss of the use of money by the creditor.

VII. Conclusion

The powers discussed here are largely discretionary and seem unrelated to each other. They all form part of a major re-organization of the Supreme Court of Judicature Act which deals with many other issues. However, the damages provisions, together with a new power to order a medical examination of a party to an action,[56] amount to a minor reform of the law of damages which expands and rationalizes the options available to judges in awarding damages. With the possible exceptions of interest and equitable damages, none of these options is available at common law. They are also not powers that the common law as perceived today is likely to produce. All of them are to be welcomed, even if some could be fine-tuned.

One major power which has not been adopted is a general power to review awards on the basis of changing conditions.[57] This could theoretically be very useful in terms of items like cost of future nursing care, equipment and medical care. However, on the whole, such a power would probably result in more undesirable effects. Plaintiffs may not prefer such awards even if they could be made. Most would prefer a lump sum award so that they would not have to bear the risk of something adverse happening to the judgment debtor. The general lack of finality will probably have a negative impact on all interested parties, including the State which has to

56 Paragraph 19 of the First Schedule confers a power to order a medical examination of a party to an action if the physical or mental condition of that person is relevant. This power can apply to criminal as well as civil cases. It can be particularly useful in cases where damages are sought for personal injuries, and some independent confirmation is required.

57 This can mean different things to different lawyers. In general, see Cane, *Atiyah's Accidents, Compensation and the Law* (4th ed, 1987), Ch 7.

provide and bear the cost of a court structure for repeated litigation. Some of the problems arising from the difficulty of estimating costs in the future can be addressed by a wide interpretation of the power to award contingent damages. Recourse to such a limited power based on pre-identified contingencies could be an alternative to a major change of the system which finances such awards. On the whole, many of the arguments for changes in this area involve a major overhaul of the system. The new powers discussed here can be commended for providing a fair amount of flexibility within the existing framework.

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