SINGAPORE AND MALAYSIAN EDITION OF CHESHIRE, FIFOOT AND FURMSTON'S LAW OF CONTRACT (2ND EDITION). [Singapore: Butterworths Asia. 1998. cxxxiii + 1158 pp (including index). Hardcover: [$288.40] (inclusive of GST)]

IT was with some reluctance that I accepted the offer of this Journal's editor to review Associate Professor Andrew Phang's latest edition of this well known English text, tailored especially, but not only, to the local context. For this is an intimidating work, with contemporary masters in the field of contract law standing on the shoulders of giants past, all leaving their considerable imprint behind.

Yet, despite our modern work schedules, I found myself drawn to the book. As a practical matter, the commercial or financial lawyer of today cannot avoid the continued updating or, in many cases, revising of his or her knowledge of contract law. We all went through law school learning of the 'contract as a promise' or 'freedom of contract'; the reality is, however, quite different, as lawyers we are constantly looking to challenge those premises. In this there is remarkable candour, and even more rigour, in the book. Thus, perhaps unusual for a textbook, but consistent with the author's belief as expressed elsewhere (*eg*, (1998) 10 SAcLJ 1), he emphasises (at page 486) that "the court is, in the sphere of vitiating factors, preeminently

concerned with arguments of fairness." While practitioners may baulk at such a statement when they first encounter it, deeper reflection may allow them to introduce a better balance to their arguments in court. Quite unlike areas where the bargaining aspects of contract, such as formative issues and consideration, occupy the main ground, there is a rich abundance of local cases on vitiating factors. Some, like the decision of TQ Lim JC in *Khushvinder Singh Chopra* v *Mooka Pillai Rajagopal* [1996] 2 SLR 379 (discussed at pages 552-3), challenging criticised English orthodoxy, which requires the proof of manifest disadvantage in cases of presumed undue influence. Professor Phang thus cannot be far off the mark when he argues that we are in the business of attaining justice. Once we accept that, we can then perhaps begin to work out how this can be accommodated with that other pillar of contract law – the need for commercial certainty. If we do not, we may ultimately have to suffer Karl Llewellyn's warnings that "covert tools are never reliable tools." ((1939) 52 Harv L Rev 700 at 703).

Indeed, the author's views on vitiating factors have not passed unnoticed; see for example, the reference to his views on economic duress by both the New South Wales Supreme Court and Court of Appeal ((1992) 29 NSWLR 260 at 297; (1993) 32 NSWLR 50 at 107); and on illegality by Kirby J, High Court of Australia, in *Colin John Fitzgerald* v *FJ Leonhardt Pty Ltd* (1997) 71 ALJR 653. One also wonders about the significance of Professor Phang's comments at page 959 that "there is no reason in principle why the factor of increased costs should not constitute a cogent reason for a successful pleading of frustration; indeed, increased costs are, more often than not, the major reason for the invocation of the doctrine in the first place". We will in the coming months have to resolve issues relating to the imposition of capital controls in Malaysia and its effects on forward foreign exchange agreements made by banks based in Singapore to pay out Malaysian ringgit in exchange for US dollars: see Loke (forthcoming in JCL). Even more importantly, perhaps, from an academic's perspective, Professor Phang's views on the linkages between undue influence and unconscionability (*eg*, [1995] JBL 552) have been critiqued in an article in the Law Quarterly Review (Capper (1998) 114 LQR 479). Professor Phang has for some time been a strong advocate for subsuming the doctrine of undue influence under the rubric of unconscionability, most recently with this reviewer in (1999) 14 JCL 72. Although he examines (at pages 555-568) how the doctrine of unconscionability is finding it difficult to get off the ground locally, one cannot help but wonder whether references to *caveat emptor* here is but a convenient way of preserving a status *quo* that no longer exists elsewhere; not even in England, where the use of Latin is no longer in vogue, in large measure due to European influences as reified in the form of the Unfair Terms in Consumer Contracts Regulations 1994 (SI 1994 No 1359). Professor Phang also examines the Hong Kong Unconscionable Contracts Ordinance (Cap 458) which was modeled on section 51AB of the Australian Trade Practices Act 1974 as well as sections 7 and 9 of the New South Wales Contracts Review Act 1980. It was the latter Act that influenced the High Court of Australia in the seminal decision of *Commercial Bank of Australia Ltd* v *Amadio* (1983) 151 CLR 447, the genesis of a great deal of subsequent academic and judicial writing. As the author observes, this decision has not taken root here, but that may partially explain why we have our difficulties with timesharing agreements, commodity bucket shops *etc*.

The wealth of information in the book manifests itself from the very beginning. Chapter 1, "Sources of Law in Singapore, Malaysia and Brunei", in the author's own understated words the only new chapter, is a mini-thesis on the subject, building on the author's previous work in the area. Those educated overseas will no doubt find this chapter extremely useful. They will also find copious footnotes throughout

to remind them of Kevin Gray's *Elements of Land Law*. As with that other work, they will find that the text is, however, remarkably accessible. Better students and practitioners will no doubt spend greater time delving through the footnotes, where they will find references to a great deal of secondary material, some by an earlier Professor Phang himself, that may be a more difficult read. Yet, the modern financial world is too complex for us not to refer to such literature, sometimes comparative, often involved. The first world beckons, and we have no choice, for there is a need for greater sophistication at all levels in Singapore. If the fulfillment of such a need appears at times somewhat overdone in this book, that is simply the price we have to pay. Trite it is, but the devil is in the details. No student of law, and we are all students, can therefore ever do enough.

This book will go some way in helping us in our travails, both in the specific local context, but just as importantly, at the comparative level. Thus, the specific issue of misrepresentation in the context of real property is dealt with in footnote 2 of that chapter, where the local decisions on discrepancies in land area are neatly summarised. At the same time, the subtle influence of North American experiences, most notably seen in Chapter 2, "Historical Introduction", written by Professor Simpson, is maintained by Professor Phang elsewhere. For example, the author wryly comments (at pages 946-7), when examining the old Malaysian case of *Kung Swee Jeng* v *Paritam Kaur* [1948] MLJ 170, which adopted the American Law Institute's definition of 'impossibility' in the context of frustration, that "the reference to American material is, in fact, not generally in keeping with the practice adopted by local courts, although the present editor hastens to add that it is a practice that should be continued in appropriate cases, especially in the modern day context."

The coverage of Malaysian law, while of most obvious utility to lawyers practising in that jurisdiction, will also interest greatly lawyers in those countries that rely on some version of the Indian Contracts Act 1872. Yet others will find in the Malaysian Contracts Act 1950 (Act 136), as amended by the Contracts (Amendment) Act 1976 (Act A329) fading images of contractual history – Professor Phang's discussion of section 26(a) of that Act recalls Lord Mansfield's attempts to treat consideration as less a legal than a moral obligation (at page 147). There is also an excellent discussion of how estoppel has developed in Malaysia in the light of *Boustead Trading (1985) Sdn Bhd* v *Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331, a decision important enough to form the basis of a forthcoming Commonwealth conference for its adoption of a broad basis for court intervention despite the absence of consideration. The author concludes, however (at page 211), "that detriment is the most concrete manifestation of inequitability....", which lends support to the dominant, conservative view of contract, though perhaps not equity, lawyers.

Alongside vitiating factors, the area of implied terms has been particularly well trodden by the author, especially within the pages of the Journal of Business Law. Here, however, Professor Phang deals concisely in three pages (268-70) with the vexing and unresolved problem of the distinction between terms implied in fact and in law; and the presence of some test of necessity in both which, though intended to be different, has not been clearly so articulated in both the overseas and local courts. My fear though is that the inherent conceptual difficulty of that distinction will mean that it will most often remain unexpressed; yet assimilation of the two tests will also not be forthcoming.

Perhaps the only criticism that can be made is that the reader feels at times that the book is trying to do too much. And yet, this may be unavoidable. Indeed, commercial lawyers will appreciate the detailed discussion (at pages 485-7) of tort cases such as *Smith New Court Securities Ltd* v *Citibank NA* [1996] 3 WLR 1051, which deals with the measure of damages for deceit. From the practical viewpoint,

the falls in asset values in the past 2 years in the region mirror the asset deflation in the United Kingdom in the late 80's and early 90's which produced a whole string of cases dealing with the issue of damages for negligence and deceit. From the standpoint of sophistication previously referred to, compartmentalisation of subject matter is at best, outmoded, and at worst, naïve.

As some law school professors are thought to believe, a good treatise is the last meaningful work one can produce. The constant calls to update begin even before the present edition is completed. One hopes this yoke does not slow Professor Phang's rate of production elsewhere, for there are few, if any, contemporary contract lawyers that traverses as much ground as he in international legal journals. Where the specific issue of gaming is concerned, the author will, however, in his next edition, have to take into account the amendments to section 6 of the Civil Law Act (Cap 43, 1994 Rev Ed), which clarifies that "investment activity" such as transactions involving contracts of differences and swaps do not constitute gaming. Here, notice must also be taken of Selvam J's decision in *Star Cruise Services Ltd* v *Overseas Union Bank* (suit no 432 of 98) which appears to have adopted a more stringent policy stance towards gaming and the treatment of loans linked to gambling activity, compare, *eg, Loh Chee Song* v *Liew Yong Chian* [1998] 2 SLR 641, noted Yeo [1998] SJLS 421. On the wider issue of illegality, the author may have chosen to highlight apparent differences in the Singapore Court of Appeal's decision in *Suntoso Jacob* v *Kong Miao Ming* [1986] 2 MLJ 170, where a very strict approach was taken towards the effects of illegality, with its own decision in *Shi Fang* v *Koh Pee Huat* [1996] 2 SLR 221. The subsequent decision in fact adopted the more formalistic approach of the majority of the House of Lords in *Tinsley* v *Milligen* [1994] 1 AC 340. This would have led the reader nicely onto the author's discussion of a substantive and independent doctrine of restitution, which is more in accordance with our instinctive feel of it than perhaps mainstream restitution writers would have us accept. In his view (at pages 663 *et seq*), this best explains the *Bowmakers Ltd* v *Barnet Instruments Ltd* [1945] KB 65 exception which allows property to be recoverable where disclosure of the underlying illegality is not necessary to the formulation of the cause of action. For those fearing that this may lead to an unbounded discretion, such as appears to exist under the New Zealand Illegal Contracts Act 1970, Professor Phang points out that this is "to argue against the very process of the common law itself and (in particular) to doubt the ability of judges to produce reasoned bases for their decisions." (at page 742). The truth is that discretion inheres in every decision. There is no need to fear the animal that can be tamed.

The author will also no doubt explore in his treatment of the topic of damages for the failure to pay money (at page 1018) the new UK Late Payment of Commercial Debts (Interest) Act 1998. In this context, some consideration might be given to *Hungerford* v *Walker* (1989) 171 CLR 125, where the High Court of Australia surmounted the common law difficulties in awarding compound interest by finding in equity a larger discretion than had been understood to exist in the United Kingdom. The discussion of paragraph 6 of the First Schedule of the Supreme Court of Judicature Act (Cap 322, 1985 Rev Ed) could also incorporate the decision of Selvam J in *TKM (Singapore) Pte Ltd* v *Export Credit Insurance Corporation of Singapore Ltd* [1993] 1 SLR 1041. This case appears to have led to the extension of the court's power to award interest on damages, when it was confined to debts in the former section 18(2)(g) of the Act (but see Soh [1994] SJLS 91).

Throughout the book, Professor Phang refers to himself as the editor. But he has added substantially to it, with judicious use of material from the jurisdictions mentioned above, as well as South Africa and Canada. It is not easy building on

what has become an accepted standard in contract jurisprudence, but Professor Phang has done so admirably, producing a work that takes its rightful place alongside every major work on contract law.

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