20. LAND LAW

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Introduction

20.1 The decided cases in the period under review helped to further clarify the law in the areas of, *inter alia*, landlord and tenant, easements, caveatable interests, strata title and conveyancing. In the area of landlord and tenant, the remedy of distress under the Distress Act (Cap 84, 1996 Rev Ed) was further clarified. The meanings of common property, structural defects and the law on meetings were further elaborated upon in the area of strata title. In the area of conveyancing, the case law also dealt with the issue of, *inter alia*, a solicitor's duty of care and the effect of an ancillary order of a foreign court for division and sale of property in Singapore.

Leases

Tenancy by estoppel

20.2 In *Ritzland Investment Pte Ltd v Grace Management & Consultancy Services Pte Ltd* [2014] 2 SLR 1342, the plaintiff, the lessee of premises, sublet to the defendant a part of the property ("premises A"). Subsequently, the defendant unilaterally ceased paying rent in respect of the sublease of premises A which expired after the main lease then in force. The plaintiff brought proceedings for summary judgment against the defendant.

20.3 The High Court allowed the plaintiff's application for summary judgment in respect of premises A. The court was of the view that the plaintiff undoubtedly had the right to exclusive possession of the entirety of premises A at the time the sublease was entered into. Even if there was any lack of title, it did not affect the rights of the parties *inter se*. A lack of sufficient title may prevent the parties from having a lease but it will not prevent the parties from having a contract unless one of the vitiating factors under the law of contract is present.

20.4 The court held that the defendant was estopped at common law from denying the plaintiff's leasehold title to premises A. On the effect

of s 118(1) of the Evidence Act (Cap 97, 1997 Rev Ed), the court elaborated (at [89]) as follows:

> … s 118(1) prescribes a rule of evidence which applies to a tenant during the continuance of the tenancy. That rule of evidence says nothing about any estoppel which may or may not apply to a tenant after the determination of the tenancy, whether by effluxion of time or otherwise. Section 118(1) is not, on that view, inconsistent with the common law rule which provides that the estoppel 'continues to operate and bind the parties even after the term has ended except where the tenant is dispossessed by a third party with a superior title to his landlord' (*per* Belinda Ang Saw Ean J in *Thode Gerd Walter v Mintwell Industry Pte Ltd* [2009] SGHC 44 at [10]). Indeed, on this view, the common law rule of evidence complements s 118(1) rather than contradicting it …

Distress for rent

20.5 The Court of Appeal further clarified this area of the law in *Cupid Jewels Pte Ltd v Orchard Central Pte Ltd* [2014] 2 SLR 156. The landlord (Orchard Central) had let two units in a commercial development to the tenant (Cupid Jewels) for the business of jewellery retailing. Subsequently, the parties entered into negotiations for a rental rebate and for the payment of the rental arrears in instalments. Later, the landlord obtained a writ of distress and seized all the goods found on the tenant's premises, including jewellery ("the distrained jewellery"). The tenant and a third party ("Forever Jewels") applied for the release of all the distrained jewellery pursuant to ss 16 and 10 (read with s 12) of the Distress Act respectively. The tenant's arguments were premised on the grounds, *inter alia*, that the landlord had failed to make full and frank disclosure to the assistant registrar when making the *ex parte* application for the writ of distress and that the goods were exempt from seizure under s 8(*d*) of the same Act. Forever Jewels argued that it was at all times the beneficial owner of the distrained jewellery and the landlord had actual knowledge of this fact.

20.6 In upholding the High Court's decision in favour of the landlord, the Court of Appeal was of the view that the landlord's duty to disclose facts beyond those required in Form 198 of Appendix A to the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("ROC") in an *ex parte* application for a writ of distress extended only to any crystallised dispute between the parties as to whether the landlord's right to distress had in fact arisen. In the instant case, the landlord's right to rent due and payable, and its consequent right to distress, were not known by it to be disputed when it made its application for distress. Accordingly, there was no duty on the part of the landlord to give any narrative of the negotiations to the assistant registrar during its application. Further, the rent in issue in the writ of distress was due and payable, and the period

in question for which rent was claimed did not exceed 12 months. There were therefore no irregularities in the writ of distress so as to render it void or invalid.

20.7 The phrase "otherwise dealt with" in s 8(*d*) of the Distress Act should be interpreted in the same way as the word "manage" in the common law formulation of the trade privilege. The provision was a codification of the common law trade privilege. This accords with the fundamental principle of purposive interpretation under s 9A(1) of the Interpretation Act (Cap 1, 2002 Rev Ed) and the principle that Parliament would not have removed rights pre-existing in common law if there was no express provision or clearly evinced intention to the effect. The feature common to factors, brokers and commission agents who are afforded privilege under the "managed" limb of the common law trade privilege is that of an agency relationship. In the instant case, the tenant was not an agent of Forever Jewels in the true sense of the word. In particular, the tenant did not sell Forever Jewels' goods upon commission. The tenant could set the price of the jewellery independently at its sole discretion. It only had to account to Forever Jewels for the cost price. Other than that, the tenant was entitled to retain any profits and had to bear the losses if any. Given that the tenant did not fall within the ambit of the common law privilege, its reliance on s 8(*d*) of the Distress Act failed.

20.8 The doctrine of reputed ownership should not, as a matter of principle, exclude that of actual knowledge. The mere awareness that the tenant would be supported by Forever Jewels in stocks and finance was simply insufficient to found actual knowledge on the part of the landlord that the distrained jewellery was not owned by the tenant. As regards the issue of the perspective of the reasonable man test, it is the landlord's perspective that is relevant. The burden is on the party seeking to make an application under s 10 to prove the conditions therein as well as those under s 12. Accordingly, it was Forever Jewels that bore the burden of proving that the distrained jewellery was not reputedly owned by the tenant.

20.9 In the instant case, there was no fixed industry wide custom or practice to show that it was usual and customary in the jewellery retail trade to have goods on consignment. On the contrary, it seemed that the parties merely had a sale and return arrangement. The court also observed that the fact that both entities were controlled and owned by the same or related parties meant that Forever Jewels could have difficulty in denying any beneficial interest in the tenancy so as to fall within s 10(1)(*c*) of the Distress Act. Since Forever Jewels failed to prove that the circumstances were not such that the tenant was the reputed owner thereof within the meaning of s 12(*a*) of the Act, it could not seek to rely on s 10.

Obligation to pay rent

20.10 In *Panpac Education Pte Ltd v Applied Movers & Trading Pte Ltd* [2014] SGHC 50, the issues before the High Court were whether the defendant (the subtenant) was liable to pay rent for the period after it vacated the premises and secondly whether it was liable to pay the reinstatement costs. The defendant had appealed against the decision of the assistant registrar who ruled in favour of the plaintiff (the chief tenant).

20.11 On the first issue, the court was of the view that the basic question to be decided was as to the proper interpretation of the defendant's obligations under the extended sublease. The plaintiff had submitted that the context in which the extension letter was issued showed clearly that the defendant was liable to pay rent right up to the end of the extended lease period notwithstanding that it physically left the premises before that date.

20.12 In all the circumstances, the court held that the proper interpretation of the extension letter appeared to be that the defendant was obliged to pay the full rental right up to the end of the extended lease period even though the defendant would have to vacate the premises about a month or so before the termination date to allow for reinstatement. This was what the parties wanted to provide for. The extension letter clearly stated the extension period as being a three-month period and that there would be a monthly rental of $94,800 plus goods and services tax and subletting fees during this period. The defendant also had to hand back the premises in their original condition. The assistant registrar's order of conditional leave to defend the claim for the balance of rent unpaid was, accordingly, upheld by the court.

20.13 As to whether the defendant was liable to pay the reinstatement costs, the court held that to claim the sum of $62,702, the plaintiff not only had to show what work had cost that amount; it also had to show that the work was necessitated by the defendant's occupation of the premises. The plaintiff had to show the condition of the sublet premises at the time they were leased out and their condition at the time the defendant vacated the premises. It then had to show that the condition of the sublet premises on subletting was the original condition at the time it took over the premises from Jurong Town Corp. Having done all that, it would have to correlate the reinstatement costs claimed with damage done by the defendant which was not fair wear and tear. As the plaintiff's evidence did not meet these requirements, the court granted the defendant unconditional leave to defend the claim.

Recovery of possession

20.14 In *JTC Corp v Chin Hong Printing Pte Ltd* [2014] SGHC 115, the plaintiff-landlord applied for summary judgment against the defendant-tenant. The plaintiff sought an order for, *inter alia*, vacant possession of the premises let to the defendant. The latter had not vacated the premises after the expiry of the lease.

20.15 The High Court found that there was no representation by the plaintiff that would serve to prevent it from seeking vacant possession. The defendant's case, that such representation was made out when the plaintiff wrote to the defendant offering to extend the lease, was unmeritorious. This was evident from the correspondence between the parties, as well as the nature of each of the plaintiff's offers. In any case, the defendant had not accepted, nor even acted on, any of the offers or the negotiations.

20.16 In the result, the court granted final judgment to the plaintiff for the defendant to deliver vacant possession of the premises.

Sublease – Whether terminated by effluxion of time

20.17 In *Soup Restaurant Singapore Pte Ltd v YES F&B Group Pte Ltd* [2014] SGHC 246, the plaintiff had obtained a lease of the unit in question from the landlord for three years. On the same day, the plaintiff sublet part of the unit to the defendant with the consent of the landlord. When the three-year lease expired, the plaintiff signed a new lease with the landlord.

20.18 The defendant had refused to deliver vacant possession of the sublet area to the plaintiff when the original three-year lease expired. It argued that there was no termination of the original three-year lease as it was renewed. Similarly, the sublease was not terminated because, just like the original three-year lease, the sublease was automatically renewed.

20.19 The High Court, in dismissing the defendant's arguments, held that the original three-year lease was terminated by effluxion of time and a new lease was entered into on the next day. The sublease of the defendant which was derived out of the original three-year lease also automatically came to an end by effluxion of time.

20.20 The court was of the view that the new lease entered into between the plaintiff and the landlord could not be seen as a mere continuation or renewal without termination of the previous one as it contained materially different terms. The new lease stipulated a higher

rent and provided for rent escalation. The term was three years and six months instead of three years.

20.21 Even assuming that the sublease was renewed, its terms were unclear. In addition, the amount of rent payable *per* month was not stipulated. Another uncertain aspect was its duration. The absence of these necessary ingredients meant that no sublease could exist at law. In the result, the defendant was in wrongful possession of the premises and was liable to damages.

Easements

Implied easement

20.22 In *Muthukumaran s/o Varthan v Kwong Kai Chung* [2014] 4 SLR 1248, the main issue was whether the plaintiffs, who did not have a staircase built within their unit, had an implied easement of a right of way over the staircase of the adjacent unit owned by the first and second defendants under s 99(1A) of the Land Titles Act (Cap 157, 2004 Rev Ed) ("LTA"). The two units in question were originally purchased by the third defendant. The undisputed evidence was that none of the properties had a permanent staircase at the time the third defendant purchased the properties. Rather, each of the properties only had a bare ladder.

20.23 It was clear that ss 99(1) and 99(1A) of the LTA had no application unless the competent authority had approved both the development and subdivision of the land over which the easement was claimed. While development approval was granted under s 99(1), the High Court found that the plaintiffs had failed to produce the approved subdivision plan in evidence. This was significant having regard to the fact that an easement will only be implied "over or under the lands appropriated or set apart for those purposes respectively on the subdivision plan submitted to the competent authority". Based on the relevant parliamentary material, the court opined that the easement had to be both clearly and specifically indicated on the approved subdivision plan in the sense that the subdivision plan must contain a legend describing the easement and the dominant and servient tenements. The plaintiffs' failure to produce the subdivision plan was, thus, fatal to its case.

20.24 The court distinguished the Court of Appeal case of *Cheng-Wong Mei Ling Theresa v Oei Hong Leong* [2006] 2 SLR(R) 637 where the approved subdivision plan was adduced in evidence. In addition, the subdivision plan showed the word "Access" where No 48 abutted No 48A. It was in this context that the Court of Appeal held that it

would be permissible to read the subdivision plan together with the other plans attached to the certificates of title. The case did not stand for the proposition that the court was entitled to disregard the subdivision plan altogether and consider the development plan instead.

20.25 Even if the court could consider whether the alleged easement was "appropriated or set apart" by only relying on the development plan, the development plan still had to clearly and specifically indicate that the plaintiffs were to have a right of way over the staircase of the adjacent unit. This requirement was not satisfied in the present case.

20.26 The court cautioned against reliance on common law principles relating to implied easements which may not be all that helpful in the interpretation of s 99 of the LTA. Primacy should instead be accorded to the statutory text and context of s 99 and the local authorities interpreting this provision.

Co-ownership

20.27 The High Court case of *Yang Chun (Mrs) née Sun Hui Min v Yang Chia Yin* [2014] 1 SLR 1, on the issue of whether under s 114 of the LTA all surviving joint tenants are required to execute and file a notice of death to the Registrar of Land Titles of the death of a joint tenant, was discussed in (2013) 14 SAL Ann Rev 426 at 433, paras 20.31–20.35.

Caveats

20.28 In *Kua Hui Li v Prosper Credit Pte Ltd* [2014] 3 SLR 1007 ("*Kua Hui Li*"), the plaintiff was the co-owner of the property in question. Unknown to her, the defendant had lodged a caveat against the property on account of a loan granted by the defendant to the plaintiff's former husband, the other co-owner. The plaintiff applied for the removal of the caveat. The defendant argued that it had an interest in the property by virtue of a loan agreement entered into between it and the plaintiff's former husband in which the latter consented to the entry of the caveat against the property.

20.29 In allowing the application, the High Court found that the interest charged was exorbitant and the transaction was substantially and grossly unfair. The loan amount was for $5,000 and the interest was stipulated as 791.61% *per* annum. Based on the statement of account for the $5,000 loan, a "late interest" of $10,000 had accrued as at the relevant date. In the circumstances, the court was empowered by s 23(1) of the Moneylenders Act (Cap 188, 2010 Rev Ed) to re-open the transaction. Pursuant to s 23(4) of the same Act, this power of the court

extended "to proceedings for relief brought by … any other person liable to repay a loan" to a licensed moneylender. The plaintiff came within the ambit of the provision.

20.30 The loan agreement entered into between the defendant and the plaintiff's former husband was, thus, set aside and the caveat removed.

20.31 The High Court in *Kua Hui Li*, accordingly, did not decide on the issue of caveatable interest as it found that the interest rate charged by the moneylender in that case was excessive and the loan agreement was set aside under s 23(3)(*b*) of the Moneylenders Act. The issue of caveatable interest was, however, left to the subsequent High Court case of *Salbiah Bte Adnan v Micro Credit Pte Ltd* [2015] 1 SLR 601 ("*Salbiah Bte Adnan*") to decide.

20.32 In the instant case, the defendant moneylender had lodged a caveat over the Housing and Development Board ("HDB") property held by the plaintiff and her ex-husband, Z, as joint tenants. The caveat was lodged to secure the defendant's interest in the sale proceeds of the property to repay a loan that Z had obtained from the defendant. The plaintiff had obtained a divorce from the Syariah Court which ordered, *inter alia*, that the property be transferred to her. However, the transfer could not be effected owing to the existence of the caveat. The plaintiff then applied for the caveat to be removed. The High Court noted that the plaintiff was not arguing that the interest rate charged by the defendant was excessive under s 23 of the Moneylenders Act.

20.33 On the issue of the meaning of "interest in the proceeds of the sale of land" in s 115(3)(*a*) of the LTA, the court was of the view that the proposition that a personal right to the repayment of a debt can create a caveatable interest within the meaning of s 115(3)(*a*) sits uneasily with the original object and purpose of the said section which is to allow a beneficiary of a trust for sale to protect, by means of a caveat, his or her interest in the proceeds of sale because of the equitable doctrine of conversion. The court further observed (*Salbiah Bte Adnan* at [41]) as follows:

> … where a person is claiming an interest in the *sale proceeds* of land, his interest is purely monetary in nature and I can see no reason why, bearing in mind the original object and purpose of s 115(3)(*a*), the requirement of a proprietary interest should not apply strictly in such a case. To hold that a person with a mere contractual right to be paid from the sale proceeds of a property can lodge a caveat on that property would effectively allow such agreements to function as a form of quasi-security, since the caveatee would be unable to register dealings in respect of the property until he pays up. This is not a purpose of the caveat mechanism; a caveat is meant to protect pre-existing interests in land, not operate in and of itself as a form of

> quasi-security for otherwise unsecured debts. If a moneylender wishes to take security over a borrower's property, he should take a mortgage or a charge. [emphasis in original]

20.34 Moreover, it creates an anomaly where a creditor who has a contractual right to have a loan repaid out of the sale proceeds of property may lodge a caveat on the basis of his contractual claim but not a creditor who successfully sues the debtor on the same contract (so that his claim is extinguished by the judgment and merged into the latter).

20.35 In any event, the court ruled that it need not decide the above issues definitively given that the loan documents in question did not confer any legal, equitable or even contractual interest in the sale proceeds. This was because para 6 of the loan documents simply stated that a caveat would be lodged on the property if payment was not prompt and removed upon completion of the loan payment. It did not say that the interest in the sale proceeds of the property was assigned to the defendant or to be held on trust for it, nor was there mention of any agreement to repay the loan out of the sale proceeds. In this regard, the court applied the principles enunciated in *The Asiatic Enterprises (Pte) Ltd v United Overseas Bank Ltd* [1999] 3 SLR(R) 976 at [28]–[29] and *Bellissimo v JCL Investments Pty Ltd* [2009] NSWSC 1260 at [17], [18] and [21]. As the defendant failed to show it had a caveatable interest in the property, the caveat was ordered removed.

20.36 Even if the loan documents did confer on the defendant a caveatable interest, it was extinguished by the Syariah Court order which required Z to transfer his interest in the property to the plaintiff. In the result, a sale of the property by Z was no longer possible. Similarly, Z would not be entitled to the sale proceeds if the plaintiff decided to sell the property. Correspondingly, the defendant's interest in the sale proceeds was extinguished and the caveat should not be allowed to remain.

20.37 The court also found that the lodgement of the caveat did not comply with the formal requirements of s 115(1) of the LTA. Given the court's findings (above at para 20.35), the caveat's description was erroneous. There was no agreement between the defendant, the plaintiff and Z that Z's debt would be paid from the sale proceeds of the property, nor did the defendant have any equitable interest in the sale proceeds.

20.38 The court noted s 51(1) of the Housing and Development Act (Cap 129, 2004 Rev Ed) which would render any agreement to use the property or its sale proceeds as security or collateral for Z's debt void. However, as the provision only came into force on 11 August 2010 after

the loan documents were concluded, it was not applicable in the present case.

Strata title

Common property and structural defects

20.39 In *Management Corporation Strata Title Plan No 367 v Lee Siew Yuen* [2014] 4 SLR 445 ("*Lee Siew Yuen*"), the appellant was the management corporation ("MCST") for the development known as Highpoint Condominium. The respondents were the subsidiary proprietors of unit #04-30 in the development. The respondents' contractor discovered serious cracks in the structural beams above the ceilings of the master bedroom toilet and the kitchen of the unit. These were referred to the MCST for its necessary action. A dispute arose as to who was responsible for the rectification and payment of these defects. The MCST referred the dispute to the Strata Titles Board, seeking an order that the respondents make good the defects of the beams inside the unit. The Board decided in favour of the respondents and the MCST appealed to the High Court.

20.40 On the question whether the defective beams form part of the "common property" of the development which the MCST must repair, the court noted that pursuant to s 29(1)(*b*)(i) of the Building Maintenance and Strata Management Act (Cap 30C, 2008 Rev Ed) ("BMSMA") the MCST has the statutory duty to maintain the common property. On the meaning of "common property", the court referred to the definition in s 2(1) of the BMSMA, an identical definition of which is in s 3(1) of the Land Titles (Strata) Act (Cap 158, 2009 Rev Ed) ("LTSA"), which provides that "common property" means "any land and building that is not comprised in any lot and used or capable of being used or enjoyed by occupiers of 2 or more lots": at [24]. The previous edition of the LTSA specifically included beams and supports as common property.

20.41 After 2005, the present definition of "common property" omitted to specify a list of structures which Parliament considered to be part of the common property so as to incorporate a generic definition of common property to cover both strata and non-strata developments. In addition, Parliament accepted the suggestions of the Singapore Institute of Surveyors and Valuers ("SISV") and decided to simplify the definition of "common property" without having to list any structure that was generally considered as part of common property. As seen from the representation made by the SISV, such a simplification was not meant to exclude from the definition of "common property" the specific structures listed in the previous edition of the LTSA. Rather, it was

meant to avoid having to rely on an exhaustive list of structures so as to accommodate future developments in technology and architecture. Furthermore, a more generic definition was needed so as to accommodate non-strata developments, which had different features as compared to strata developments.

20.42 On the meaning of "comprised" in the definition of "common property" in s 2(1) of the BMSMA, the court held that it did not mean "situated" but rather that it meant "included". Reference was made to *Stroud's Judicial Dictionary of Words and Phrases* vol A–E (Daniel Greenberg ed) (Sweet & Maxwell, 8th Ed, 2012) at p 524. The court was of the view that the respondents, if they could have their way, would not want these beams in their apartment as they occupied space and did not serve any purpose or function for the unit. The beams were part of a supporting infrastructure that held the entire building together. It seemed logical and obvious that the beams were common property as they were crucial in ensuring the structural integrity of the building. The photographs taken of these beams might suggest that they were inside the unit but this was because the photographs and the strata title plan were one-dimensional and were not able to disclose those portions of the beam that were located inside the unit above it.

20.43 The second condition in the definition of "common property" was easily fulfilled as the beams in question served the purpose of supporting the building blocks of the development. They were erected to support the units above. Hence, the purpose was more than mere enjoyment for the other occupiers. The cases of *Management Corporation Strata Title Plan No 958 v Tay Soo Seng* [1992] 3 SLR(R) 818 and *Tsui Sai Cheong v Management Corporation Strata Title Plan No 1186 (Loyang Valley)* [1995] 3 SLR(R) 713 were distinguished where the objects therein were solely constructed within the unit for the enjoyment of the unit owner only.

20.44 Furthermore, the defective beams were structural defects under s 30(5) of the BMSMA which the MCST must repair. As the BMSMA did not define structural defects, regard was had to s 2(1) of the Building Control Act (Cap 29, 1999 Rev Ed) which sets out what "key structural elements" are, namely, foundations, columns, beams, shear cores, structural walls, struts, ground anchors and such other parts of a building which are essential for its support and overall structural stability. Given that the beams were essential for the support of the building and its overall structural stability, they were clearly "key structural elements" of the development. In addition, both the consulting engineer of the MCST and the expert of the respondents agreed that the cracks in the beams were structural in nature. These defects had significantly affected the load bearing capacities of the beams and required urgent rectification. Therefore, the MCST was

responsible for the rectification of the affected beams, provided the respondents had not breached their duty under s 63(*a*) of the BMSMA.

20.45 The statutory duty in s 63(*a*) mandates that the unit owner "shall not … do anything or permit anything to be done" which causes structural defects. The court opined that the first prohibition ("shall not do anything") required the unit owner to refrain from doing a positive and direct act which caused the structural defect, while the second prohibition ("shall not permit anything to be done") required that the unit owner refrained from allowing another party, such as his contractor, to do an act which caused structural defects. Furthermore, the phrase "do anything or permit anything to be done" connotes a conscious state of mind in which the unit owner knowingly causes the structural defect or allows it to be caused.

20.46 The court rejected the argument of the MCST that an omission could amount to a breach of s 63(*a*) in light of s 2(1) of the Interpretation Act which defines an "act", in relation to an offence or civil wrong, to include "a series of acts, and words which refer to acts done shall be construed as extending to illegal omissions". As the court further explained (*Lee Siew Yuen* at [42]):

> … the Interpretation Act does not construe an act to mean a mere omission. It refers to an illegal omission. The emphasis is on the adjective 'illegal'. When the definition of 'act' under the Interpretation Act is applied to s 63(*a*) of the BMSMA, it does not mean that the provision refers to every omission *per se*. The omission has to be illegal. What constitutes an illegal omission under s 63(*a*) of the BMSMA? This requires an analysis of the phrase 'do anything or permit anything to be done' which … [has been] explained above … The subsidiary proprietor must have done a positive act with the intention, knowledge or wilfully caused the structural defect. The subsidiary proprietor will also be liable if he lets, agrees, allows, authorises, approves or even facilitates actions that result in the structural defect. Therefore, the illegal omission under s 63(*a*) has to be considered in this context. Hence, it has to be a conscious, deliberate or wilful omission with the knowledge that such omission will result in a structural defect.

20.47 In the instant case, the court found no evidence to suggest that the respondents had caused or permitted anything to be done to the affected beams that resulted in the structural defects. There was also no evidence to suggest that the defective beams were the result of a wilful omission on the part of the respondents. On the contrary, if water seepage from the upper floor was the dominant cause of the defects, the defects could not possibly be intentionally caused by the respondents. Furthermore, given that the beams were hidden in the false ceiling, the respondents would have had no knowledge of such defects or their ability to cause such defects. In any event, the development was about

41 years old and was plagued with widespread problems of extensive spalling concrete that affected many other units.

20.48 The court also rejected the argument of the MCST that it had discharged its duty when it issued circulars requiring unit owners, including the respondents, to check their ceilings for spalling concrete and to make good these defects. As the respondents omitted to act on the circular, they thus failed to discharge their duty under s 63(*a*) of the BMSMA. The court held that since the defective beams were structural defects, the MCST was legally obliged to rectify them under s 30(5) of the BMSMA and that it could not deflect such an obligation by simply sending out a circular asking the unit owners to remedy the problem.

By-laws

20.49 *Automobile Association of Singapore v Management Corporation Strata Title Plan No 918* [2014] 1 SLR 164, where the principal issue was whether certain by-laws governing the use of the car park at the Automobile Association Centre were valid and thus binding on the defendant management corporation, was discussed in (2013) 14 SAL Ann Rev 426 at 435–437, paras 20.40–20.49.

Meetings

20.50 The Court of Appeal in *Fu Loong Lithographer Pte Ltd v Mok Wai Hoe* [2014] 3 SLR 456 clarified various aspects of the law on meetings under the BMSMA.

20.51 The appellants had appealed against the decision of the High Court dismissing their application to invalidate certain rulings made by the first respondent in his capacity as chairperson of the second respondent (the management corporation) and to restrain the first respondent or any subsequent chairperson from making such rulings in the future. Certain motions, which were submitted by the appellants at an extraordinary general meeting on 5 June 2013 ("the 5 June 2013 EGM"), were ruled "out of order" by the first respondent. In allowing the appeal in part, the Court of Appeal made certain observations on the role of a chairperson and the exercise by him of his power to rule motions out of order at a general meeting.

20.52 In holding that the role of the chairperson of a general meeting of a management corporation was not fiduciary in nature, the court opined (at [26]) as follows:

> … the duty imposed by s 61(1) of the BMSMA to act honestly and with reasonable diligence applies to a member of a management corporation's council in the exercise of his powers and the discharge of

> his duties *as a council member*; it does not necessarily apply to a council member acting as the chairperson of a general meeting of the management corporation. This point is reinforced by the fact that the chairperson presiding at a general meeting of a management corporation need not be a council member at all. … the chairperson of a management corporation acts as the chairperson of a general meeting of the management corporation not because to do so is part of the function of his office; rather, he acts as the chairperson of a general meeting of the management corporation as *persona designata* (see *McKerlie v Drillsearch Energy Ltd* [2009] NSWSC 488 at [37]). [emphasis in original]

20.53 As for the chairperson's exercise of power to rule motions out of order at a general meeting, the principles in judicial review of administrative action applied. As the court noted (at [37] and [38]):

> … Apart from acting in good faith when exercising this power, the chairperson presiding over a general meeting of a management corporation should exercise this power in accordance with the law and the proper purposes of the power.
>
> … A ruling by the chairperson of a meeting of a body corporate which, although made honestly, is plainly wrong in law and operates to deprive a member of his voting rights is *ultra vires* and should be set aside (see *ANZ Nominees Limited v Allied Resources Corporation Limited* (1984) 2 ACLC 783 at 789).

20.54 In respect of motions 3(a) and 3(b), which sought to revoke past resolutions for the ratification of certain upgrading work expenses and the adoption of the financial reports for various years, the court was of the view that whether or not a ratification of audited financial reports or audited accounts amounted to a ratification of the individual expenditure items in those reports or accounts depended on the facts and circumstances of the particular case and could not be reduced to a blanket proposition of law. It was open to the trial judge to make a finding on this issue, if necessary, based on the relevant evidence and arguments in the case.

20.55 With regard to motion 8, which sought to revoke and credit to the accounts of certain unit owners the late payment interest charges levied on them, the court held that the ruling of the first respondent that the motion was out of order for being in conflict with the BMSMA should be set aside as it involved an error of law. As a matter of law, late payment interest charges that had been paid by a unit owner into the management fund could be refunded and disbursed to the unit owner, provided the management corporation had so determined in a general meeting pursuant to s 40(6)(*b*) of the BMSMA. To interpret s 40(6)(*b*) of the BMSMA otherwise would effectively operate as a disincentive for unit owners to make timely payment of interest charges on late

contributions because they would thereby be precluded from contesting the interest charges at a general meeting.

20.56 Similarly, the first respondent's ruling that motion 9 was out of order for being in conflict with the BMSMA because it called for an ordinary resolution and not a 90% resolution was wrong in law and should be invalidated. Section 34(4) of the BMSMA did not in fact require a 90% resolution to be passed for the subdivision of lots, even if the subdivision affects the common property. This provision only states that a management corporation "may approve" the subdivision of a lot and does not state that such approval has to be by a particular type of resolution. This is in contrast to other provisions (such as ss 33(1) and 34(1)) in the BMSMA which expressly state that a management corporation may only approve certain actions by a particular type of resolution. In the instant case, motion 9 clearly related to the subdivision of lots, and not the improvement of lots that increased or was likely to increase the floor area of the land and building in the development which would have required a 90% resolution under s 37(2) of the BMSMA.

20.57 With regard to the first respondent's rejection of the contested votes on motion 2 at the 5 June 2013 EGM on the basis of conflict of interest, the court held that it was not valid. Motion 2 called for the termination of Chancery Law Corp as the legal representatives of the second respondent with immediate effect. A unit owner could only be properly denied a vote on the ground that he had not fulfilled one or both of the requirements in para 2(1) of the First Sched to the BMSMA. Therefore, the chairperson of a general meeting of a management corporation did not have the power under the BMSMA to reject votes from a unit owner who had satisfied the requirements therein. Even if there was such a power, its exercise was not justified in the circumstances of the instant case as the second respondent was an artificially created legal entity comprising the unit owners of the lots in the development, including the appellants.

20.58 Finally, having regard to the nature of a management corporation as noted above, the High Court's direction that the appellants were not to propose any future and/or intended amendments to motions 1(b) and 1(e) which touched on the lawyers already appointed by the second respondent to defend itself was set aside. The unit owners of the lots in a development were entitled to control the management corporation by voting in a general meeting and this right to vote should not be taken away from them even if it meant that the management corporation might not have legal representation in a suit to which it was a party.

Collective sale

20.59 The Court of Appeal decision in *N K Rajarh v Tan Eng Chuan* [2014] 1 SLR 694 *on the validity* of an application for the collective sale of Harbour View Gardens, was discussed in (2013) 14 SAL Ann Rev 426 at 446–449, paras 20.80–20.90.

Conveyancing

Whether contract existed to grant option to purchase

20.60 In *Woo Kah Wai v Chew Ai Hua Sandra* [2014] 4 SLR 166, the Court of Appeal had to consider, *inter alia*, whether a pre-option contract came into existence and if so, whether the option period was in compliance with the terms of the pre-option contract. The purchaser had made a written offer to the vendors to purchase the property. On the evidence, the court found that the vendors had accepted the purchaser's written offer. Among others, the vendors had orally agreed to the indicated price and the option was then prepared by the vendors' estate agent, the terms of which were based on the written offer. The terms of the written offer were not ambiguous.

20.61 The option money paid by the purchaser to the vendors was consideration for the pre-option contract as well as for the option given that they were inseparably linked to one another such that the entire transaction had to be viewed as a continuum. The court was of the view that, in principle, a pre-option contract would be enforceable as long as the requirements for an enforceable contract were present. The written offer in question could be motivated by an intention to create legal relations. The court also held (at [139]) that the pre-option contract must also satisfy the requirements of s 6(*d*) of the Civil Law Act (Cap 43, 1999 Rev Ed).

20.62 The court took the view that the option period referred to in the written offer meant three calendar days, not three working days. As the purchaser effectively only had one day to exercise the option, the vendors had breached their obligations under the pre-option contract. The vendors had subsequently sold the property to a third party before proceedings were commenced by the purchaser. The court assessed the damages to the purchaser by reference to the difference between the contract price and the market value of the property as at the putative date of completion.

Solicitor's duty of care

20.63 In *Su Ah Tee v Allister Lim and Thrumurgan* [2014] SGHC 159, the duty of care owed by a solicitor in the conveyance of leasehold property was considered by the High Court. In the instant case, the plaintiffs claimed damages for breach of contract and negligence from the defendants who acted as their solicitors in the purchase of a HDB shophouse. The plaintiffs alleged that it was only sometime after the purchase was completed that they learnt that: (a) they had paid $900,000 for a property which had only 17 years remaining out of a 30-year lease, instead of what they had expected, which was a property with 62 years of its lease remaining; and (b) the property was subject to a head tenancy agreement instead of two separate tenancy agreements which the first plaintiff had received with the option to purchase. They alleged that the defendants, *inter alia*, failed to advise or inform them of the tenure problem before completion or at all, and further, failed to advise them on the head tenancy to which the sale of the property was subject.

20.64 On the tenure problem, the High Court elaborated thus (at [91]):

> The tenure is important to the nature of the Property. It cannot be gainsaid that in leasehold property the tenure of the property being purchased is a crucial aspect of that property. Unlike a freehold interest, a leasehold HDB shophouse has a fixed term lease, and when the property is being on-sold by another person (as opposed to HDB) as in this case, the remaining duration of the lease would be a material concern to the purchaser. The question for determination in the present case is whether it was implicit in the defendants' engagement to handle the sale and purchase of the Property that the defendants had a duty to inform the plaintiffs of the tenure which included passing on to the plaintiffs information that had come into the defendants' possession about the term of the lease on the Property and the number of years remaining on that lease.

20.65 The concern here was that the plaintiffs did not get the legal particulars of the leasehold property from the defendants at all. The court did not agree with the defendants that the solicitor's duty to protect his client from the possibility of a misdescription of the legal particulars of the leasehold property which the client intended to purchase only arose upon the client's specific express instructions to the solicitor. The court was of the view that one way of protecting the client's interest would be for the solicitor to check what kind of leasehold interest the client thought he was buying and to verify this through the title searches.

20.66 With regard to the tenancy problem, the court held that the solicitor appointed to handle the sale and purchase transaction has a

duty to advise the plaintiffs on the terms of the tenancies. A solicitor owes a general duty to explain important and relevant documents to the client or at least ensure that he understands the effect and purport of material parts of the documents.

20.67 In the result, the defendants were held to be in breach of their duty of care to the plaintiffs by failing to (a) inform the plaintiffs about the duration of the lease of the property and the number of years remaining on its lease; and (b) explain/advice the plaintiffs on the tenancy agreements and their legal implications.

Obligation to use all reasonable endeavours to obtain approval

20.68 In *The One Suites Pte Ltd v Pacific Motor Credit (Pte) Ltd* [2014] 4 SLR 806, the High Court had occasion to consider this obligation involving an option to purchase a HDB leasehold property granted by the defendant-vendor to the plaintiff-purchaser. The latter had subsequently brought a claim against the defendant for the refund of the deposit paid on the ground that the option to purchase had been validly rescinded by the HDB's refusal to grant its approval for the sale. The defendant counterclaimed for various declarations, an order that the plaintiff proceed to apply to the HDB for approval of sale of the property, as well as damages. The defendant also sought the forfeiture of the deposit as well as the withdrawal of the plaintiff's caveat against the property.

20.69 In dismissing the plaintiff's claim, the court found that under the option to purchase the time for completion was contingent on the grant of the HDB's approval but the option to purchase did not specify any time limit for such approval to be obtained, or a long stop date for the determination of the contract. It put no obligation on the plaintiff to pursue the relevant approvals beyond the submission of the applications. The end result was that if the plaintiff had simply sat on his hands after making the applications, and the relevant authorities remained silent, the option to purchase could continue indefinitely. The parties would find themselves in limbo.

20.70 In the circumstances, the court found that there was an implied term in fact that the plaintiff had to use all reasonable endeavours to obtain the written approval of the HDB and such other competent authority to the sale of the property within a reasonable time. If no such approval was forthcoming within a reasonable time after the exercise of all reasonable endeavours, either party may give notice to rescind.

20.71 The court held that even if it was accepted that the plaintiff's implied obligation to take all reasonable steps to procure approvals only

related to the HDB, they could not establish that they had done so unless they could show that all reasonable efforts were also taken to obtain the National Environment Agency's ("NEA's") approval when they were aware that the NEA's approval was a prerequisite to the HDB's approval. The plaintiff should have written to the NEA to reconsider and to see if there was any scope for negotiation to achieve a mutually acceptable outcome. There was ample time and opportunity for them to do so.

20.72 Having regard to the evidence, it appeared that the plaintiff had already lost interest in the transaction and was already looking for an opportunity to rescind rather than for a way to persuade the authority to change its mind. Accordingly, the purported rescission on the part of the plaintiff was premature and therefore invalid.

Effect of ancillary order of foreign court for division and sale of property in Singapore

20.73 In *Tan Poh Beng v Choo Lee Mei* [2014] 4 SLR 462, the High Court had to consider whether an ancillary order issued by a foreign court for the division and sale of property situated in Singapore may be given legal effect in Singapore. The plaintiff and defendant, who were husband and wife respectively, were Malaysian citizens and they had obtained a decree *nisi* for divorce which was subsequently made absolute. The Malaysian High Court ordered, *inter alia*, that their property in Singapore be sold. As the defendant refused to sign the documents pertaining to the sale of the property, the Registrar of the Malaysian court signed on the defendant's behalf. The plaintiff could not register the transfer of the property in favour of the purchasers in light of s 56(2)(*d*) of the LTA read with s 2 of the Interpretation Act which required a transfer to be executed on behalf of the registered proprietor by an officer of a court of competent jurisdiction in Singapore.

20.74 The plaintiff commenced proceedings seeking, *inter alia*, for an order that the Registrar of the Supreme Court of Singapore be empowered to execute the transfer instrument for and on behalf of the defendant. In dismissing the plaintiff's application, the High Court held that the ancillary order of the Malaysian court could not be given legal effect in Singapore.

20.75 On its power under para 2 of the First Sched to the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("SCJA") read with O 31 r 1 of the ROC, the court held that its power to order the sale of a property is contingent on there being a substantive legal basis to justify the exercise of that power. There has to be a cause of action, whether based on common law or statute, creating a substantive legal basis for

ordering a sale of the property: citing, *inter alia*, *Rubyna Kaur a/p Surinder Singh v Jasbir Singh a/l Harbajan Singh* [2003] 6 MLJ 753 at 761. Neither provision was intended to create an unfettered power on the court's part to order the sale of a property simply because it is "necessary or expedient" to do so.

20.76 The court also held that the mere fact that the defendant had voluntarily submitted to the court's jurisdiction did not mean that it had an open-ended discretion to make any orders it wished in relation to the property as it still had to decide the plaintiff's application on the basis of established legal principles.

20.77 The court also rejected the plaintiff's argument that it should exercise its inherent jurisdiction to make the orders sought. The court noted that its inherent powers recognised in O 92 r 4 of the ROC may only be exercised in exceptional circumstances where there is a clear need for it and the justice of the case so demands: citing *Roberto Building Material Pte Ltd v Oversea-Chinese Banking Corp Ltd* [2003] 2 SLR(R) 353 at [17]. The court held that it was precluded from exercising its inherent powers to fill in a lacuna in the law that was deliberately left there by the Legislature. There was compelling evidence to show that Parliament was well aware of the lack of legal avenues to enforce foreign ancillary orders for the division of property in Singapore, but chose not to pass legislation to enable their enforcement here: see *Report of the Law Reform Committee of the Singapore Academy of Law on Ancillary Orders after Foreign Divorce or Annulment* (July 2009) and *Singapore Parliamentary Debates, Official Report* (10 January 2011) vol 87 at cols 2048–2049. The court was also hesitant to exercise its inherent powers to procure what was in effect the enforcement of a foreign order which could not otherwise be enforced under the relevant law here.