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GOVERNMENT FUNDING OF TOWN COUNCILS

The Role of Private Law

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Section 42 of the Town Councils Act (Cap 329A, 2000 Rev Ed) provides for the Government to provide grants to Town Councils "subject to such conditions as the Minister may determine". The imposition of such conditions can be useful in theory. However, there is no clear mechanism by which such conditions may be enforced. This article proposes that this lacuna be filled as follows: such conditions are to take the form of private-law relationships between the Government and Town Councils. After outlining the benefits of this proposal, the article critiques the Court of Appeal's decision in a 2016 case which held that such private-law relationships cannot exist as a matter of law, and explains why the proposal would be compatible with both the policy behind the Town Council scheme and the terms of the Town Councils Act. The article ends by commenting on how the proposal may be implemented in practice by means of contracts, trusts or bailments.

I. Introduction: Use of grant conditions

1 Since the introduction of the Town Councils Act[1] ("TCA") in 1989, the common property in public housing estates is managed by

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1 Cap 329A, 2000 Rev Ed.

Town Councils ("TCs") led by elected Members of Parliament.[2] TCs are funded by levying charges on residents; through grants (known as "grants-in-aid") from the Government[3] and through income gained through the investment of existing funds.[4] This article is concerned with the second of these sources. The TCA provides that grants-in-aid may be made "subject to such conditions as the Minister may determine" ("grant conditions").[5] What may grant conditions be used for, and how may grant conditions be enforced?

2 There could be, it is submitted, two possible functions served by imposing grant conditions:

(a) The *duty-enforcing function*: grant conditions could be used to ensure that TCs perform their statutory duties (such as duties to keep common areas clean and to maintain proper accounts and internal financial controls) through the threat of grants-in-aid being withheld and/or clawed back. This is potentially powerful. A review of TCs' financial statements for the financial years 2013/2014 and 2014/2015 (summarised in the Appendix to this article)[6] suggests that TCs are generally dependent on government grants, in that, without government grants, most TCs would incur an operating deficit. In other words, the Government is generally TCs' most important source of funding. Therefore, grants-in-aid represent a powerful tool with which the Government can ensure that TCs perform their statutory duties: a TC which refuses grants-in-aid would have to deplete its reserves in the short run and/or provide lower levels of service to residents in the longer run, both of which would be likely to incur a high political cost. In the 2015 case of *Attorney-General v Aljunied-Hougang-Punggol East Town Council*[7]

2 Each town consists of the area comprising one or more electoral constituencies: Town Councils Act (Cap 329A, 2000 Rev Ed) s 3(1).

3 Town Councils Act (Cap 329A, 2000 Rev Ed) s 42. As the Ministry of National Development ("MND") is the government ministry in charge of such matters, in this article "the MND", "the Minister", and "the Government" will be used interchangeably.

4 For more details, *see Attorney-General v Aljunied-Hougang-Punggol East Town Council* [2015] 4 SLR 474 (HC) at [42]–[47] and *Attorney-General v Aljunied-Hougang-Punggol East Town Council* [2016] 1 SLR 915 (CA) at [1]–[9].

5 Town Councils Act (Cap 329A, 2000 Rev Ed) s 42. "Minister" refers to the Minister for National Development.

6 See para 115 below and the accompanying table.

7 *Attorney-General v Aljunied-Hougang-Punggol East Town Council* [2015] 4 SLR 474 (HC); *Attorney-General v Aljunied-Hougang-Punggol East Town Council* [2016] 1 SLR 915 (CA).

("*AHPETC*"), the Court of Appeal alluded to this point, describing grant conditions as the:[8]

> … ample and indeed, in our judgment, the appropriate means by which to secure the ends of sound governance. To the extent the Minister has any concerns over the application of the grants-in-aid, it is open to him to condition the making of any or further grants-in-aid upon the Town Council agreeing to abide by appropriate safeguards.

(b) The *discretion-regulating function*: one can imagine that grant conditions, if carefully crafted, could do more than just securing "sound governance", which, one would think, is the *minimum* standard that is to be expected of TCs. Grant conditions could be used to set the boundaries within which TCs may exercise discretion as to the use of funds. The Government's role in funding TCs suggests that TCs' discretion as to the use of funds is not meant to be unfettered, notwithstanding that TCs are autonomous bodies with both the legal power and the democratic mandate to make choices as to how they expend their funds. For example, one could imagine the Government wishing to fund certain types of project but not others, or to direct a TC as to what to do while leaving it to the TC to decide how to do it. In other words, there is a balance to be struck between TCs' autonomy on the one hand, and the desire for the Government to maintain influence over the use of TCs' funds on the other. The negotiation of grant conditions could serve as a means by which this balance could be struck in a flexible manner. This would be consonant with the Government's statutory role as not only a regulator which aims to prevent misconduct, but also a funder, and therefore facilitator, of TCs' activities for the good of residents.[9]

3 However, all this potential is potentially wasted because, as this author has previously argued, it is not clear from either the TCA or the

8 *Attorney-General v Aljunied-Hougang-Punggol East Town Council* [2016] 1 SLR 915 at [82].

9 The Government's role in this regard is seen in s 42 of the Town Councils Act (Cap 329A, 2000 Rev Ed) ("TCA"), which explicitly states that government grants to Town Councils ("TCs") are made "[f]or the purposes of enabling a Town Council to carry out its functions under this Act or any other Act". According to s 18(1)(*a*) of the TCA, the "functions" of a TC include:

> … to control, manage, maintain and improve the common property of the residential and commercial property in the housing estates of the Board within the Town *for the benefit of the residents of those housing estates*. [emphasis added]

judgments in *AHPETC* how grant conditions may be enforced.[10] There are therefore no legal mechanisms to hold TCs accountable for their use of government grants. As a result, the ability of grant conditions to serve the functions set out above is greatly reduced to near-vanishing point. This is particularly worrying given that, as mentioned above, government grants are generally TCs' most important source of funding.[11]

4 This is not a problem in so far as the *duty-enforcing function* is concerned. This function is now served by amendments to the TCA made in 2017 ("the 2017 amendments"),[12] which introduced various new statutory mechanisms by which TCs may be held to their duties, hence addressing the problem that it was effectively possible for a TC to "fail to perform [its] statutory duties and face only minimal consequences".[13] The new statutory provisions allow for the Minister for National Development ("the Minister") to:

> (a) order "compliance reviews"[14] and "investigation[s]"[15] to determine whether TCs are carrying out their statutory duties;
>
> (b) issue "rectification order[s]" to compel the TC to take specified action to "address … deficiencies" or "correct [an] irregularity or to guard against the recurrence of irregularities" in the conduct of a TC's affairs;[16] and
>
> (c) in certain limited cases, order that the TC members be temporarily suspended from office and replaced by an "official manager".[17]

5 However, there is a limit to what the new statutory provisions can do. The statutory provisions only perform the *duty-enforcing function*. Moreover, they ensure this in a somewhat blunt fashion: their aim is no more or less than to secure the performance of those duties immediately. It has been observed above that grant conditions can be used to do much more than this by serving the *discretion-regulating function*.

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10 See Benjamin Joshua Ong, "Enforcing Town Councils' Duties of Financial Prudence: Problems Addressed by the Town Councils (Amendment) Act 2017" (2018) 30 SAcLJ 923 at 940–941, paras 42–46.

11 See para 2(a) above; see also the Appendix and the accompanying table below.

12 Town Councils (Amendment) Act 2017 (Act 17 of 2017).

13 Benjamin Joshua Ong, "Enforcing Town Councils' Duties of Financial Prudence: Problems Addressed by the Town Councils (Amendment) Act 2017" (2018) 30 SAcLJ 923 at 942–943, para 49.

14 Town Councils Act (Cap 329A, 2000 Rev Ed) s 43A.

15 Town Councils Act (Cap 329A, 2000 Rev Ed) s 43B.

16 Town Councils Act (Cap 329A, 2000 Rev Ed) s 43D.

17 Town Councils Act (Cap 329A, 2000 Rev Ed) s 43G.

6 In fact, grant conditions *should* serve the discretion-regulating function, rather than merely ensuring that the minimum standards laid down by law are met. Surely any person who provides funding ought to have at least some influence in what that funding may be used for; there is no reason why the Government's funding a TC ought to be any different. But this would be meaningless unless the conditions attached to the use of funds is legally enforceable. Therefore, the usefulness of grant conditions is greatly diminished by the lack of a means to enforce them.

7 This author previously identified the problem of how to enforce grant conditions as a "potential area for future development of the law".[18] This article aims to present a proposal to fulfil this potential. The proposal is that grant conditions can be made enforceable if they are made to take the legal form of private-law devices such as contracts, bailments or trusts. This will not only afford a measure of flexibility in the Government's funding of TCs but also increase the legitimacy of the TC scheme by allowing the TC to play a clearer role in negotiating the grant conditions with the Government.

8 Part II of this article[19] sets out the proposal, while Parts III[20] and IV[21] defend the proposal against various possible objections. Finally, Part V[22] explains how the proposal may be put into action by means of contracts, trusts and/or bailments.

II. Usefulness of private law

9 Private law has already developed several solutions to the problem of how *A* may both grant latitude to *B* to use *A*'s money, and at the same time impose restrictive conditions on the uses to which *B* may put the money or the manner in which *B* may manage the money. (Examples include a contract between *A* and *B* imposing obligations on *B*, or an arrangement whereby *B* holds the money on trust for *A*.)

10 This is precisely what grant conditions ought to be able to do, with *A* being the Government and *B* a TC. Private law is well placed to supply various juristic devices through which conditions may be attached to grants-in-aid, and by which those conditions may be

18 Benjamin Joshua Ong, "Enforcing Town Councils' Duties of Financial Prudence: Problems Addressed by the Town Councils (Amendment) Act 2017" (2018) 30 SAcLJ 923 at 948, para 62.

19 See paras 9–15 below.

20 See paras 16–30 below.

21 See paras 31–87 below.

22 See paras 88–112 below.

enforced. This article will propose that grant conditions take this form of private-law relationships, such as relationships of contract, trust, and bailment, between the Government and TCs. This will be referred to as "the Proposal".

11 The following are just a few possible examples of how the Proposal could be put into action:

(a) Suppose the Government wishes to fund a TC's expenditure, but only for a particular purpose ("purpose X"). One of the following mechanisms would allow this:

(i) The TC holds grant money on an express *Quistclose* trust[23] for the Government, with the duty to use the money only for purpose X. The money is to be disbursed into a separate bank account from the rest of the TC's funds, which is to be monitored by an independent accountant. If the TC uses the grant money for purpose Y, or if the TC fails to carry out purpose X, the TC must restore the trust fund by replenishing the bank account, failing which the Government may sue the TC for breach of trust.

(ii) The TC is bailee of the Government's grant money, with a direction to use that money only for purpose X. If the TC uses that money for purpose Y, or if the TC fails to carry out purpose X, then the TC is in breach of the terms of the bailment, and the Government may assert its right to immediate possession of the money (and sue to recover the same).

(b) One can imagine more flexible possibilities to structure the use of grant moneys for a variety of purposes, each subject to varying levels of oversight by the Government. This could be done by way of contract. An illustration is as follows: the TC could enter into a contract with the Government, under which $a is disbursed to be used as the TC sees fit; $b for the use of purpose X only, failing which $b will be repayable immediately; and $c for the use of purpose Y only and on certain conditions which, if not met, will entitle the Government to a partial

23 An express *Quistclose* trust arises when:

> … the settlor-donor [*ie*, the Government] … intend[s] to constitute the recipient [*ie*, the TC] as a trustee, and confer a power or duty on the recipient-trustee to apply the money exclusively in accordance with the stated purpose

See *Attorney-General v Aljunied-Hougang-Punggol East Town Council* [2015] 4 SLR 474 at [114(c)]. Note that some cases have taken issue with the term "express *Quistclose* trust" in favour of, for example, "express '*Quistclose*-type' trust": *MSP4GE Asia Pte Ltd v MSP Global Pte Ltd* [2019] SGHC 20 at [110].

repayment for each month during which those conditions are not met.[24]

12 The chief benefit of this method of making grant conditions enforceable, besides preventing the problem of grant conditions being toothless, is flexibility. There are three dimensions to this:

(a) First, it would be open to the Government and the TC to negotiate the grant conditions. TCs' role in such negotiations would be in line with their autonomy and independence in accordance with the aims of the TC scheme, as opposed to their being mere passive recipients of money from the Government. At the same time, once such negotiations are concluded, their outcome will be formalised and given legally binding effect, increasing certainty as to the terms eventually agreed upon.

(b) Second, as explained above, the grant conditions could take a multitude of possible forms, allowing for varying degrees of restriction on the use of grant money.

(c) Third, there would be flexibility in dealing with situations of breach of the terms of grant conditions. Of course, the Government could bring an action for breach; but, alternatively, the credible *threat* of bringing such an action could serve as a bargaining chip in further negotiations between the Government and the TC, leading to a form of alternative dispute resolution. For example, the Government and TC might reach a compromise agreement in which, in consideration of the Government fully or partly waiving its claim, the conditions are further tightened.

In short, the Proposal would ensure that, even as the Government exercises influence over TCs' use of funds, there is continuous space for political negotiation in the management of TCs.

13 One might ask whether the existence of such private-law relationships would be incompatible with the statutory scheme governing Town Councils and their relationship with the Government. For the reasons explained in Part IV,[25] there is no incompatibility. On the contrary, private-law relationships of the sort proposed above would

24 The contract will need to be drafted such that the obligations to pay money to the Government take the form of a debt (*ie*, a primary obligation to pay money), as opposed to damages (*ie*, a secondary obligation to pay compensation for the breach of a primary obligation). See generally *Chitty on Contracts* (Hugh G Beale gen ed) (Sweet & Maxwell, 32nd Ed, 2015) at para 26-008.

25 See paras 31–87 below.

fit perfectly harmoniously with the statutory scheme governing grants-in-aid. The relevant statutory provision is s 42 of the TCA:

> For the purposes of enabling a Town Council to carry out its functions under this Act or any other Act, the Minister may from time to time make grants-in-aid to the Town Council of such sums of money and subject to such conditions as the Minister may determine out of moneys to be provided by Parliament.

Section 42 contemplates a Government–TC relationship with characteristics similar to those of private-law relationships:

> (a) First, the statutory scheme envisages that grants-in-aid may be given on condition that they be used for a specific purpose only.[26] This is precisely what is envisaged by, for example, a *Quistclose* trust.
>
> (b) Second, moneys paid to TCs under this scheme are described as *grants* of money, as opposed to, say, allocation of money. In other words, they are offered by the Minister, and TCs are free to accept or to reject them;[27] it is not the case that moneys, with attendant conditions, are simply foisted on TCs. Similarly, for example, the laws surrounding contracts and of *Quistclose* trusts are concerned with seeing to it that obligations are undertaken voluntarily and with the obligor's consent.

14 Further, the law is clear that TCs and the Government have the capacity to enter into such private-law relationships. A TC has the capacity to "sue and be sued" in its own "corporate name",[28] and to enter into contracts.[29] Correspondingly, the Government has the power to "acquire, hold and dispose of property of any kind and to make contracts".[30] Moreover, TCs' private-law capacity as set out in the TCA overlaps strikingly with the way in which grants-in-aid work. According to s 19(1)(*b*) of the TCA, TCs have the capacity to:

> … acquire and hold property of any description if, in the opinion of the Town Council, the property is necessary for the … performance of any *purpose which the Town Council is required or is permitted … to perform*, [emphasis added]

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26 This is evident from s 39(12) of the Town Councils Act (Cap 329A, 2000 Rev Ed):
> [A] Town Council may differentiate the rates of [conservancy and service charges levied in respect of flats] to take into account any grants-in-aid made under section 42 which are expressed to be *for the benefit of any class of owners of flats*. [emphasis added]

27 *Attorney-General v Aljunied-Hougang-Punggol East Town Council* [2015] 4 SLR 474 at [72]–[74].

28 Town Councils Act (Cap 329A, 2000 Rev Ed) s 5.

29 Town Councils Act (Cap 329A, 2000 Rev Ed) s 7.

30 Constitution of the Republic of Singapore (1999 Reprint) Art 37.

and:

> … *subject to the terms and conditions upon which the property is held*, to dispose of the property [emphasis added].

Grants-in-aid are perfectly harmonious with this provision. They are disbursements of property for the performance of purposes which a TC is required or permitted to perform; and they are held by, and expendable by, TCs subject to terms and conditions.

15 Having set out the Proposal, the author will explore in Part V[31] how it might be implemented in practice. Before that, however, it must be defended against various types of possible objection. This will be done over the next two parts of this article. In Part III,[32] the author will deal with the most immediate obstacle, which is created by the Court of Appeal's decision in *AHPETC*; it will be argued that the Court of Appeal erred in holding that no private-law relationships can exist between the Government and TCs. In Part IV,[33] the author will reject the view that the Proposal is not possible because it would contravene the policy or specific provisions of the TCA.

III. Court of Appeal's objection to applicability of private law

16 The first possible objection that must be dealt with is the one arising from the Court of Appeal's decision in *AHPETC*. In that case, the Government, through the Ministry of National Development ("MND"), had sought to enforce the Aljunied-Hougang-Punggol East Town Council's ("AHPETC's") statutory duties. Besides the statutory remedy in s 21(2) of the TCA,[34] the MND claimed that it had a right of action against AHPETC by virtue of a contract and/or a relationship of

31 See paras 88–112 below.

32 See paras 16–30 below.

33 See paras 31–87 below.

34 Section 21(1)(*f*) of the Town Councils Act (Cap 329A, 2000 Rev Ed) ("TCA") provides that Town Councils ("TCs") have the duty to "comply with the provisions of [the TCA] and the rules made thereunder". Section 21(2) provides:

> Where a requirement or duty is imposed on a Town Council by this section, the [Housing and Development] Board or any person for whose benefit, or for the benefit of whose flat that requirement or duty is imposed on the Town Council, may apply to the High Court for an order compelling the Town Council to carry out the requirement or perform the duty, as the case may be.

For completeness, it should be noted that the Court of Appeal had held that the MND was not a "person for whose benefit, or for the benefit of whose flat" the TCA imposed duties on TCs. However, the Court of Appeal granted *the Housing and Development Board's* application under s 21(2). For more details, see Benjamin Joshua Ong, "Enforcing Town Councils' Duties of Financial Prudence: Problems Addressed by the Town Councils (Amendment) Act 2017" (2018) 30 SAcLJ 923 at 929–932, paras 11–16.

Quistclose trust between the Government and AHPETC. However, the Court of Appeal held that such relationships could not exist as a matter of law. It will now be argued that this view was misplaced, and, in truth, presents no bar to the Proposal.

17 In attempting to sue AHPETC on a contract and/or a *Quistclose* trust, the MND had sought to argue that the contract and the trust contained terms to the effect that AHPETC was to perform its statutory duties. However, the Court of Appeal held that the relationships between the Government and TCs, being "governed by statute", must fall solely within the realm of "public law", and create "rights and obligations [which] could not be determined based on private law concepts".[35] There was said to be a "fundamental distinction"[36] between "public law and private law".[37] Therefore, said the Court of Appeal, the MND could not:[38]

> … fundamentally alter the very basis of the relationship [between itself and TCs] from one founded in and regulated by statute to one in trust, agency or any other private law concept. It is not appropriate, on the facts of the present case, to add such private law overlays to the statutory relationship between the Minister and the Town Councils. Indeed, there is nothing at all in the TCA to suggest otherwise. This also forecloses the MND's alternative contention based on a legal interest pursuant to a contractual mandate and a beneficial interest under a *Quistclose* trust.

Instead, said the Court of Appeal, "any remedy for any failure to apply any [grant] money in accordance with the TCA must rest *in the TCA as a matter of public law* and be based upon it" [emphasis added].[39]

18 In essence, the Court of Appeal's reasoning appears to have been as follows:

> (a) The Government–TC relationship is "regulated by statute".
>
> (b) A matter which is "regulated by statute" is a matter of "public law".

35 *Attorney-General v Aljunied-Hougang-Punggol East Town Council* [2016] 1 SLR 915 at [124].
36 *Attorney-General v Aljunied-Hougang-Punggol East Town Council* [2016] 1 SLR 915 at [126].
37 *Attorney-General v Aljunied-Hougang-Punggol East Town Council* [2016] 1 SLR 915 at [125] and [127].
38 *Attorney-General v Aljunied-Hougang-Punggol East Town Council* [2016] 1 SLR 915 at [123].
39 *Attorney-General v Aljunied-Hougang-Punggol East Town Council* [2016] 1 SLR 915 at [128].

(c) A matter of "public law" must have nothing to do with "private law".

With respect, this reasoning is incorrect because it is based on both a category mistake and a false dichotomy.

A. Category mistake

19 First, the Court of Appeal's remarks suggest that a relationship "regulated by statute" must *ipso facto* have nothing to do with private law. However, this is a category mistake. Private law is a *type* of legal relationship between legal persons, while a statute is a *source* of legal relationships or of legal persons. (That is why there are such things as statutory torts, statutory contracts, and statutory trusts.) The Court of Appeal therefore erred in suggesting that "regulated by statute" is equivalent to "public law", or that it is the antithesis of "private law". In truth, the mere fact that there is a statutory relationship between the Government and TCs does not preclude the existence of *separate* private-law relationships. Nothing in the Proposal entails that the TCA be undermined or subverted. On the contrary, the private-law relationships envisaged by the Proposal will *complement* the statutory scheme.

20 In support of its view, the Court of Appeal cited the case of *Re Patricia Isobel Gold*[40] ("*Gold*"), which, in the Court of Appeal's words, was said to stand for the principle that:[41]

> … [s]ince the relationship between the applicant and the body corporate was one that arose out of and was governed by statute, their mutual rights and obligations *could not be* determined based on private law concepts. [emphasis added]

The implication was that the Government, similarly, could not have had "rights and obligations" *vis-à-vis* a TC other than those set out in the Act.

21 However, *Gold* said no such thing. The case involved a proprietor of a unit in a strata development who had failed to pay levies to the Management Corporation ("the Corporation").[42] She argued that she did not have to pay the levies because the articles of the Corporation

40 [1996] FCA 1274.

41 *Attorney-General v Aljunied-Hougang-Punggol East Town Council* [2016] 1 SLR 915 at [124].

42 More details about this case may be gleaned from the judgment in *Gold v Proprietors – Units Plan No 52* (1992) 110 FLR 356.

constituted a contract between her and the Corporation,[43] which the Corporation had allegedly breached.[44] The Federal Court of Australia rejected this contention because the obligation to pay the levies came not from any contract but from a statutory provision.[45] However, that court did *not* say that a contractual analysis *could not* apply *because* a statutory regime existed. What it said was that a contractual analysis *did not* apply because the rights in question were, *on the facts*, not contractual in nature.

22 In other words, in principle, there *could* have been a contractual relationship between residents and the Corporation *in addition to* the statutory relationship. In fact, the contents of the contract could even have *reproduced* the statutory rights and obligations in question. *A fortiori*, it must have been possible for there to be a contract between a resident and the Corporation which contained terms *other* than a condition that the Corporation perform its obligation under the Act.

23 Similarly, even though the TCA now allows the Government to take action to enforce a TC's statutory duties, this ought not to preclude the Proposal that the Government be allowed to enter into *separate* private-law relationships with TCs. What the Court of Appeal in *AHPETC* was anxious to avoid was the *replacement* of the TCA by contracts and trusts. But the Proposal will entail no such thing.

B. The false dichotomy

24 The Court of Appeal's reasoning in *AHPETC* was also premised on a dichotomy between "public law" and "private law": it held that the Government's and a TC's "mutual rights and obligations [cannot] be determined based on private law concepts" but instead "must rest in the TCA as a matter of public law".[46]

25 However, this dichotomy is a false one. Even if s 42 of the TCA, which empowers the Government to disburse grants-in-aid to TCs, creates a relationship of "public law" between the Government and TCs, that does not mean that "private law" has no role to play. On the contrary, public law can give rise to a power to enter into a private-law relationship.

43 Unit Titles Act 1970 (ACT) s 79.
44 *Re Patricia Isobel Gold* [1996] FCA 1274 at [24].
45 *Re Patricia Isobel Gold* [1996] FCA 1274 at [23] and [25].
46 *Attorney-General v Aljunied-Hougang-Punggol East Town Council* [2016] 1 SLR 915 at [123], [124] and [128].

26 A useful analogy is that of public housing authorities in the UK. When such an authority exercises its discretion to decide whether or not to provide housing to someone, it thereby performs a "public law functio[n]".[47] However, if the decision to provide housing is made, *then* "rights and obligations [may be] immediately created in the field of private law"[48] (such as a lease or a licence).

27 Similarly, the Proposal is based on the notion that, in the context of grants-in-aid, public law dictates the *circumstances* in which grants are to be made, while private law structures the *implementation* of grants, including disbursement and recovery. Thus:

> (a) Section 42 of the TCA gives rise to the Minister's discretionary *power* to make grants-in-aid to a TC. The exercise of this power is governed by public law norms. For example, a TC may seek judicial review of the Minister's decision not to make a grant if this decision is made in bad faith or as a result of taking into account irrelevant considerations.
>
> (b) But once the Minister decides to exercise his power to make a grant-in-aid to a TC, the *mechanism* through which he does so may be the creation of what amounts in *private law* to (for example) a conveyance pursuant to a contract, a passing of possession pursuant to a bailment, or the constitution of a *Quistclose* trust. If either party does not act in accordance with the terms thereof, then the other party may seek a private-law remedy.

There is therefore no contradiction between the private-law relationships proposed and the "public" character of the Government and the MND.

28 In support of its view that there is a "fundamental distinction" between public law and private law, the Court of Appeal cited the case of *Swain v The Law Society*.[49] In this case, the Law Society of England and Wales took out a "master policy" from an insurance broker, and made it compulsory for individual solicitors to pay premiums on this policy, in return for which the Law Society would receive commissions from the

47 *Cocks v Thanet District Council* [1983] 2 AC 286 at 292F.

48 *Cocks v Thanet District Council* [1983] 2 AC 286 at 292H–293B. The original quotation from the case reads "are immediately created". The author has substituted it with "may be immediately created" because of the *caveat* pointed out in *O'Rourke v Camden LBC* [1998] AC 188 that private-law rights and obligations do not arise *immediately and automatically* once the housing authority has made its decision; rather, the housing authority's making its decision is a *precondition* for its going on to take steps to *bring into existence* private-law rights and obligations.

49 [1983] AC 598.

insurance broker for each solicitor who was insured.[50] The House of Lords rejected the view that the Law Society was liable to account for the commissions as a fiduciary for the solicitors. According to Lord Diplock, this was because the Law Society was acting in a "public capacity" rather than a "private capacity"[51] as the entire insurance scheme was an exercise of statutory powers that would bind *all* solicitors, rather than only those who were members of the Law Society.[52]

29 However, with respect, this reasoning is based on the same false dichotomy that has just been criticised. It is submitted that the correct analysis is as follows. The Law Society's decision to enter into the insurance scheme sounded in public law, and could be challenged by *any* solicitor by way of judicial review. But the scheme itself, if valid as a matter of public law, had ramifications in private law which potentially created private-law rights on the part of *the individual solicitors who had made payments*. Lord Brightman's reasoning in the case is to be preferred: unlike Lord Diplock, he did not deny that, as a matter of law, the Law Society could in principle "constitute itself a trustee of the master policy contract" for its members; rather, he disposed of the case on the basis that there was, *on the facts*, no such trust.[53]

30 In conclusion, the Court of Appeal was, based on what the author has just argued to be shaky authority, attacking a straw man when it stated that the MND cannot:[54]

> … fundamentally alter the very basis of the relationship [between the Government and TCs] … [and] add … private law overlays to the statutory relationship between the Minister and the Town Councils.

This was *not* what the MND was saying should be done; neither is it what the Proposal would entail. The MND had not claimed that TCs should be regulated by "private law" *and not* "public law". Nor would the Proposal involve attempting to *overlay* private law on top of public law. Rather, it would simply involve a recognition that the statutory grant scheme, which creates public-law power to make grants, leaves space for private law to operate once that public-law power has been validly and effectively exercised.

50 *Swain v The Law Society* [1983] AC 598 at 609E, 609G and 610E–610F.
51 *Swain v The Law Society* [1983] AC 598 at 607H–608A.
52 *Swain v The Law Society* [1983] AC 598 at 608C–608D.
53 *Swain v The Law Society* [1983] AC 598 at 620F–621E.
54 *Attorney-General v Aljunied-Hougang-Punggol East Town Council* [2016] 1 SLR 915 at [123].

IV. The Proposal's compatibility with policy of TCA

31 For the reasons above, it does not follow from the mere existence of a statutory scheme governing TCs that there can be no private-law relationships between the Government and TCs. Nonetheless, the Court of Appeal's judgment ought to make one pause to consider whether there is something *particular* to the TCA that militates against such relationships. This is important because the common law recognises a general principle that a common-law cause of action cannot be allowed to stultify a statutory policy.[55] For example, one cannot sue for breach of statutory duty when there is an existing statutory remedy for the breach of that duty;[56] one cannot make a claim in unjust enrichment to reverse transfers made pursuant to a contract if doing so would "undermine the fundamental policy that rendered the underlying contract void and unenforceable";[57] and one might not be able to sue to enforce a contract for the purpose of contravening a statutory provision[58] or even the "policy objective" of a statute.[59] Recently, the High Court (constituted by three judges) articulated a more general principle: one will not be allowed to claim a legal right which violates and is outweighed by a public policy embodied in the "value or purpose"[60] of a statute.[61]

32 For present purposes, there are two issues to discuss:

(a) The first involves a general discussion of the policies underlying the TC scheme, and a consideration of whether the Proposal would contradict them.

(b) The second calls for a comparison of the Proposal with various remedies and actions which might be available to the Government against a TC. This is necessary because of what will be called the "*Bridges* rule": "where an Act creates an obligation, and enforces the performance in a specified

55 The author is grateful to an anonymous reviewer for this point.

56 *Doe dem Murray, Lord Bishop of Rochester v Bridges* (1854) 1 B & Ad 847 at 859; (1854) 109 ER 1001 at 1006; see also the cases cited at n 62, and the discussion at paras 73–74 below.

57 *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363 at [159]. For discussion of a more general principle of non-stultification of statutory policy, see [161] and [168].

58 *Ting Siew May v Boon Lay Choo* [2014] 3 SLR 609 at [75].

59 *Ting Siew May v Boon Lay Choo* [2014] 3 SLR 609 at [84].

60 *UKM v Attorney-General* [2019] 3 SLR 874 at [162(a)(i)(A)].

61 *UKM v Attorney-General* [2019] 3 SLR 874 at [162(a)(i)(A)], [162(a)(iv)] and [162(b)]. On a similar note, in the context of trusts, see *V Nithia v Buthmanaban s/o Vaithilingam* [2015] 5 SLR 1422 at [74], discussed in Tang Hang Wu, "Equity and Trusts" (2015) 16 SAL Ann Rev 450 at 460, para 15.24.

manner … that performance cannot be enforced in any other manner".[62]

A. The Proposal is not incompatible with statutory policy on Government–TC relations

33 The idea of private-law relationships between two bodies is premised on the two bodies being in substance separate entities, as opposed to one being part of the other. In other words, for the Proposal to make sense, TCs cannot be mere emanations of the Government.

34 Any scheme of local government must address the question of exactly how much discretion local government bodies have, and thus, conversely, how much control the central government has. This depends on the answer to a fundamental policy question, which Paul Craig phrases as being a choice between "two opposing views of central-local relations, that which sees the latter as a mere agent of the former, and that which accords the two a more equal or autonomous status".[63] He calls the former the "agency view", which is based on the idea that "[d]ivergent treatment of the same problem in different areas is regarded as unjust".[64] By contrast, the latter focuses on the principle of respect for the choices of a democratically elected body. Of course, there are "[s]hades of grey" between the two models; the latter, in particular, acknowledges that local authorities' choices should only "*within bounds* be respected. What those bounds are is the focus of debate"[65] [emphasis added].

35 If TCs are just agents through which the Government acts, then the relationship between the two would have been like that between "the human body and its members" – TCs would be akin to the hands of the Government, and it is "nonsensical … to say: 'My hand is holding this pen as my agent, or as trustee for me'".[66]

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62 *Doe dem Murray, Lord Bishop of Rochester v Bridges* (1854) 1 B & Ad 847 at 859; (1854) 109 ER 1001 at 1006. This principle has been endorsed several times by the English courts: *eg*, *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)* [1982] AC 173 at 185B–185C; *X v Bedfordshire CC* [1995] 2 AC 633 at 731E–731G; and *Morshead Mansions Ltd v Di Marco (No 2)* [2014] 1 WLR 1799 at [25]–[26].

63 Paul Craig, *Administrative Law* (London: Sweet & Maxwell, 7th Ed, 2012) at p 159, para 6-015.

64 Paul Craig, *Administrative Law* (London: Sweet & Maxwell, 7th Ed, 2012) at p 159, para 6-015.

65 Paul Craig, *Administrative Law* (London: Sweet & Maxwell, 7th Ed, 2012) at p 160, para 6-015.

66 *Town Investments Ltd v Department of the Environment* [1978] AC 359 at 400G, *per* Lord Simon.

36 If, on the other hand, TCs are autonomous, then, even if they are in some sense servants of the Government, they would "remai[n] separate from the [Government] and [are] not and d[o] not become the [Government]".[67] In such a case, a TC would in principle be capable of being a trustee for the Government, or a party to a contract with the Government; there would be no conflict between the Proposal and the policy of the TCA.

37 The author will now show that TCs are indeed autonomous from the Government (and its statutory boards), and that this is in line with the policy behind the TCA. This will be done by analysing the position of TCs *vis-à-vis* both:

(a) statutory boards and other agencies of the Government (which are creatures of various statutes), for example, the Housing and Development Board ("HDB") ("statutory authorities"); and

(b) the Government itself (that is, the executive government which is a creature of the Constitution).

(1) TCs' autonomy from HDB and other statutory authorities

38 TCs are free to make choices on matters which are inherently subjective and on which there can be legitimate divergence of opinion. This includes developing the "distinctive character" of towns,[68] such as by painting murals, creating gardens,[69] and installing benches and "poles for bird singing".[70] (If not for TCs, these matters would be under the HDB's purview.) TCs may also choose what investments to make because they "are in the best position to determine the balance that suits their respective financial requirement and risk tolerance".[71] For these

67 *Town Investments Ltd v Department of the Environment* [1978] AC 359 at 393E, *per* Lord Morris (dissenting).

68 *Singapore Parliamentary Debates, Official Report* (3 March 2014) vol 9 "Measures to Protect Interests of Residents of Town Councils" (Khaw Boon Wan, Minister for National Development).

69 *Singapore Parliamentary Debates, Official Report* (28 June 1988) vol 51 at col 374 (S Dhanabalan, Minister for National Development).

70 *Singapore Parliamentary Debates, Official Report* (28 June 1988) vol 51 at col 380 (Goh Chok Tong, First Deputy Prime Minister and Minister for Defence).

71 *Singapore Parliamentary Debates, Official Report* (17 November 2008) vol 85 at col 705 (Grace Fu Hai Yien, Senior Minister of State for National Development, for the Minister of National Development).

reasons, M Shamsul Haque[72] analyses Town Councils as "possess[ing] certain characteristics of devolution", which he defines as "the *transfer* of functions and decision-making authority to the legally incorporated local government" [emphasis added].[73]

39 On the other hand, although TCs are autonomous (to the exclusion of the involvement of the HDB) within these areas, these areas are small. Three points may be made, which may prompt one to think that TCs are in reality mere "agents of the HDB".[74] As will now be argued, such a view is too simplistic, and would not do justice to the areas in which TCs do have discretion or, at least, a role in negotiating the boundaries of their discretion.

(a) Restrictions on TCs' priorities

40 First, TCs face pressure to prioritise certain functions over others. In an annual Town Council Management Report ("the Report") published by the MND, TCs are graded on matters such as "estate cleanliness, lift performance, S&CC arrears management and corporate governance".[75] Residents may then use the Report as a tool by which to judge their TC's performance. In addition, TCs are statutorily required to prioritise "cyclical maintenance works",[76] in that they are required to transfer most or all of their operating surpluses to their sinking funds at the end of every election cycle so as to ensure that money is set aside for these purposes.

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72 M Shamsul Haque, "A Grassroots Approach to Decentralization in Singapore" (1996) 4 *Asian Journal of Political Science* 64 at 73–75. "Devolution" is opposed to "delegation", in which a local government authority is "transfer[red] … government functions … but still work[s] as the agents of the state"; or "deconcentration", in which the "transfer of functions" still takes place "along the central government hierarchy".

73 M Shamsul Haque, "A Grassroots Approach to Decentralization in Singapore" (1996) 4 *Asian Journal of Political Science* 64 at 73.

74 *Singapore Parliamentary Debates, Official Report* (29 June 1988) vol 51 at cols 415–416 (Chiam See Tong):

> Town Councillors, technically, are nothing more than the agents of the HDB to do the cleaning and the repair of buildings in HDB estates … there is in fact an inconsistency or a contradiction … because [TCs] do not own the property and [TCs] are asked to manage it, to take care of it.

75 *Singapore Parliamentary Debates, Official Report* (5 February 2013) vol 90 "Written Answers to Questions for Oral Answer [*sic*] not Answered by 3.00pm: Annual Grants for Town Councils" (Khaw Boon Wan, Minister for National Development). See the Ministry of National Development website at https://www.mnd.gov.sg/our-work/regulating-town-councils/town-council-management-report-(tcmr) (accessed 9 May 2019) for the Town Council Management Report framework and past Town Council Management Reports.

76 *Singapore Parliamentary Debates, Official Report* (10 October 1996) vol 66 at cols 666–667 (Lim Hng Kiang, Minister for National Development).

41 Nonetheless, even in such areas, TCs retain discretion as to *how* to discharge their duties. Moreover, TCs have the power to make discretionary decisions as to how far they will go *above and beyond* performing such duties. TCs may "decide on the priority between many desirable services and the standard of each service", so as to "shape a distinct identity for each estate".[77] In other words, once they have met *minimum* compulsory standards (such as cleanliness), they are free to allocate their remaining resources toward either *further* improving on those standards, or on *other* projects.

(b) HDB's ultimate power as landlord

42 Second, the HDB is ultimately the "landlord and lessor" of housing estates.[78] Thus, for example, TCs have been "required to obtain the permission of the HDB for development plans including the addition of facilities".[79] One might therefore think that, save in certain narrow areas, a TC can have latitude but only to the extent that the HDB allows it.[80]

43 But even then, the TC does not thereby become a mere vassal of the HDB. The TCA explicitly states that TCs are to manage parking places, industrial properties, markets, and food centres "upon terms and conditions agreed between the Town Council and the Board".[81] In other words, the TCA explicitly contemplates that, even as the HDB plays a supervisory role, TCs have the power to negotiate *their* role. Similarly, works done "on any common property of the housing estates within the Town on behalf of the Board" are to be done on terms agreed on

77 Ooi Giok Ling, *Town Councils in Singapore: Self-Determination for Public Housing Estates* (Institute of Policy Studies Occasional Paper No 4) (Singapore: Times Academic Press, 1990) at p 19, citing remarks of Lee Kuan Yew, *The Sunday Times* (2 July 1989).

78 Thio Li-ann, "Neither Fish nor Fowl: Town Councils, Community Development Councils and the Cultivation of Local Government/Governance in Singapore" in *Municipi d'Oriente: Il Governo Locale in Europa Orientale, Asia e Australia* (Hiroko Kudo, Giampaolo Ladu & Lucio Pegoraro eds) (Centre for Constitutional Studies and Democratic Development, 2009) at p 12 <https://www.academia.edu/601385/_Neither_Fish_nor_Fowl_Town_Councils_Community_Development_Councils_and_the_Cultivation_of_Local_Government_Governance_in_Singapore> (accessed 9 May 2019).

79 Ooi Giok Ling, "Town Councils in Public Housing Estates: Change and Implications" in *City & the State: Singapore's Built Environment Revisited* (Ooi Giok Ling & Kenson Kwok eds) (Singapore: Oxford University Press, 1997) ch 3 at p 57.

80 *Singapore Parliamentary Debates, Official Report* (28 June 1988) vol 51 at cols 376–377 (S Dhanabalan, Minister for National Development); Town Councils Act (Cap 329A, 2000 Rev Ed) ss 19(2)–19(3).

81 Town Councils Act (Cap 329A, 2000 Rev Ed) s 19(2)(*a*)(i).

between the HDB *and the TC*;[82] the same applies to works which the TC carries out "on the request of any statutory authority or any community-based association".[83]

(c) TCs' duty to co-operate with public bodies

44 Third, as of 2017, s 21A(1) of the TCA requires that:

> … [a] Town Council must, in the exercise of its powers and the performance of its functions and duties under this Act in relation to the residential property and commercial property in the housing estates of the Board within its Town, work cooperatively and in collaboration with [the HDB and various other statutory authorities and public officers].

45 But even then, this provision implicitly reaffirms that TCs are not mere emanations of these authorities, nor are their duties co-extensive. The word "cooperatively" indicates that TCs play a much more active role than merely taking marching orders from statutory authorities. Indeed, s 21A(7) of the TCA explicitly affirms that TCs are "not prohibit[ed] … from proposing reasonable terms and conditions for carrying out [such] activities" even notwithstanding TCs' duty to co-operate with statutory authorities.

46 The Public Sector (Governance) Act 2018,[84] when brought into force, would go even further. It would specifically exclude Town Councils from its definitions of "public body" and "public sector", and therefore affirm that Town Councils have nothing at all to do with a "whole-of-government approach to the delivery of services".[85]

47 One might next retort as follows: under s 21A(2) of the TCA, if a TC has "unreasonably delayed, hampered or prevented" a statutory authority from carrying out their functions in relation to common property, that authority may direct the TC to "do, or refrain from doing, such things as are specified … as to facilitate or enable [the authority] … to so perform that function". Because the failure to comply with such a direction is a criminal offence, it may at first blush appear that such a direction has the effect of subjugating the TC's autonomy to the desires of various statutory authorities, thus detracting from the TC's autonomy *vis-à-vis* those authorities.

82 Town Councils Act (Cap 329A, 2000 Rev Ed) s 19(2)(*b*).
83 Town Councils Act (Cap 329A, 2000 Rev Ed) s 19(3).
84 Act 5 of 2018.
85 Public Sector (Governance) Act 2018 (Act 5 of 2018) ss 2–3. The author is grateful to an anonymous referee for this point.

48 To an extent, this is true, in the sense that it privileges these other statutory authorities' discretion over the TCs' discretion. However, the effect of such a direction will rarely conflict with TCs' discretion. All that such a direction tells the TC to do is to refrain from "unreasonably" preventing other statutory authorities from doing what the latter have legal power to do. Further, such a direction may only be made in limited circumstances, *viz*, in relation to work which:

> (a) falls within the scope of the HDB "in the discharge of [its] functions under the Housing and Development Act"; or
>
> (b) falls within the scope of "any statutory authority or public officer performing functions (but without specific power) under any written law";[86] *and* relates to the narrow purposes of "public safety", "public order", "preventing disease or injury", "creating and maintaining a healthy environment", or "electronic, information and communication technologies so as to improve quality of life for residents".[87]

49 In short, notwithstanding the limited nature of TCs' discretion, the extent and nature of the limits is such that TCs are autonomous from statutory authorities.

(2) TCs' autonomy from the Government

50 So much for TCs' autonomy from statutory authorities. What about independence from the Government itself? The various statutory procedures by which the Government may assert control over TCs must now be examined. In particular, the 2017 amendments to the TCA must be examined to determine whether they evince a legislative intention to reduce TCs' autonomy from what was envisaged when the TC scheme was introduced in 1989.

51 This inquiry will show that the new statutory provisions have the potential to curtail TCs' autonomy in *exceptional* circumstances, but not at all to the extent that TCs become mere emanations of the Government.

(a) Former s 50 procedure

52 The first such provision that must be examined is what will be called "the s 50 procedure", which existed prior to the 2017 amendments to the TCA. In *AHPETC*, the Court of Appeal put forth the view that, although the Government could not bring a private-law claim against a

86 Town Councils Act (Cap 329A, 2000 Rev Ed) s 21A(1).
87 Town Councils Act (Cap 329A, 2000 Rev Ed) s 21A(1)(*b*).

TC, the Government might still have "recourse … pursuant to s 50 of the TCA".[88]

53 Section 50 of the TCA covered two sorts of situation. For convenience, these will be referred to as "limb (a)" and "limb (b)":[89]

> (a) If a TC had "failed to keep or maintain any part of the common property … in a state of good and serviceable repair or in a proper and clean condition", then the Minister could appoint "any person" to "perform such powers, duties and functions of the Town Council and for such period as may be specified in the [Minister's] order".
>
> (b) If "any duty of a Town Council must be carried out urgently in order to remove any imminent danger to the health or safety of residents", then the Minister could appoint "any person" to "carry out any duty of the Town Council so as to remove the danger".

54 The "person" would act "in the name and on behalf of the Town Council". The TC had to accept that person's decisions and bear the costs thereof.[90] The TC could not, say, attempt to reduce costs by giving instructions to the "person" on how to go about its tasks.

55 Might it be said that, once s 50 had been invoked, the Minister's powers would have been so broad as to oust the TC's discretion? Might it further be said that, because the Minister was in such cases capable of *replacing* the TC, there was (as the Court of Appeal said) no need for the Minister to be able to *sue* the TC? Not quite. The existence of the s 50 procedure did not have the effect of rendering the TC a mere vassal of the Government.

56 The s 50 procedure was available only in limited circumstances, namely, when the preconditions in limb (a) or (b) were made out. These preconditions were but a narrow subset of the functions and duties of TCs,[91] and concerned a TC's *most basic functions*. The s 50 procedure was not available merely in the event that, for instance, the Minister disagreed with the TC's discretionary decisions; or even that the TC had

88 *Attorney-General v Aljunied-Hougang-Punggol East Town Council* [2016] 1 SLR 915 at [123].

89 Town Councils Act (Cap 329A, 2000 Rev Ed) s 50(1), prior to the Town Councils (Amendment) Act 2017 (Act 17 of 2017).

90 Town Councils Act (Cap 329A, 2000 Rev Ed) s 50(5), prior to the Town Councils (Amendment) Act 2017 (Act 17 of 2017).

91 Town Councils Act (Cap 329A, 2000 Rev Ed) ss 18 and 21.

allegedly failed to "control, manage, maintain and improve the common property".[92]

57 And *even then*, it would likely have been open to a TC which thought that the scope of the Minister's order was too wide to challenge the order by way of judicial review. Had this ever taken place, the courts might even have been inclined to hold that any use of the s 50 procedure to replace the "person" to any extent greater than that necessary for restoring a "state of good and serviceable repair" and a "proper and clean condition" or "remov[ing] the danger" would have been an exercise of statutory powers for improper purposes, and quashed it accordingly.

58 In short, the former s 50 procedure did not detract from TCs' autonomy from the Government. It is not completely accurate to say, *pace* Thio, that the s 50 procedure means that "TCs do not have a free hand in running towns".[93]

(b) Overview of 2017 amendments

59 In 2017, the s 50 procedure was abolished and replaced with two sets of statutory mechanisms.

60 First, a new system was introduced under which the Minister may assign inspectors to:

> (a) carry out "compliance reviews … the purpose of which is to ensure that the Town Councils conduct their business in accordance with [the] Act [and rules made thereunder]",[94] which may lead to "recommendations for administrative or regulatory change";[95] or
>
> (b) conduct an "investigation … into the affairs of a Town Council" if, *inter alia*, "there are reasonable grounds to suspect a material irregularity in or affecting the conduct of the Town

92 Town Councils Act (Cap 329A, 2000 Rev Ed) s 18(1)(*a*).

93 Thio Li-ann, "Neither Fish nor Fowl: Town Councils, Community Development Councils and the Cultivation of Local Government/Governance in Singapore" in *Municipi d'Oriente: Il Governo Locale in Europa Orientale, Asia e Australia* (Hiroko Kudo, Giampaolo Ladu & Lucio Pegoraro eds) (Centre for Constitutional Studies and Democratic Development, 2009) at p 11 <https://www.academia.edu/601385/_Neither_Fish_nor_Fowl_Town_Councils_Community_Development_Councils_and_the_Cultivation_of_Local_Government_Governance_in_Singapore> (accessed 9 May 2019).

94 Town Councils Act (Cap 329A, 2000 Rev Ed) s 43A.

95 Town Councils Act (Cap 329A, 2000 Rev Ed) s 43A(4).

Council's affairs" or if documents required in the course of compliance reviews are not produced.[96]

61 Second, there are two courses of action available to the Minister (which, it must be noted, do not depend on the holding of a compliance review or an investigation):

(a) First, the Minister now has the power to place the TC under "official management" – a process in which the members of the TC are suspended from office altogether.[97]

(b) Second, the Minister now has a power to order a TC to take specific actions to address "deficiencies … in the conduct of a Town Council's affairs" or "irregularit[ies]… in the administration of a Town Council's financial affairs".[98] Such orders are known as "rectification orders".

Each of these will now be considered in turn.

(c) Compliance reviews and investigations

62 All that needs to be said regarding compliance reviews and investigations is that the only coercive powers they create over TCs relate to the *process* of review or investigation, such as the powers to require documents to be produced, questions to be answered, and statements to be made.[99] The existence of such powers of investigation does not detract from TCs' autonomy to make discretionary decisions and act on them because the *outcomes* of the review and/or investigation are not coercive in nature. All they entail is a report being made to the Minister and the TC.[100] At the most, a compliance review report "may contain recommendations for administrative or regulatory change", but nothing in the TCA requires that the TC implement or even consider these recommendations.[101]

(d) Official management

63 The official management procedure is similar in effect to the former s 50 procedure, except that it is even more difficult for the Minister to invoke. *A fortiori*, therefore, it does not detract from TCs' autonomy.[102] To elaborate:

96 Town Councils Act (Cap 329A, 2000 Rev Ed) s 43B.
97 Town Councils Act (Cap 329A, 2000 Rev Ed) s 43G.
98 Town Councils Act (Cap 329A, 2000 Rev Ed) ss 43A–43D.
99 Town Councils Act (Cap 329A, 2000 Rev Ed) ss 43A, 43C, 43E and 43F.
100 Town Councils Act (Cap 329A, 2000 Rev Ed) ss 43A(3) and 43B(3) respectively.
101 Town Councils Act (Cap 329A, 2000 Rev Ed) s 43A(4).
102 See paras 52–55 above.

(a) Limb (b) of the official management procedure requires an additional precondition not found in limb (b) of the s 50 procedure, namely, that the Minister must be satisfied that the Town Council "refuses or is unable to carry out" the duty required to be carried out urgently in order to remove the danger.[103]

(b) There is also an additional precondition *on top of* limbs (a) and (b), which is that "the Minister is of the opinion that it is inappropriate for the Town Council to continue without official management".[104]

(c) There is also a more rigorous process by which the TC may make representations in response to a threatened official management order. Prior to making such an order, the Minister must notify the TC at least a week in advance and give the TC time to make representations in response.[105]

(d) Moreover, judicial review of an official management order is likely to be possible. While there is ostensibly a statutory ouster clause ("Any decision of the Minister under subsection (1) is final"),[106] it would appear not to be effective to oust judicial review because it is worded even less rigorously than other statutes which the courts have held to be ineffective to oust the power of judicial review.[107]

(e) In addition, the courts are likely to conduct such judicial review intensively. The English Court of Appeal has persuasively held that because powers in which the Government may effectively replace a decision-maker (known as "default powers") and "interfere with a high hand over local authorities" are "most coercive", "the courts should be vigilant to see that this power of the central government is not exceeded or misused".[108]

103 Town Councils Act (Cap 329A, 2000 Rev Ed) s 43G(1)(*b*).
104 Town Councils Act (Cap 329A, 2000 Rev Ed) s 43G(1).
105 Town Councils Act (Cap 329A, 2000 Rev Ed) s 43G(2).
106 Town Councils Act (Cap 329A, 2000 Rev Ed) s 43G(4).
107 *Re Application by Yee Yut Ee* [1977–1978] SLR(R) 490 ("an award shall be final and conclusive, and no award or decision or order of a Court or the President or a referee shall be challenged, appealed against, reviewed, quashed, or called in question in any court and shall not be subject to certiorari, prohibition, mandamus or injunction in any court on any account"); *Stansfield Business International Pte Ltd v Minister for Manpower* [1999] 2 SLR(R) 866 ("The decision of the Minister on any representation made under this section shall be final and conclusive and shall not be challenged in any court.")
108 *R v Secretary of State for the Environment, ex parte Norwich City Council* [1982] QB 808 at 824F–824G, *per* Lord Denning MR; see also 824F–825B.

64 This having been said, once the official management procedure has been successfully invoked, the consequences for the TC can be, at first glance, more severe than in the case of the former s 50 procedure. Under the official management procedure, the official manager has "full power to transact *any* business of the Town Council" [emphasis added].[109] Moreover, "all members of the Town Council are suspended from office unless the Minister indicates otherwise".[110]

65 Nonetheless, as with the former s 50 procedure, the official management procedure can only be invoked in the case of very serious breaches of TCs' duties. In Parliament, it was described as being a "last resort".[111] Moreover, official management may only be ordered for a limited purpose: it must come to an end "when the Minister is satisfied that the reasons for the official manager's appointment have ceased to exist".[112]

66 For these reasons, like the former s 50 procedure, the statutory provisions on official management do not render TCs other than autonomous from the Government.

(e) Rectification orders

67 The Minister may issue a rectification order if he is:[113]

> … of the opinion —
>
> (*a*) that deficiencies have been identified in the conduct of a Town Council's affairs and that action must be taken to address them; or
>
> (*b*) an irregularity has occurred, or is occurring, in the administration of a Town Council's financial affairs.

68 The rectification order may order the TC to take *specified* action to "address the deficiencies" or "to correct the irregularity or to guard against the recurrence of irregularities (or both)".[114]

69 At first glance, rectification orders appear potentially draconian. Non-compliance with the rectification order is a criminal offence, punishable by a fine which increases with every day during which the

109 Town Councils Act (Cap 329A, 2000 Rev Ed) s 43H(1).
110 Town Councils Act (Cap 329A, 2000 Rev Ed) s 43G(3).
111 *Singapore Parliamentary Debates, Official Report* (10 March 2017) vol 94 "Town Councils (Amendment) Bill" (Desmond Lee, Senior Minister of State for National Development).
112 Town Councils Act (Cap 329A, 2000 Rev Ed) s 43G(5).
113 Town Councils Act (Cap 329A, 2000 Rev Ed) s 43D(1).
114 Town Councils Act (Cap 329A, 2000 Rev Ed) s 43D(2).

offence continues;[115] the chairman or secretary of the TC may also be convicted of an offence punishable by a fine and/or imprisonment.[116] One might therefore think that the threat of making rectification orders provides the Government with strong *de facto* control over TCs.

70 In truth, however, the scope of rectification orders is significantly limited:

(a) First, while the process leading to the making of a rectification order is less rigorous than that leading to the making of an official management order, it is still in principle possible for a TC to apply for judicial review of a rectification order.[117]

(b) Second, although the legislation does not define "deficiencies" or "irregularity", it is highly likely that these refer merely to a failure by a TC to fulfil its statutory duties. This being so, rectification orders do not hamper TCs' autonomy, for they merely provide a means of compelling TCs to do what they "ought to have done in the first place" and "will not require the Town Council to take any action over and above what is necessary to bring the Town Council into compliance with the Town Councils Act and its subsidiary legislation".[118]

(f) Conclusion

71 While the 2017 amendments to the TCA have intensified the Government's oversight of TCs, they do not detract from TCs' autonomy. Even when these mechanisms are capable of operating coercively, they are merely means of compelling TCs to perform compulsory duties mandated by law.

72 For all the reasons above, TCs are neither *de jure* nor *de facto* extensions of the Government or of any statutory authority. Rather, they are independent legal entities in form as well as in substance. Notwithstanding that the Government may use grant conditions to

115 Town Councils Act (Cap 329A, 2000 Rev Ed) s 43D(4).

116 Town Councils Act (Cap 329A, 2000 Rev Ed) s 48A.

117 Benjamin Joshua Ong, "Enforcing Town Councils' Duties of Financial Prudence: Problems Addressed by the Town Councils (Amendment) Act 2017" (2018) 30 SAcLJ 923 at 947, para 60.

118 *Singapore Parliamentary Debates, Official Report* (10 March 2017) vol 94 "Town Councils (Amendment) Bill" (Desmond Lee, Senior Minister of State for National Development). For further commentary on rectification orders, see Benjamin Joshua Ong, "Enforcing Town Councils' Duties of Financial Prudence: Problems Addressed by the Town Councils (Amendment) Act 2017" (2018) 30 SAcLJ 923 at 946–947, paras 56–60.

influence TCs in their use of funds, such influence does not, either as a matter of law or of historical practice, extend to rendering TCs mere emanations of the Government. It is therefore not conceptually incoherent to say that TCs are capable of entering into private-law relationships with the Government. In other words, there is no conflict between the Proposal and the policy underlying the TCA.

B. *The* Bridges *rule*

73 Next, one must consider the *Bridges* rule, namely: "where an Act creates an obligation, and enforces the performance in a specified manner … that performance cannot be enforced in any other manner".[119] Does the TCA create an obligation to comply with grant conditions, and specify a manner by which this obligation may be enforced?

74 The *Bridges* rule has its roots in the law on the tort of breach of statutory duty.[120] The law will not impose tort liability for breach of statutory duty if to do so would go against legislative intention.[121] Hence, for instance, if a statute criminalises a breach of a certain duty, a party may not seek to enforce that same duty by way of an action in tort for damages.[122] So, too, if the person to whom the duty is owed has a statutory right of action[123] or has a "remedy by way of judicial review".[124]

75 Of course, the analogy with breach of statutory duty is not a perfect one. The TCA does not create a statutory duty to comply with grant conditions; and the Proposal is a means to *create* a duty on the part of a TC rather than a means to *enforce* a duty which already exists under a statute. Nonetheless, the point remains: if the TCA discloses legislative intention not only as to what duties exist, but also to what remedies are available for them, then the Proposal risks stultifying the policy of the TCA.

119 *Doe dem Murray, Lord Bishop of Rochester v Bridges* (1854) 1 B & Ad 847 at 859; (1854) 109 ER 1001 at 1006. See also the cases cited at n 62 above.

120 The author is grateful to an anonymous reviewer for this analogy.

121 *Clerk & Lindsell on Torts* (Michael A Jones gen ed) (Sweet & Maxwell, 22nd Ed, 2018) at para 9-13.

122 *Management Corporation Strata Title Plan No 586 v Menezes Ignatius Augustine* [1992] 1 SLR(R) 201 at [19].

123 *Management Corporation Strata Title Plan No 586 v Menezes Ignatius Augustine* [1992] 1 SLR(R) 201 at [19] read with [11].

124 *Calveley v Chief Constable of the Merseyside Police* [1989] AC 1228 at 1237.

76 On the other hand, one must not forget the converse of the *Bridges* rule, namely, that:[125]

> … [i]f an obligation is created [by the statute], but no mode of enforcing its performance is ordained, the common law may, in general, find a mode suited to the particular nature of the case.

This must be so because, otherwise, "the statute would be but a pious aspiration".[126]

77 It will now be argued that the Proposal that grant conditions take the form of private-law relationships between the Government and TCs does not contravene the *Bridges* rule. Therefore, if not for the Proposal, grant conditions would, too, be "but a pious aspiration".

(1) The Bridges *rule does not apply to grant conditions*

78 First, and most simply, the *Bridges* rule does not even apply to grant conditions. The *Bridges* rule only applies "where an Act creates an obligation".[127] The TCA does not create grant conditions. Neither can it be said that the TCA creates a general statutory duty to comply with grant conditions. Nothing in the TCA requires that grant conditions take the form of obligations which are *imperative* for the TC to perform: for example, an obligation "to do X". Consider the following possible forms of grant condition:

> (a) Case A: The TC must do X. (This implies that, if the TC breaches its obligation to do X, then it must return the grant money.)
>
> (b) Case B: The TC must *either* do X *or* return the grant money.
>
> (c) Case C: The TC must do X, *or else* the uses of the grant money may be restricted as follows …

In case A, the TC has an *obligation* to do X. But in case B, and more obviously in case C, there is no *obligation* to do X; not doing X is simply an alternative choice available to the TC. In case B, for example, the TC will have to repay the money, but such repayment is not redress for the failure to do X. To borrow language from contract law:

125 *Doe dem Murray, Lord Bishop of Rochester v Bridges* (1854) 1 B & Ad 847 at 859; (1854) 109 ER 1001 at 1006.

126 *Cutler v Wandsworth Stadium Ltd* [1949] AC 398 at 407. See also *X v Bedfordshire CC* [1995] 2 AC 633 at 731.

127 *Doe dem Murray, Lord Bishop of Rochester v Bridges* (1854) 1 B & Ad 847 at 859; (1854) 109 ER 1001 at 1006.

(a) In case A, doing X is a primary obligation, the breach of which gives rise to the secondary obligation to make repayment.

(b) In case B, doing X and making repayment are alternative primary obligations, such that the failure to do X cannot be described as the *breach* of an obligation and making repayment cannot be described as a *remedy for breach*.

(c) In case C, similarly, doing X and complying with the additional restrictions are alternative primary obligations.[128]

79 Finally, even if grant conditions do take the form of A, the TCA is simply completely silent on *how* compliance with such conditions is to be secured.

80 The author will now examine three statutory mechanisms which might appear to facilitate the enforcement of grant conditions, and explain why they do not in fact do so.

(2) Section 21(2) of TCA cannot be used to enforce grant conditions

81 Section 21(2) of the TCA cannot be used to enforce grant conditions, and therefore cannot be a remedy for the breach thereof. Section 21(2) provides that:

> Where a requirement or duty is imposed on a Town Council by this section, the [Housing and Development] Board or any person for whose benefit, or for the benefit of whose flat that requirement or duty is imposed on the Town Council, may apply to the High Court for an order compelling the Town Council to carry out the requirement or perform the duty, as the case may be.

The duty to comply with grant conditions is not imposed on TCs "by this section". One might argue that the duty is that set out in s 21(1)(*f*) of the TCA, which provides that TCs have the duty to "comply with the provisions of [the TCA] and the rules made thereunder". But the fact remains that grant conditions are provisions of neither the TCA nor rules (that is, subsidiary legislation) made under the TCA.

(3) Former s 50 procedure and present official management procedure cannot be used to enforce grant conditions

82 Both the former s 50 procedure and the present official management procedure, *once triggered*, allow the exercise of broad powers by, respectively, the "person" appointed by the Minister and the official manager. The former could "perform such powers, duties and

128 See *iTronic Holdings Pte Ltd v Tan Swee Leon* [2016] 3 SLR 663 at [162]–[167].

functions of the Town Council" as ordered by the Minister;[129] the latter has "full power to transact any business of the Town Council".[130] Conceivably, if grant conditions are not complied with, the "person" could, or the official manager can, see to it that they are complied with.

83 However, neither procedure amounts to a means of compelling compliance with grant conditions, for the simple reason that neither is triggered merely by non-compliance with grant conditions. Instead, they can be triggered only by certain types of breach of statutory duty, namely those relating to the physical condition of common property (*viz* duties to maintain the common property in "good and serviceable repair", a "proper and clean condition" and without "danger to the health or safety of residents").

84 It has been argued that it may even be the case that neither the former s 50 procedure nor the official management procedure could be invoked to enforce obligations other than *statutory duties relating to the physical condition of the common property*.[131] In such a case, any use of the official management procedure for the purpose of enforcing grant conditions would simply be *ultra vires*.

(4) Rectification orders cannot be used to enforce grant conditions

85 As we have seen, rectification orders may be used in order to address "deficiencies … in the conduct of a Town Council's affairs" or an "irregularity … in the administration of a Town Council's financial affairs".[132] However, non-compliance with terms of grant conditions does not necessarily amount to a "deficienc[y]" and/or "irregularity". Consider, again, the three examples of possible forms of grant condition discussed above.[133] In case A, it is arguable that the failure to do X is a "deficienc[y]" and/or an "irregularity". But in cases B and C, there is nothing deficient or irregular about an omission to do X; doing X is simply one of several alternative choices available to the TC.

(5) Grant conditions cannot be enforced through administrative law

86 Finally, one might think that grant conditions might be enforced through an application for judicial review by the Government against a TC. There are, however, three problems with this. First, an application for judicial review *by* the Government, as opposed to by a

129 Town Councils Act (Cap 329A, 2000 Rev Ed) s 50(1), prior to the Town Councils (Amendment) Act 2017 (Act 17 of 2017).
130 Town Councils Act (Cap 329A, 2000 Rev Ed) s 43H(1).
131 See para 57 above.
132 Town Councils Act (Cap 329A, 2000 Rev Ed) s 43D(1).
133 See para 78 above.

private person against an executive body, is unheard of. Second, it is likely that the actions and decisions of a TC are not amenable to judicial review. This is because a TC's choices as to how to spend its money are essentially an exercise of "management powers", whereas judicial review cannot involve the court in a "management exercise".[134] Third, it is by no means clear that a mere failure to comply with grant conditions, without more, would mean that one of the recognised grounds of judicial review is made out.[135]

(6) Conclusion on Bridges *rule*

87 In short, the *Bridges* rule would only threaten the Proposal *if* there existed alternative means of enforcement of grant conditions which are expressly provided for in statute. The author has just argued that there is none, particularly because the TCA does not itself give rise to duties to comply with grant conditions. (This last point also explains why it cannot be said that the Government's remedy for a TC's breach of grant conditions ought to be to sue the TC in the tort of breach of statutory duty.)

V. Possible types of private-law relationship between TCs and the Government

88 Having defended the Proposal in principle, the author will now explore what kind of private-law relationships could conceivably exist between the Government and TCs, and potential challenges that may arise. In the course of doing so, where appropriate, the author will examine the reasoning of the *High Court* in *AHPETC*, which held that such private-law relationships were capable of existing as a matter of law, but that no contract or trust arose on the facts. The aim is not to comprehensively set out sample terms of contracts, trusts or bailments. Rather, it is simply to show that private-law relationships between the Government and TCs are capable of existing harmoniously with the relevant rules of private law.

A. Contracts

89 A grant-in-aid could take the form of a contract between the Government and the TC. The author has given an example of such a

134 *R v Inland Revenue Commissioners, ex parte National Federation of Self-employed and Small Businesses Ltd* [1981] AC 617 at 635G–635H.

135 These grounds are "illegality, irrationality [and] procedural impropriety", and possibly breach of substantive legitimate expectations (or some variant thereof): *SGB Starkstrom Pte Ltd v Commissioner for Labour* [2016] 3 SLR 598 at [57], [59] and [63].

contract above,[136] which illustrates the potential degree of nuance that such a contract may contain.

90 It may appear from certain *dicta* of the High Court in *AHPETC* that there can be no possibility of such a contract ever existing. However, on closer examination, the High Court said no such thing. What the High Court held was that the MND was wrong to claim that it had "a legal interest in disbursed grants-in-aid *pursuant to* a contractual mandate" [emphasis added].[137] The High Court was right to reject such a submission: either the contract passes title to the money to the TC, in which case the Government has no legal interest;[138] or the contract does not pass title, in which case the Government's legal interest in the money exists not "pursuant to" the contract, but rather simply because the Government always had such an interest as owner.

91 The real problem in *AHPETC* was that there could be no contract because there was insufficient certainty of terms.[139] But this problem can easily be avoided in future contracts. In particular, the Government may wish to demand some "clear and express provisions making [the contracts] amenable to legal action", lest it be argued that the political nature of the subject matter is a "background of opinion

136 See para 11(b) above.

137 *Attorney-General v Aljunied-Hougang-Punggol East Town Council* [2015] 4 SLR 474 at [137].

138 The Ministry of National Development attempted to argue that, on the contrary, *Conservative and Unionist Central Office v Burrell* [1982] 1 WLR 522 ("*Burrell*") is authority for the proposition that there is such a thing as a "contractual mandate" which involves the mandatary retaining a legal interest in the moneys. This is, with respect, incorrect. As the High Court of England and Wales pointed out in that case, *Burrell* involved what is in substance a trust, not a contract (*Conservative and Unionist Central Office v Burrell* [1980] 3 All ER 42 at 63c and 63e–63f):

> … an obligation binding on the recipient to use the moneys subscribed for that purpose, to keep them separate from his own moneys and to return them if this purpose is frustrated or if the funds subscribed are more than is needed to accomplish it,

in response to a breach of which

> … the court [may] restrain the recipient of such a fund from applying it (or any accretions to it such as income of investments made with it) otherwise tha[n] in pursuance of the stated purpose.

On appeal, the Court of Appeal of England and Wales also never described the "mandate" as being somehow contractual in nature. On the contrary, the Court of Appeal held that the remedy for misappropriation of funds was that the mandatee "like any other agent could be required to replace any money misapplied": *Conservative and Unionist Central Office v Burrell* [1982] 1 WLR 522 at 529, *per* Brightman LJ. This is reminiscent of a trust, not a contract.

139 *Attorney-General v Aljunied-Hougang-Punggol East Town Council* [2015] 4 SLR 474 at [138].

adverse to enforceability" which negatives intention to create a contract.[140]

B. Trusts

(1) The possibility of trust relationships

92 It ought, in principle, to be possible for the Government and a TC to enter into an arrangement such that the TC holds grant moneys on an express *Quistclose* trust[141] for the Government.

93 The main reason why the High Court in *AHPETC* held that no such trust existed was that there was insufficient certainty of intention to create a trust,[142] as evidenced by certain features which were said to be inconsistent with a trust device. Some of these apply to *Quistclose* trusts in particular; others apply to trusts generally. The author will now examine and address each of these points in turn.

(2) Segregation of grant moneys

94 In *AHPETC*, no trust could exist because the grant moneys had not been segregated from other moneys belonging to the TC.[143] This is not fatal to the existence of a trust in a future case in which grant moneys are held in a separate bank account from the TC's other funds.[144]

(3) Lack of restrictions on what grant moneys may be used for

95 The High Court said that:[145]

> … [TCs'] freedom to allocate [the] sum [of grants-in-aid] on the very many kinds of projects with the purposes set-out in the TCA, which

140 *Ford Motor Co Ltd v Amalgamated Union of Engineering and Foundry Workers* [1969] 1 WLR 339 at 356.

141 On the requirements for this, see n 23 above.

142 *Attorney-General v Aljunied-Hougang-Punggol East Town Council* [2015] 4 SLR 474 at [116]–[121].

143 *Attorney-General v Aljunied-Hougang-Punggol East Town Council* [2015] 4 SLR 474 at [119] and [134]–[136].

144 This was what the Ministry of National Development ("MND") had proposed for the future: in *Attorney-General v Aljunied-Hougang-Punggol East Town Council* [2015] 4 SLR 474 at [3], the MND prayed that Aljunied-Hougang-Punggol East Town Council be ordered to set up "Special Accounts", which would be "segregated bank accounts … into which Grants payable for financial years 2014/15 and 2015/16 [would] be paid by MND to [AHPETC]", and which would be specifically subject to monitoring by independent accountants.

145 *Attorney-General v Aljunied-Hougang-Punggol East Town Council* [2015] 4 SLR 474 at [115].

> can include a project that could be very expensive with not much utility and on which not all their constituents would agree upon, shows that no resulting *Quistclose* trust can arise,

particularly since, on the facts, the MND had not imposed any conditions on the grants.[146]

96 By contrast, said the High Court, in order for a *Quistclose* trust to exist, there must be some more specific purpose for which the money is required to be used. On the facts, the alleged purpose of "increas[ing] the quantity of funds available to AHPETC" was far too broad and uncertain to found a *Quistclose* trust.[147] It was akin to the classic example in *Twinsectra Ltd v Yardley*[148] of a situation in which a *Quistclose* trust does *not* arise, namely, where the recipient of the funds can use the funds for *anything at all*.[149] However, this does not preclude a *Quistclose* trust from existing, provided only that the TC's power to apply the grants-in-aid is expressed in a manner "sufficiently certain to be valid if the court can say that a given application of the money does or does not fall within its terms".[150]

(4) Who the beneficiary ought to be

97 The High Court also held that there could be no trust because there could be no beneficiary:

(a) The trust beneficiary could not be the MND, because:[151]

> … [i]t would be strange, to say the least, for the MND to be said to be the beneficial owner if the proper administration and expenditure of the aforementioned funds would directly benefit residents or the HDB.

(b) The trust beneficiary could not be the "residents or the HDB", because:[152]

> … [i]f all the residents of a Town Council were to be the beneficial owners of grants-in-aid, they could theoretically

146 *Attorney-General v Aljunied-Hougang-Punggol East Town Council* [2015] 4 SLR 474 at [116].
147 *Attorney-General v Aljunied-Hougang-Punggol East Town Council* [2015] 4 SLR 474 at [126].
148 [2002] 2 AC 164.
149 For example, where pre-payments for goods are simply said to be usable by a vendor "as part of his cashflow": *Twinsectra Ltd v Yardley* [2002] 2 AC 164 at [73], *per* Lord Millett.
150 *Twinsectra Ltd v Yardley* [2002] 2 AC 164 at [16], *per* Lord Hoffmann.
151 *Attorney-General v Aljunied-Hougang-Punggol East Town Council* [2015] 4 SLR 474 at [128].
152 *Attorney-General v Aljunied-Hougang-Punggol East Town Council* [2015] 4 SLR 474 at [130].

> come together and call for the disbursement of the moneys in contravention of the listed purposes in s 33(6) of the TCA.

98 Point (b) does not concern us, as our aim is to demonstrate that *the Government* can be the beneficiary of a trust. For completeness, however, let it suffice to point out that the courts in cases such as *In re Denley's Trust Deed*[153] and *In re the Trusts of the Abbott Fund*[154] have not been dissuaded from holding that a trust existed, notwithstanding that the various beneficiaries in those cases would not[155] or could not[156] exercise a *Saunders v Vautier*[157] power.

99 As for point (a), the flaw in the reasoning is that it conflates being the *beneficial owner* of a trust fund with gaining the *practical benefit* of the use of that money. The former is a legal concept; the latter is a matter of fact. The former, not the latter, is the defining characteristic of a trust.

100 To see why this is so, consider the (unrelated) case of a sub-trust: *A* holds *X* on trust for *B*, and *B* holds the equitable interest in *X* on trust for *C*. A *is a trustee and* B *is a beneficiary*, notwithstanding that, because of the sub-trust in favour of *C*, *B* gains *no factual benefit* (and, in fact, is prohibited from gaining a benefit) from the equitable interest in *X*.

101 Similarly, contrary to the High Court's statement,[158] it is possible that a TC is a trustee of grant moneys for the Government even though the Government does not itself derive any factual benefit from the use of the grant moneys (as the factual benefit is enjoyed only by residents and flat-owners). In *Barclays Bank Ltd v Quistclose Investments Ltd* [159] itself, a company borrowed money from another company on condition that that the money be used for the purpose of paying a dividend to shareholders; the borrower held the money on a *Quistclose* trust to be used for the purpose of paying this dividend – a purpose from which the lender gained no factual benefit. Similarly, in the context of TCs, the defining feature is that the TC has a "power or duty … to use the money for the specified purpose".[160] It is not a requirement for a *Quistclose* trust

153 [1969] 1 Ch 373.
154 [1900] 2 Ch 326.
155 *In re Denley's Trust Deed* [1969] 1 Ch 373 at 387F.
156 *In re the Trusts of the Abbott Fund* [1900] 2 Ch 326 at 330–331.
157 (1841) 41 ER 482.
158 *Attorney-General v Aljunied-Hougang-Punggol East Town Council* [2015] 4 SLR 474 at [128].
159 [1970] AC 567.
160 *Attorney-General v Aljunied-Hougang-Punggol East Town Council* [2015] 4 SLR 474 at [114(a)].

in favour of the Government to arise that the "purpose" must be one that factually benefits the Government – a trust can exist even if the "purpose" is to factually benefit residents and flat-owners.

102 Therefore, the beneficiary principle does not prevent a TC from holding grant moneys on trust for the Government. Even if the grant moneys are ultimately held for the purpose of bringing a *factual* benefit to residents, this is no bar to the Government being the *legal* beneficiary of a trust.

(5) Consequences in insolvency

103 Finally, the High Court suggested that the existence of a trust would lead to undesirable consequences if a TC were to become insolvent:[161]

> [I]f either the MND or Town Council residents were to be the beneficial owners of grants-in-aid, the grants-in-aid would not be payable to the general creditors of a Town Council in the event of insolvency, but to the beneficial owners. It is highly doubtful if this was an intended outcome of the statutory scheme … Even outside of an actual insolvency, the fact that general creditors would be subordinated to either the MND or Town Council residents would adversely impact the creditworthiness of Town Councils: this would also lead to the anomalous situation where S&CC funds would be payable to the general creditors, while grants-in-aid are not and will be refunded to the Government. If anything one would expect the situation to be reversed, and for residents' money to be refunded to them in the event of insolvency.

104 With respect, however, it is unclear why, as a matter of principle, any of these points should matter. This is for the following reasons:

> (a) First, the fact that the "general creditors" would be subordinated to the "beneficial owners" in the event of insolvency is neither here nor there. It is up to the "general creditors" to negotiate, at the time of the creation of debts owing from the TC to them, the terms of the debts, including whether security is required from the TC. At most, the High Court's point is an argument that general creditors must not be *taken by surprise* by the existence of trusts. This worry can easily be addressed by publicising grants-in-aid.
>
> (b) Second, it cannot be *definitively* stated that TCs' creditworthiness would be impacted by the "general creditors" being subordinated to the Government. Surely that must

161 *Attorney-General v Aljunied-Hougang-Punggol East Town Council* [2015] 4 SLR 474 at [132].

depend on the size of the debts owed to those "general creditors" compared to the amount of grants-in-aid.

(c) Third, there is nothing "anomalous" about the idea that, if a TC becomes insolvent, residents would not get their money back. On the contrary, this would be wholly in line with the objective of the statutory scheme that "people … have to live with the consequences of their choice" of Town Councillors.[162]

(6) Conclusion

105 In short, there are no obstacles to grants-in-aid taking the form of trusts in favour of the Government. While the High Court discussed several objections at length, these objections turn out either to be misplaced, or to be directed only at the finding that there was a trust on the specific facts in *AHPETC* and not at the proposition that such a trust can exist in principle.

C. Bailments

106 Alternatively, a grant may take the form of a bailment, namely that which is "called *mandatum* … It is what we call in English an acting by commission".[163] If the TC breaches the terms of such a bailment, the Government can straightforwardly recover possession of the grant money.

107 The classic case of *mandatum* is as described in the leading case of *Coggs v Barnard*[164] ("*Coggs*"): "when there is a delivery of goods or chattels to somebody, who is to carry them, or do something about them *gratis*, without any reward for such his work or carriage",[165] if "by [the carrier's] ill management the goods are spoiled", the consignor has an action against him. This is because the defendant carrier has expressly given an "undertaking to be careful", and the plaintiff has only consigned the goods to him because of this promise. The defendant's failure to comply with this undertaking is therefore tantamount to a "fraud upon the plaintiff".[166] Moreover, it does not matter that the defendant is providing the delivery service for no charge: "[T]he owner's trusting him with the goods is a sufficient consideration to oblige him to a careful management."[167]

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162 *Attorney-General v Aljunied-Hougang-Punggol East Town Council* [2015] 4 SLR 474 at [46].
163 *Coggs v Bernard* (1703) 92 ER 107 at 113.
164 (1703) 92 ER 107.
165 *Coggs v Bernard* (1703) 92 ER 107 at 109.
166 *Coggs v Bernard* (1703) 92 ER 107 at 113.
167 *Coggs v Bernard* (1703) 92 ER 107 at 113.

108 This logic has since been extended to cover cases where the property bailed is not goods, but rather "money to be applied for a certain purpose".[168] An example is *Whitehead v Greetham*[169] ("*Whitehead*"), in which the plaintiff had given money to the defendant to use to purchase an annuity which would yield "well and sufficiently secured" returns; the defendant, in breach of an express promise to "use due and sufficient care", used the money to buy an annuity from someone who turned out to be insolvent. The court pithily held that the plaintiff thereby had a cause of action simply by analogy to *Coggs*.[170]

109 One can immediately see the analogy with the situation of a TC which has been entrusted with grant money by the Government for a specific purpose, provided that the grant money is segregated from the TC's other moneys.[171] Had the TC not undertaken to use the moneys for that purpose, the Government would not have handed the money over. In such a situation, the Government would retain property in the money; the TC would only have a right of possession limited according to the terms of the bailment, and such limited powers as are necessary to fulfil the purpose.[172] Therefore, in the event of a breach of the terms of the bailment, the Government would be entitled to recover the money.[173]

110 One might seek to distinguish the case of TCs from more traditional cases of bailments as follows. In the traditional cases, the plaintiff has some stake in the defendant's performance: in *Whitehead*, the plaintiff's interest was his intention to use the annuity as a source of income; in *Coggs*, the plaintiff may well have retained a proprietary interest in the goods as owner, or at least had the hope of selling the goods for profit. On the other hand, it is not clear that the Government

168 Norman Palmer, *Palmer on Bailment* (London: Thomson Reuters, 3rd Ed, 2009) at para 11-001.

169 *Whitehead v Greetham* (1825) 130 ER 385; cited in Norman Palmer, *Palmer on Bailment* (London: Thomson Reuters, 3rd Ed, 2009) at para 11-001, fn 4.

170 *Whitehead v Greetham* (1825) 130 ER 385 at 387.

171 Norman Palmer, *Palmer on Bailment* (London: Thomson Reuters, 3rd Ed, 2009) at para 3-080.

172 Norman Palmer, *Palmer on Bailment* (London: Thomson Reuters, 3rd Ed, 2009) at para 4-012.

173 Norman Palmer, *Palmer on Bailment* (London: Thomson Reuters, 3rd Ed, 2009) at para 4-017, citing *Plasycoed Collieries Co Ltd v Partridge, Jones & Co Ltd* [1912] 2 KB 345 at 351:

> [W]here chattels have been placed in the hands of a bailee for a limited purpose, and he deals with them in a manner wholly inconsistent with the terms of the bailment, and consistent only with his intention to treat them as his own, the right to possession revests in the owner, who can sue the bailee in trover.

can properly be said to derive a benefit from the TC's performance of its duties.

111 But this is a red herring. The true *ratio* of *Coggs* and *Whitehead* is not that the plaintiff stood to benefit from the defendant's performance, but rather simply that the defendant had promised to perform:

> (a) *Whitehead* tells us that the "consideration" on which the plaintiff could sue was simply "[t]hat the Defendant promised to lay [the money] out [to buy the annuity] securely, and that the Plaintiff delivered him the money for that purpose".[174]
>
> (b) *Coggs* is even clearer that the crux of *mandatum* is the plaintiff's reliance on his having "intrust[ed] the bailee upon his undertaking to be careful",[175] and not that the plaintiff stood to benefit from what the bailee would do. This is evident from the court's holding that a "bailment of goods, delivered by one man to another to keep *for the use of the bailor*"[176] [emphasis added] is a *separate* type of bailment from *mandatum*.

112 Finally, for completeness, none of this is changed by the doctrine of consideration, which bars the enforcement of gratuitous promises as a matter of contract law. This is because liability in bailment, including gratuitous bailments, is *sui generis* rather than contractual (or tortious).[177]

VI. Conclusion

113 One might attempt to justify the Court of Appeal's rejection in *AHPETC* of the use of private-law devices to enforce TCs' statutory duties relating to financial prudence, on the ground that that would have stultified the statutory provisions specifically aimed at enforcing those duties (such as s 21 of the TCA). However, putting aside the problem that those statutory provisions were themselves conceptually and problematically problematic,[178] this is no reason to reject entirely

174 *Whitehead v Greetham* (1825) 130 ER 385 at 387.

175 *Coggs v Bernard* (1703) 92 ER 107 at 113.

176 *Coggs v Bernard* (1703) 92 ER 107 at 109.

177 *Yearworth v North Bristol NHS Trust* [2010] QB 1 at [48(h)]. In particular, *Whitehead v Greetham* (1825) 130 ER 385 itself was cited with judicial approval as recently as the 1950s, both in passing in England and Wales (*Woods v Martins Bank Ltd* [1958] 1 WLR 1018 at 1032), and applied by the Federation of Malaya (*Ali Ahmad v Chop Bee Hin* [1950] MLJ 55).

178 Benjamin Joshua Ong, "Enforcing Town Councils' Duties of Financial Prudence: Problems Addressed by the Town Councils (Amendment) Act 2017" (2018) 30 SAcLJ 923 at 935–940, paras 30–42.

the notion that TCs are capable of entering into private-law relationships with the Government. Neither does anything in the nature of TCs or in the TCA reject such a notion.

114 On the contrary, recognising the possibility of such private-law relationships would *promote* the aims of the TC scheme by allowing for a more structured negotiation, with more nuanced results, of government funding to TCs and TCs' use thereof, backed by mechanisms to enforce the agreed-on terms of funding. The combination of the process of negotiation of grant conditions with the enforceability of the grant conditions eventually agreed upon would recognise both TCs' autonomy from the Government as well as the need to hold TCs accountable for their use of government grants, filling a significant *lacuna* in the law.

VI. Appendix: TCs' reliance on government grants

115 The following table contains data gathered from TCs' financial statements for the financial years 2013/2014 and 2014/2015.[179] These financial years have been chosen in order to exclude the effect of transfers between TCs arising from changes in TCs' boundaries following the general election held in September 2015. The table illustrates the importance of government grants to TCs by showing that, if not for government grants, most TCs would have operated at a deficit during these financial years.

Town Council	Operating surplus (deficit) for the financial year		Amount of government grants received (less amounts transferred to sinking funds, *etc*), as reported in the TC's Income and Expenditure Statement		What the operating surplus (deficit) for the financial year would have been without any government grants	
	FY 14/15	FY 13/14	FY 14/15	FY 13/14	FY 14/15	FY 13/14
Aljunied-Hougang-Punggol East TC[180]	$(3,238,496)	$(2,008,212)	$1,218,566	$5,595,366	$(4,457,062)	$(7,603,578)
Ang Mo Kio TC	$7,079,723	$2,115,964	$8,707,970	$8,269,388	$(1,628,247)	$(6,153,424)
Bishan-Toa Payoh TC	$5,335,103	$3,722,071	$4,973,913	$4,999,474	$361,190	$(1,277,403)
Chua Chu Kang TC	$484,654	$3,092,923	$4,501,016	$4,359,665	$(4,016,362)	$(1,266,742)
East Coast TC	$2,877,251	$1,877,850	$3,285,112	$3,248,743	$(407,861)	$(1,370,893)
Holland-Bukit Panjang TC	$4,264,000	$770,132	$3,069,465	$2,844,942	$1,194,535	$(2,074,810)
Jurong TC	$2,884,897	$1,233,362	$5,026,747	$4,750,860	$(2,141,850)	$(3,517,498)
Marine Parade TC	$2,841,986	$1,083,127	$6,178,945	$6,113,390	$(3,336,959)	$(5,030,263)
Nee Soon TC	$4,405,484	$1,983,149	$5,381,438	$4,935,399	$(975,954)	$(2,952,250)
Pasir Ris-Punggol TC	$4,682,370	$1,625,713	$5,092,320	$4,642,992	$(409,950)	$(3,017,279)

179 These may be found on Town Councils' websites, and/or by performing an "exact phrase" search for "town council" through the "Papers Presented to Parliament Series" page on the website of the National Archives of Singapore: http://www.nas.gov.sg/archivesonline/government_records/highlights (accessed 9 May 2019).

180 It should be noted that AHPETC's auditors disclaimed their opinion on the financial statements for the financial years 2013/2014 and 2014/2015.

Sembawang TC	$3,747,000	$(281,000)	$4,367,000	$4,055,000	$(620,000)	$(4,336,000)
Tampines TC	$80,645	$1,759,707	$4,470,449	$4,240,197	$(4,389,804)	$(2,480,490)
Tanjong Pagar TC	$3,995,094	$3,335,722	$9,663,635	$9,669,955	$(5,668,541)	$(6,334,233)
West Coast TC	$2,858,576	$85,771	$5,798,923	$5,645,920	$(2,940,347)	$(5,560,149)