

## 20. LAND LAW

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### I. Interests in land

20.1 The High Court decision in *Carpe Diem Holdings Pte Ltd v Carpe Diem Playskool Pte Ltd*<sup>1</sup> was considered in an earlier review.<sup>2</sup>

### II. Co-ownership

#### A. Determination of relative shares of co-owners

20.2 The High Court decision in *Tan Chor Hong v Ng Cheng Hock*<sup>3</sup> is instructive in determining, *inter alia*, the relative shares of co-owners in a property. The plaintiff and defendant were registered as tenants-in-common of a five-room flat bought from the Housing and Development Board (“HDB”) under the Joint Singles Scheme. They were not related in any way but became acquainted through a mutual friend. The plaintiff had a 95% share in the flat and the defendant a 5% share.

20.3 Disputes subsequently arose between the parties over the flat. The plaintiff applied to court for the flat to be sold in the open market and for the sale proceeds to be divided between her and the defendant in the ratio of 95:5. The plaintiff also sought to be given sole conduct of the sale. In addition, she sought an order that she be allowed to buy over the defendant’s share directly at valuation price in lieu of putting the flat up for sale.

20.4 The defendant did not object to the court ordering a sale of the flat. However, the defendant had argued, *inter alia*, that as the \$190,100 HDB loan was taken out in their joint names, he should be regarded as having contributed half of the HDB loan towards the purchase of the flat. Since his contribution was substantially larger than the 5% share registered in his name, the parties should be presumed to hold their shares in equity in proportion to their respective contributions.

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1 [2019] 3 SLR 233.

2 (2018) 19 SAL Ann Rev 645 at 646–647.

3 [2019] SGHC 257.

20.5 The High Court did not agree with the defendant's contention. The court referred to the Court of Appeal decision in *Lau Siew Kim v Yeo Chye Terence*<sup>4</sup> where it was held that equity intervenes in a legal joint tenancy in order to "effect justice between the parties" or "ensure fairness between the parties" because the legal presumption of joint tenancy gives rise to the risk that the parties may "hold land as legal joint tenants without fully appreciating or voluntarily intending the consequences of such manner of holding" or "may have been presumed to be joint tenants at law without any informed or voluntary intention on their part to hold the land they co-own in such a manner".<sup>5</sup> However, where co-owners have expressly specified their intention on their manner of holding, "there would be no cause for equity not to follow the law".<sup>6</sup>

20.6 In the instant case, since the parties had expressly agreed to hold as tenants in common and expressly agreed on their relative shares, there was no room for equity to intervene with an equitable presumption that parties held as beneficial tenants in common in proportion to their contributions to the acquisition of the property. The defendant was, therefore, bound by the contractual documents he signed and therefore acquired only a 5% share in the flat.

20.7 The defendant had also argued that, applying the principle in the Court of Appeal decision of *Su Emmanuel v Emmanuel Priya Ethel Anne*<sup>7</sup> ("*Su Emmanuel*"), the court ought to disregard the fact that the loan repayments were all made by the plaintiff, as those payments were not referable to any agreement made at the time of acquisition of the flat concerning how the loan was to be serviced. The High Court correctly held that the principle set out in *Su Emmanuel* was in essence a method for ascertaining the parties' respective contributions in the event that the court had decided that parties in a legal joint tenancy were presumed to hold as beneficial tenants in common. This principle had no application in the present case given that the parties held as tenants in common in the shares specified in the contractual documents, as opposed to in shares in proportion to their respective contributions.<sup>8</sup> In any event, a proper application of the principle in *Su Emmanuel* would have led the court to attribute all the loan repayments to the plaintiff instead of apportioning the loan repayments equally between the parties. This was because the High Court had found that it was the parties' understanding, at the time

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4 [2008] 2 SLR(R) 108.

5 *Lau Siew Kim v Yeo Chye Terence* [2008] 2 SLR(R) 108 at [90] and [92].

6 *Lau Siew Kim v Yeo Chye Terence* [2008] 2 SLR(R) 108 at [93].

7 [2016] 3 SLR 1223.

8 *Tan Chor Hong v Ng Cheng Hock* [2019] SGHC 257 at [35].

the flat was purchased, that the plaintiff would be solely responsible for repayment of the HDB mortgage loan.<sup>9</sup>

20.8 It was clear that the relationship between parties in the instant case had deteriorated to such an extent that it would be necessary and expedient for a sale to be ordered in lieu of partition. Accordingly, the court held that it was a suitable case for making an order of sale of the flat in *lieu* of partition pursuant to para 2 of the First Schedule to the Supreme Court of Judicature Act.<sup>10</sup> Given the state of the parties' relationship, the court was also of the view that it was unrealistic to expect the parties to cooperate in the sale. Further, having regard to the fact that the plaintiff would be entitled to 95% of the sale proceeds while the defendant would only be entitled to 5%, the court considered it fair and equitable for the plaintiff to have sole conduct of the sale.

20.9 However, the court declined to make an order giving the plaintiff the right to purchase the defendant's share. Having regard to the wording in para 2 of the First Schedule to the Supreme Court of Judicature Act, it empowered the court to "order the land or any part of it to be sold". It did not empower the court to allow one co-owner to compulsorily purchase the other co-owner's share. Notwithstanding this ruling, the parties were free to negotiate with each other to buy over the other's share at a mutually agreed price.<sup>11</sup>

## **B. Severance of joint tenancy**

20.10 The law laid down by the Court of Appeal in *Sivakolunthu Kumarasamy v Shanmugam Nagaiah*,<sup>12</sup> that the grant of a court order which has been made absolute effects severance of a joint tenancy, was applied in *Tao Li v Toh Ah Poh*.<sup>13</sup> In the instant case, Tan and the defendant, who were husband and wife respectively, were joint tenants of a flat. Subsequently, the parties divorced when the court order dissolving the marriage was made absolute.

20.11 The parties had consented to the joint tenancy being severed so that upon the payment of \$60,000 by Tan to the defendant, the latter would transfer her interest in the flat to the former. After the decree was made absolute, Tan married the plaintiff and they lived in the flat together, but the \$60,000 had not been paid to the defendant.

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9 *Tan Chor Hong v Ng Cheng Hock* [2019] SGHC 257 at [42].

10 Cap 322, 2007 Rev Ed. *Tan Chor Hong v Ng Cheng Hock* [2019] SGHC 257 at [48].

11 *Tan Chor Hong v Ng Cheng Hock* [2019] SGHC 257 at [54].

12 [1987] SLR(R) 702.

13 [2019] SGHC 164.

20.12 On Tan's death, the issue arose whether the joint tenancy in the flat had been severed. If it had not, then upon Tan's death, the whole of the interest in the flat would devolve to the defendant by way of the right of survivorship, which is the hallmark of a joint tenancy. The plaintiff had argued that the joint tenancy had been severed.

20.13 The High Court correctly applied the law in *Sivakolunthu Kumarasamy*<sup>14</sup> and held that when the judgment was made absolute, and the joint tenancy severed, the flat could no longer be held by the parties concerned as joint tenants.<sup>15</sup> It is trite that the act of severance, whether by consensual agreement or judicial pronouncement, is permanent. The High Court was of the view that if the obligations that accompany or follow the severance remain unfulfilled, the parties must enforce them as the law may permit.

20.14 In the instant case, the estate of Tan could be compelled to pay up the \$60,000 as required. Until then, the property remained in the joint names of Tan and the defendant as tenants-in-common.<sup>16</sup> Judgment was, accordingly, entered for the plaintiff.

### **C. Attachment of joint tenant's interest under writ of seizure and sale**

20.15 The High Court case of *Ong Boon Hwee v Cheah Ng Soo*<sup>17</sup> represents the latest in a string of cases which dealt with the issue whether a writ of seizure and sale can be attached to a joint tenant's interest in land. The High Court in *Malayan Banking Bhd v Focal Finance Ltd*<sup>18</sup> ("*Malayan Banking*") and *Chan Lung Kien v Chan Shwe Ching*<sup>19</sup> ("*Chan Lung Kien*") answered in the negative, while in *Chan Shwe Ching v Leong Lai Yee*<sup>20</sup> and *Peter Low LLC v Higgins, Danial Patrick*<sup>21</sup> ("*Peter Low LLC*"), the High Court decided to the contrary. The Court of Appeal in *Chan Lung Kien v Chan Shwe Ching*<sup>22</sup> did not deal with this issue.

20.16 In the present case, the judgment creditors sought to enforce against the judgment debtor a consent judgment whereby the latter was to pay them a certain sum with interest thereon. They obtained an order

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14 See para 20.10 above.

15 *Tao Li v Toh Ah Poh* [2019] SGHC 164 at [6].

16 *Tao Li v Toh Ah Poh* [2019] SGHC 164 at [6].

17 [2019] 4 SLR 1392.

18 [1998] 3 SLR(R) 1008.

19 [2018] 4 SLR 208.

20 [2015] 5 SLR 295.

21 [2018] 4 SLR 1003.

22 [2018] 2 SLR 84.

to attach the judgment debtor's interest in a property by way of a writ of seizure and sale ("WSS") in satisfaction of the judgment. The judgment debtor and her husband, the appellant, were joint tenants of the property. The appellant, who was not a judgment debtor, applied to set aside the order. The assistant registrar dismissed the appellant's application.

20.17 In dismissing the appellant's appeal, the High Court agreed with the finding in *Peter Low LLC* that prior to the decision in *Malayan Banking*, all relevant authorities appeared to support the view that, under Singapore law, the interest of a joint tenant in land was liable to be attached in execution.<sup>23</sup> In fact, s 135(1) of the Land Titles Act<sup>24</sup> ("LTA") provides that: "The interest in registered land which may be sold in execution under a writ shall be the interest which belongs to the judgment debtor at the date of the registration of the writ." As was clear from Baalman's *Commentary*,<sup>25</sup> it was the drafter's intention that this "interest" included a joint tenant's interest in land.<sup>26</sup>

20.18 Further, the court was of the view that, as a joint tenant had a real ownership interest which was capable of immediate alienation, it was not a requirement that the WSS simultaneously severed a joint tenancy before it was capable of being attached to a joint tenant's interest in land.<sup>27</sup> In other words, the WSS was capable of being attached to a joint tenant's interest in land independent of severance,<sup>28</sup> a view consistent with the broad wording of the relevant statutory provisions.<sup>29</sup>

20.19 Having found that the WSS could attach to the judgment debtor's interest as a joint tenant of the property, the court went on to consider whether she had any beneficial interest therein, as without any such interest, there would be nothing for the WSS to attach to. The appellant had argued that the entire beneficial interest in the property resided in him as he was the only person who paid for the property and the judgment debtor had not contributed to the purchase price of the property.

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23 *Ong Boon Hwee v Cheah Ng Soo* [2019] 4 SLR 1392 at [20].

24 Cap 157, 2004 Rev Ed.

25 John Baalman, *The Singapore Torrens System – Being a Commentary on the Land Titles Ordinance 1956 of the State of Singapore* (Singapore: Government Printer, 1961) at p 218.

26 *Ong Boon Hwee v Cheah Ng Soo* [2019] 4 SLR 1392 at [40].

27 *Ong Boon Hwee v Cheah Ng Soo* [2019] 4 SLR 1392 at [49].

28 *Ong Boon Hwee v Cheah Ng Soo* [2019] 4 SLR 1392 at [50].

29 See s 135(1) of the Land Titles Act (Cap 157, 2004 Rev Ed), O 47 r 4 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) and s 13 of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed).

20.20 The court found that the judgment debtor had a beneficial interest in the property by virtue of the presumption of advancement which was not rebutted.<sup>30</sup> This presumption applied between a husband and his wife as the law presumed that a gift was intended.

20.21 This decision of the High Court further reiterates that a WSS can attach to a joint tenant's interest in land. The consequence is that it is unnecessary to first determine the conceptual issue of whether a WSS can sever a joint tenancy so as to enable the WSS to attach to a joint tenant's interest in land. This appears to be the premise of the opposing High Court decisions in *Malayan Banking*<sup>31</sup> and *Chan Lung Kien*.<sup>32</sup> In light of conflicting decisions, the issue must await final determination by the Court of Appeal on the matter, hopefully, in the near future.

### III. Contractual licence

20.22 In *Ram Niranjana v Navin Jatia*,<sup>33</sup> one of the issues for the consideration of the High Court was whether a contractual licence could be brought to an end even though it contained no provision to this effect. The plaintiff and his son, the first defendant, had entered into a memorandum of understanding ("MOU") which provided, *inter alia*, that the plaintiff and his wife "have absolute discretion of right of stay with full comforts in [the Poole Road property] for their entire lives". The High Court found that the parties clearly intended the MOU to be legally binding.<sup>34</sup> The plaintiff had paid for the property, which was registered in the sole name of the first defendant, as the plaintiff, not being a Singapore citizen, could not buy it in his own name.

20.23 Applying the three-step process for the implication of contractual terms laid down by the Court of Appeal in *Sembcorp Marine Ltd v PPL Holdings Pte Ltd*,<sup>35</sup> the High Court agreed with the first defendant's contention that the contractual licence under the MOU was subject to an implied term that the plaintiff and his wife did not misbehave in such a way as would make it unreasonable for them to insist on staying at the property.

20.24 Closed-circuit television recordings confirmed the plaintiff's propensity towards violent behaviour and verbal abuse whilst living at the

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30 *Ong Boon Hwee v Cheah Ng Soo* [2019] 4 SLR 1392 at [72].

31 See para 20.15 above.

32 See para 20.15 above.

33 [2019] SGHC 138.

34 *Ram Niranjana v Navin Jatia* [2019] SGHC 138 at [84].

35 [2013] 4 SLR 193.

said property. The High Court, accordingly, ruled that the plaintiff had, by his conduct, breached the implied term and that the first defendant was fully entitled to revoke the plaintiff's licence to stay at the property as the first defendant and his family could not be expected to have to put up with the plaintiff's behaviour at the said property.

20.25 As for the plaintiff's wife, the High Court found that it was her own decision not to continue staying at the property. In the result, the first defendant did not breach the contractual licence where the plaintiff's wife was concerned.

#### IV. Priority of competing claims

##### A. *Purchaser's equitable lien against other creditors in a bankruptcy*

20.26 In *DBS Bank Ltd v Davis, Colin Niel*,<sup>36</sup> the issue of the purchasers' equitable lien over the balance sale proceeds arose for consideration. Chan and Tay were tenants-in-common of a property which was mortgaged to DBS Bank. Upon their default on mortgage payments, DBS Bank sold the property and filed the present interpleader application to determine the respective claims of the respondents to the balance sale proceeds remaining.

20.27 Before the mortgagee sale, Chan and Tay had granted an option to Davis Colin Niel and Kim Ji Soo ("the purchasers") to purchase the property. The purchasers exercised the option and lodged a caveat against the property. Subsequently, a bankruptcy application was filed by Chan's other creditors against her. As a result, Chan and Tay failed to complete the sale. The purchasers commenced legal proceedings for return of the deposit of \$187,750 and damages for breach of the option and obtained final judgment against them before the bankruptcy order was made.

20.28 It was accepted by the parties that Tay was entitled to half of the sale proceeds as a co-owner of the property and the High Court ordered the release of her share to the purchasers in partial satisfaction of the judgment debt. Chan's half remained in dispute ("the disputed sum").

20.29 In regard to the competing claims of the Official Assignee ("OA") and the purchasers, the OA argued that the disputed sum formed part of Chan's estate in bankruptcy and should be paid to the OA for the benefit of all of Chan's creditors. It submitted that the purchasers' claim was a mere

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36 [2019] SGHC 245.

judgment debt that was provable in bankruptcy and the purchasers must file proofs of debt like all other creditors. As for the purchasers, it was argued that they had an equitable lien over the balance sale proceeds and that their claim should be paid in priority to all other creditors. Thus, DBS should release part of the disputed sum to them in satisfaction of their claim.

20.30 On the issue whether recognising an equitable lien over the sale proceeds would be inconsistent with s 77(1) of the Bankruptcy Act,<sup>37</sup> the High Court explained as follows:<sup>38</sup>

The recognition of an equitable lien over the sale proceeds does not contradict s 77 because the lien is only over the money that was paid and not the entire Property. Had the sale been completed but subsequently rendered void, the Purchasers would not be able to obtain the Property; it would be unfair if they were also denied a refund of the money they paid for the Property. The lien allows them to retain an interest in the money without granting them an interest in the Property.

20.31 On the authority of the Court of Appeal decision in *Chip Thye Enterprises Pte Ltd v Development Bank of Singapore Ltd*,<sup>39</sup> the High Court correctly held that the purchasers had an equitable lien for their deposit of \$187,750 over the balance sale proceeds.<sup>40</sup>

20.32 However, the High Court rejected the purchasers' claim to the \$95,000 increase in value of the property. As they opted to pursue a remedy of damages for breach of the option for which they had obtained damages, they could no longer be regarded as the owners of the property in equity and were therefore not entitled to the \$95,000 appreciation in the value of the property.<sup>41</sup>

20.33 As for the damages and costs awarded by the court and any interest accrued, they were a judgment debt due to the purchasers. The Court of Appeal in *Chip Thye Enterprises* did not go so far as to hold that such a debt could be the subject of an equitable lien over sale proceeds.

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37 Cap 20, 2009 Rev Ed. This provision reads:

Where a person is adjudged bankrupt, any disposition of property made by him during the period beginning with the day of the making of the bankruptcy application and ending with the making of the bankruptcy order shall be void except to the extent that such disposition has been made with the consent of, or been subsequently ratified by, the court.

38 *DBS Bank Ltd v Davis, Colin Niel* [2019] SGHC 245 at [15].

39 [1994] 2 SLR(R) 68.

40 *DBS Bank Ltd v Davis, Colin Niel* [2019] SGHC 245 at [16].

41 *DBS Bank Ltd v Davis, Colin Niel* [2019] SGHC 245 at [18].

Accordingly, they were debts provable in bankruptcy under s 87(1) of the Bankruptcy Act.<sup>42</sup>

20.34 In the result, the purchasers only had an equitable lien over the balance sale proceeds to the extent of their \$187,750 deposit.

**B. Competing writs of seizure and sale**

20.35 In *Peter Low & Choo LLC v Singapore Air Charter Pte Ltd*,<sup>43</sup> the competing claims were the respective writs of seizure and sale (“WSS”) of the applicant and the first respondent. The applicant and the first respondent were judgment creditors of DP. The second respondent was a secured creditor of DP and sold the property mortgaged to it and the sale was completed on 13 December 2018.

20.36 Prior to the sale of the property, the first respondent had registered its order of court for attachment and execution of the property (“A&E Order”) on 19 April 2017 and the first respondent’s WSS 21/2017 (“WSS 21”) was filed on the same date. However, the first respondent did not succeed in registering an order of court to extend WSS 21 until 19 December 2018. In the meantime, on 11 April 2018, the applicant registered its A&E Order and was issued WSS 18/2018 (“WSS 18”). The second respondent had earlier notified the applicant and the first respondent that the surplus sale proceeds had been handed to the Sheriff. The applicant applied for a declaration that it was entitled to the surplus proceeds in priority over the first respondent.

20.37 The High Court held that an A&E Order and a WSS were two distinct and separate documents. Under O 47 r 4 of the Rules of Court<sup>44</sup> (“ROC”), a WSS is to be filed after an A&E Order is registered with the Registrar.<sup>45</sup> The court was of the view that an A&E Order came within the definition of “writ” under Part XIII of the LTA and would expire one year from the date of its registration.<sup>46</sup> This is in light of s 131 of the LTA which defined a “writ” to mean “a writ of execution issued out of any court having jurisdiction to levy execution against land”. An A&E Order was a “writ of execution” since the seizure of the judgment debtor’s interest occurred once an A&E Order was registered pursuant to O 47 r 4(1)(a) of the ROC and s 132(1) of the LTA. This registration was an essential prerequisite to bind or affect the property. In addition, pursuant

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42 *DBS Bank Ltd v Davis, Colin Niel* [2019] SGHC 245 at [20].

43 [2019] SGHC 89.

44 Cap 322, R 5, 2014 Rev Ed.

45 Citing *Peter Low LLC v Higgins, Danial Patrick* [2018] SGHC 59.

46 *Peter Low & Choo LLC v Singapore Air Charter Pte Ltd* [2019] SGHC 89 at [9].

to s 134(1) of the LTA, an A&E Order would expire one year from its date of registration and a WSS issued pursuant to the registration of the A&E Order would expire on this same date.<sup>47</sup>

20.38 The High Court took the view that priority of third parties' interest in relation to the surplus proceeds should be determined with reference to the date at which the property was sold. On 13 December 2018 when the property was sold, the only registered instrument binding the property was the applicant's WSS 18. The first respondent only managed to extend the validity of WSS 21 on 19 December 2018, six days after the property was sold. Thus, having regard to ss 37(5) and 48(1) of the LTA, the applicant was entitled to the surplus proceeds from the sale of the property in priority over the first respondent.<sup>48</sup>

20.39 Given the rather technical application of the provisions involved and the complexity of the issues in *Peter Low & Choo LLC*,<sup>49</sup> any further clarification from the Court of Appeal is to be welcomed. The relevant appeal is *Singapore Air Charter Pte Ltd v Peter Low & Choo LLC*.<sup>50</sup>

### **C. Mortgage against a lease**

20.40 The competing claims involving a mortgage and a lease were considered in *United Overseas Bank Ltd v Homely Bath Services & Trading Pte Ltd*.<sup>51</sup> In the instant case, the tenant ("the first defendant"), since 2011, had been in continuous occupation of the property of the landlord company. Later, the landlord granted a mortgage of the property to the plaintiff bank. Out of the three tenancy agreements between the tenant and landlord, the second tenancy agreement predated the mortgage and it contained an option for the tenant to renew the lease. The third tenancy agreement post-dated the mortgage and purported to allow the tenant to remain in possession until 31 March 2020. All the tenancies created were seven years and below, that is, short term tenancies.

20.41 Subsequently, the tenant was served a notice by the bank to deliver up vacant possession of the property after the landlord was wound up. The tenant resisted the bank's action for possession on the basis that the latter had allegedly authorised, consented to or acquiesced in the tenancies. There was no dispute that the bank was in possession of the second tenancy agreement at the time of the mortgage and it

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47 *Peter Low & Choo LLC v Singapore Air Charter Pte Ltd* [2019] SGHC 89 at [11].

48 *Peter Low & Choo LLC v Singapore Air Charter Pte Ltd* [2019] SGHC 89 at [12].

49 See para 20.35 above.

50 CA/CA 163 of 2019.

51 [2019] SGHCR 3.

therefore could not deny that it knew of the terms of the second tenancy agreement, including the option to renew.<sup>52</sup>

20.42 It is trite that the nature of a tenant's rights as against the mortgagee and *vice versa* depends on the order of creation. This is because a registered proprietor who has leased the property to a third party no longer has a right to exclusive possession to the property at the time he mortgages it, since that right, as an essential characteristic of a lease, now belongs to the third party. On the other hand, where a proprietor has a mortgage on his property, he can only confer on a prospective tenant an estate that is subject to the rights of the mortgagee.

20.43 Where a short-term tenancy is created before a mortgage, the tenant's rights will override the mortgagee's, in so far as those rights are inconsistent. This is the effect of s 46(1)(vi) of the LTA where such tenancies, which cannot be registered<sup>53</sup> and hence are not conferred the quality of indefeasibility, are elevated to the status of an overriding interest so as to confer protection on them under the LTA. It remains open, however, for the tenant to agree to subordinate its rights to those of the mortgagee, in which event the priority of the lease over the mortgage will not persist.

20.44 In the case where a mortgage comes first and then a tenancy, the tenancy cannot bind the mortgagee.<sup>54</sup> The reason is that the mortgagor, having granted the mortgagee a security interest over his estate, no longer has an unqualified right to and control over the property. This means that the mortgagee may regard the tenant as a trespasser and lawfully evict him or her. There are, however, two exceptions to the general rule that a lease granted after a mortgage will not bind the mortgagee. The first concerns express or implied authorisation of the lease, either by the terms of the mortgage or as a matter of law<sup>55</sup> and the second exception is the express or implied consent by the mortgagee to the lease.<sup>56</sup> In the earlier case of *Singapore Finance Ltd v Matterhorn (Pte) Ltd*,<sup>57</sup> the High Court took the view that, in order for the mortgagee to have consented to or acquiesced in the tenancy, there must have been some positive acts emanating from the mortgagee or its agent from which one can reasonably infer that the mortgagee consented to or acquiesced in the tenancy.

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52 *United Overseas Bank Ltd v Homely Bath Services & Trading Pte Ltd* [2019] SGHCR 3 at [68].

53 Land Titles Act (Cap 157, 2004 Rev Ed) s 87(2)(a).

54 Land Titles Act (Cap 157, 2004 Rev Ed) s 89(1).

55 See ss 23(1) and 23(11) of Conveyancing and Law of Property Act (Cap 61, 1994 Rev Ed).

56 Land Titles Act (Cap 157, 2004 Rev Ed) ss 89(1)(a) and 89(1)(b).

57 [1989] 2 SLR(R) 105 at [19].

20.45 In the instant case, the tenant had contended that the bank was bound to honour the third tenancy agreement, which would only expire in 31 March 2020, as the third tenancy agreement was in substance a renewal of the second tenancy agreement, which predated the bank's mortgage and which the bank had knowledge of, including the option to renew contained therein.

20.46 The court rejected the contention of the tenant as it found that the third tenancy agreement was not a renewal of the second tenancy agreement. The terms of the option to renew contained in the second tenancy agreement were not consistent with the third tenancy agreement. For example, in relation to the period of renewal, the agreed tenancy period in the third tenancy agreement was three times that provided in the option to renew.<sup>58</sup> Further, the tenant did not give the landlord the required written notice to renew before the expiry of the second tenancy agreement.<sup>59</sup> The court thus concluded that the third tenancy agreement was a separate and independent tenancy agreement from the second tenancy agreement.

20.47 The court also found that the bank did not consent to the third tenancy agreement. While the bank accepted that its security would be subject to the tenant's rights and interests as contained in the second tenancy agreement, the third tenancy agreement, as noted above, was not a renewal of the second tenancy agreement under the option to renew. Nothing in the bank's decision to accept the property as security therefore suggested that it consented to giving the landlord a general discretion to create fresh tenancies of the property.<sup>60</sup> Further, the bank's entitlement to rental proceeds under the assignment of rental proceeds was unaffected by the issue of the bank's consent or otherwise to any tenancy agreements for the property. There was no requirement that the bank must have consented to the tenancy agreements for it to be entitled to the rental proceeds.<sup>61</sup> In the circumstances, none of the acts that the tenant referred to could be regarded as positive acts from which the bank's consent to or acquiescence in the third tenancy agreement could reasonably be inferred.

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58 *United Overseas Bank Ltd v Homely Bath Services & Trading Pte Ltd* [2019] SGHCR 3 at [72].

59 *United Overseas Bank Ltd v Homely Bath Services & Trading Pte Ltd* [2019] SGHCR 3 at [73].

60 *United Overseas Bank Ltd v Homely Bath Services & Trading Pte Ltd* [2019] SGHCR 3 at [78].

61 *United Overseas Bank Ltd v Homely Bath Services & Trading Pte Ltd* [2019] SGHCR 3 at [80].

20.48 It was also noted by the court that, under the memorandum of mortgage, any consent given by the bank to the third tenancy agreement must be in writing. On the facts, there was no such written consent. Hence, the landlord's failure to obtain such written consent was not only a breach of the terms of the mortgage, entitling the bank to take possession of the property, but it also meant that the third tenancy agreement was not binding on the bank.<sup>62</sup>

## V. Sale of mortgaged immovable property seized under writ of seizure and sale

20.49 Can a mortgaged property seized under a writ of seizure and sale be ordered to be sold without the consent of the mortgagee? If so, what are the relevant considerations to be taken into account by the court? These issues were considered in *BYX v BYY*.<sup>63</sup>

20.50 In the present case, the plaintiff and the defendant were divorced. There were three children to the marriage. The plaintiff and the children resided at the property after the divorce. A sum of about \$4.1m arising from the ancillary divorce proceedings was owed by the defendant to the plaintiff. The property was subject to a mortgage and was seized under a writ of seizure and sale. The mortgagee did not consent to the sale of the property. The plaintiff then made an *ex parte* application for an order that the property solely owned by the defendant be sold. The mortgagee did not participate in the application despite being invited to do so by the plaintiff's lawyers.

20.51 In granting the order that the defendant's interest in the property be attached and taken in execution in satisfaction of the judgment debt owed to the plaintiff, the High Court held that an execution creditor is not required to obtain the consent of the mortgagee. This is notwithstanding paras 80(1) and 80(2) of the Supreme Court Practice Directions,<sup>64</sup> which in essence require the written consent of the mortgagee to the sale. The court was of the view that the Practice Directions are essentially administrative directions and may not override the court's judicial powers.<sup>65</sup> The court departed from its earlier observations in *Peter Low LLC v Higgins, Danial Patrick*,<sup>66</sup> which held to the contrary as the observations therein were made by way of *obiter dicta* in proceedings

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62 *United Overseas Bank Ltd v Homely Bath Services & Trading Pte Ltd* [2019] SGHCR 3 at [83].

63 [2019] SGHC 237.

64 1 January 2013 release.

65 *BYX v BYY* [2019] SGHC 237 at [14].

66 *Peter Low & Choo LLC v Singapore Air Charter Pte Ltd* [2019] SGHC 89 at [114(b)].

relating to immovable property held under a joint tenancy, which was not the situation in the present case.<sup>67</sup>

20.52 Having decided that the mortgagee's refusal to consent to the sale of the mortgaged property did not prevent the court from ordering a sale of the property, the next issue to consider was when a sale should be ordered in such circumstances. The court was of the view that it should consider the interests of those affected when exercising its discretion to order the sale of property and any outcome that was reached should be fair and just.<sup>68</sup> As required under para 2 of the First Schedule to the Supreme Court of Judicature Act and O 31 r 1 of the ROC, the court should conduct a balancing exercise of the following non-exhaustive factors to decide if it was necessary or expedient to order a sale of the property:<sup>69</sup>

- (a) whether the expected sale proceeds will be sufficient to redeem the mortgage;
- (b) the potential prejudice that the mortgagee and the execution creditor might face in each of the possible scenarios, namely, if a sale is granted and if a sale is not granted; and
- (c) the potential prejudice that any third parties (including the mortgagor) may face in each of the possible scenarios.

20.53 In the present case, the evidence showed that the proceeds of sale were likely to be sufficient to redeem the mortgage. According to the valuation report, the forced sale value of the property was about \$5m while the outstanding mortgage loan was about \$3m, a sum which currently was likely to be lower as the defendant had been prompt in servicing the mortgage.<sup>70</sup> The court found that the prejudice that the plaintiff and the children would face if a sale was not ordered would be considerable. It had adversely affected the children's educational and living arrangements as the plaintiff had been unable to make timely school fee payments as a result. Further, the defendant, who lived overseas, had not been present in court proceedings and had been evasive with regard to payment of the judgment sum. The plaintiff had no other remedy available to her to enforce the judgment sum.<sup>71</sup> Finally, there was no indication that the mortgagee or any other third party would be prejudiced if a sale of the property was ordered.<sup>72</sup> In the result, the court found it necessary and expedient to order the sale of the property.

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67 *BYX v BYY* [2019] SGHC 237 at [17].

68 *BYX v BYY* [2019] SGHC 237 at [26].

69 *BYX v BYY* [2019] SGHC 237 at [26].

70 *BYX v BYY* [2019] SGHC 237 at [29].

71 *BYX v BYY* [2019] SGHC 237 at [30].

72 *BYX v BYY* [2019] SGHC 237 at [31].

20.54 In light of the decision above, the language in para 80 of the Practice Directions could be refined to provide clearer guidance on the steps execution creditors should take if they wish to effect the sale of mortgaged immovable property in circumstances where it was seized under a writ of seizure and sale but the execution creditors were unable to obtain the mortgagee's consent to such a sale and the mortgagee had no plans to sell the property. On the part of the mortgagee, to avoid being unduly prejudiced, it should make clear in its written response to any request for consent under para 80 of the Practice Directions if the sale of the property would prejudice its interests so as to (hopefully) avoid a similar outcome seen in the present case.

## VI. Adverse possession

20.55 In *Ahmad Kasim bin Adam v Moona Esmail Tamby Merican s/o Mohamed Ganse*,<sup>73</sup> one of the issues considered by the Court of Appeal was whether the appellant had acquired title by adverse possession to the house on the property in question. The property concerned was compulsorily acquired by the government in 1987 and title to it vested in the State in 1988. The High Court had dismissed the appellant's application.<sup>74</sup> The appeal on this issue was allowed on the following grounds.

20.56 It was not disputed that the appellant's claim was not affected by the abolition of the acquisition of title by adverse possession in 1994 by the Land Titles Act 1993<sup>75</sup> and s 9(3) of the Limitation Act.<sup>76</sup> This was because he claimed that his or his father's title to the house had crystallised before the compulsory acquisition.

20.57 For the appellant to succeed in proving his title by adverse possession, he had to establish two elements: (a) factual possession; and (b) an intention to possess.<sup>77</sup> The first element signifies an appropriate degree of physical control. The adverse possessor must establish that he was in factual possession of the land for at least 12 continuous years. This 12-year period can be constituted by the aggregate of separate but continuous periods of adverse possession by different people. The adverse possessor need not personally be in occupation of the land to be in factual possession or to have the requisite intention to possess.<sup>78</sup>

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73 [2019] 1 SLR 1185.

74 *Ahmad Kasim bin Adam v Moona Esmail Tamby Merican s/o Mohamed Ganse* [2017] SGHC 19.

75 Act 27 of 1993.

76 Cap 163, 1996 Rev Ed.

77 See *Lee Martin v Wama bte Buang* [1994] 2 SLR(R) 467 at [16].

78 See *Soon Peng Yam v Maimon bte Ahmad* [1995] 1 SLR(R) 279 at [14].

What is crucial is that the adverse possessor dealt with the property as an owner. Receipt of rent or grant of a licence in respect of the property would be an act of ownership adverse to the title of the true owner. The second element of intention to possess involves an intention to exclude the world at large, including the owner, so far as is reasonably practicable and so far as the process of the law will allow.<sup>79</sup>

20.58 In the present case, the first element was satisfied as there was sufficient evidence that the appellant's father and his family occupied the house from as early as 1955 until at least 1967.<sup>80</sup> The requirement for a continuous 12-year period of occupation was thus satisfied. The occupation of the house was adverse to the interests of the true owners ("the first and second respondents"), who did not grant permission for the house to be built. This came from the village headman who had never asserted any right to the house.<sup>81</sup>

20.59 On the requirement of the intention to possess, the appellant's father and his family had demonstrated an intention to exclude all others from the house as far as was reasonably practicable. What was required for adverse possession was not an intention to own or to acquire ownership of the land, but an intention to possess it.<sup>82</sup> Their belief that the land as a whole was *waqaf* land did not preclude an intention to exclusively possess the portion of the land given to them as a benefit in kind for their caretaking services. This intention was manifested in their construction of the house, their residing in the house without paying any rent, their construction of sanitary facilities, and their payment of property tax and utility bills.<sup>83</sup>

20.60 In the result, the appellant's father had adversely acquired title to the house in 1967 by virtue of his adverse possession and, after his demise, such title passed to the appellant in his capacity as the personal representative of his father's estate. All rights and title to the house held by the first and second respondents or any persons claiming through them were thus extinguished in 1967.<sup>84</sup>

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79 *Lee Martin v Wama bte Buang* [1994] 2 SLR(R) 467 at [16].

80 *Ahmad Kasim bin Adam v Moona Esmail Tamby Merican s/o Mohamed Ganse* [2019] 1 SLR 1185 at [47].

81 *Ahmad Kasim bin Adam v Moona Esmail Tamby Merican s/o Mohamed Ganse* [2019] 1 SLR 1185 at [63].

82 *Ahmad Kasim bin Adam v Moona Esmail Tamby Merican s/o Mohamed Ganse* [2019] 1 SLR 1185 at [68].

83 *Ahmad Kasim bin Adam v Moona Esmail Tamby Merican s/o Mohamed Ganse* [2019] 1 SLR 1185 at [68].

84 *Ahmad Kasim bin Adam v Moona Esmail Tamby Merican s/o Mohamed Ganse* [2019] 1 SLR 1185 at [69].

## VII. Strata title

### A. Collective sales

20.61 Under the collective sale legislative framework, a collective sale committee is under a duty to convene one or more general meetings of the management corporation in accordance with the Second Schedule to the Land Titles (Strata) Act<sup>85</sup> (“LTSA”) for the following purposes:<sup>86</sup> (a) to appoint any advocate and solicitor, any property consultant or marketing agent in connection with a collective sale where the collective sale committee is not already authorised at a general meeting to make such appointments; (b) to approve the apportionment of sale proceeds; and (c) to approve the terms and conditions of the collective sale agreement. The meeting for purposes of (a)–(c) above must be convened before any subsidiary proprietor signs the collective sale agreement.<sup>87</sup> Apart from clarifying the process by which the sale committee decides on the selection of the property consultant, marketing agent and the lawyer, the above provisions will also ensure that subsidiary proprietors will have the opportunity to discuss such key issues before consenting to them.

20.62 In *Lim Hun Joo v Kok Yin Chong*,<sup>88</sup> these provisions were breached. It was not disputed that the signing of the collective sale agreement was done after the extraordinary general meeting (“EGM”) was concluded. The legal adviser had given the wrong advice that it was sufficient for the assenting subsidiary proprietors to sign the collective sale agreement after the EGM. In addition, the approval had to be established by some overt act like voting and it was not sufficient to say that it was clear that a majority of those attending the EGM had approved those aspects given that it was not a unanimous decision.<sup>89</sup> However, the statutory framework for collective sale is that non-compliance *per se* is not necessarily fatal to an application to the High Court for approval.<sup>90</sup> Nevertheless, the court would dismiss the application if the circumstances pertaining to the non-compliance amounted to an absence of good faith in the transaction in regard to, *inter alia*, the sale price.<sup>91</sup> The Court of Appeal in *Kok Yin Chong v Lim Hun Joo*<sup>92</sup> had observed that the High Court has the power to validate and approve the application although there was non-compliance with the Schedules to the LTSA when considering

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85 Cap 158, 2009 Rev Ed.

86 Land Titles (Strata) Act (Cap 158, 2009 Rev Ed) Third Schedule, paras 7(1)(a)–7(1)(c).

87 Land Titles (Strata) Act (Cap 158, 2009 Rev Ed) Third Schedule, para 7(2).

88 [2019] SGHC 3.

89 *Lim Hun Joo v Kok Yin Chong* [2019] SGHC 3 at [85].

90 See Land Titles (Strata) Act (Cap 158, 2009 Rev Ed) s 84A(7C).

91 *Lim Hun Joo v Kok Yin Chong* [2019] SGHC 3 at [95].

92 [2019] 2 SLR 46 at [54].

whether the transaction was in good faith. This is so notwithstanding that s 84A(7C) of the LTSA mentions the board and not the High Court.<sup>93</sup> It ruled that the breaches in question were technical in nature and did not prejudice the subsidiary proprietors. It was clear that the requisite number of subsidiary proprietors had signed the collective sale agreement. As a matter of common sense, the subsidiary proprietors would not have voted differently if a formal vote had been held at the EGM.<sup>94</sup> In approving the application despite the failure to put the apportionment of sale proceeds and the terms and conditions of the collective sale agreement to a formal vote, the Court of Appeal reiterated that whether an application will be invalidated or approved in any particular case depends on its facts and circumstances.

20.63 In *Kok Yin Chong v Lim Hun Joo*, the Court of Appeal was of the view that the burden of proof was on the objectors to point out by credible evidence that the transaction was not in good faith.<sup>95</sup> This is in line with the earlier Court of Appeal decision in *Low Kwang Tong v Karen Teo Mei Ling*.<sup>96</sup>

20.64 The Court of Appeal in *Kok Yin Chong v Lim Hun Joo* also made certain observations on unrealistic timelines set out in the sale and purchase agreement pertaining to a collective sale which equally apply to proceedings in the High Court. It noted that the appeal before it proceeded on an expedited basis as the vendors had agreed with the purchaser of the property that the sale and purchase agreement would be treated as rescinded if the Court of Appeal failed to deliver its decision four months after the decision of the High Court. While it was able to do so, the Court of Appeal pointed out that the deadline was unrealistic and did not appear to take into consideration the rules regulating appeals from the High Court to the Court of Appeal.<sup>97</sup> It highlighted two points for future collective sales committees and their advisors to note. First, even if all the requisite documents can be filed very quickly, an early hearing date before the Court of Appeal may not be available.<sup>98</sup> Second, even if an early hearing date is made available, the Court of Appeal may not be able

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93 The Court of Appeal noted that the High Court's jurisdiction and powers are derived principally from Art 93 of the Constitution of the Republic of Singapore (1999 Reprint) and the provisions of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed). The High Court also possesses inherent powers, namely, powers that are not expressly conferred through legislation: see *Li Shengwu v The Attorney-General* [2019] 1 SLR 1081 at [98]–[103].

94 *Kok Yin Chong v Lim Hun Joo* [2019] 2 SLR 46 at [60].

95 *Kok Yin Chong v Lim Hun Joo* [2019] 2 SLR 46 at [71].

96 [2018] SGCA 86.

97 *Kok Yin Chong v Lim Hun Joo* [2019] 2 SLR 46 at [100].

98 *Kok Yin Chong v Lim Hun Joo* [2019] 2 SLR 46 at [103].

to arrive at its decision within a very compressed time span, especially if the appeal involves many parties and complex issues.<sup>99</sup> Accordingly, if a future collective sale committee agrees to unrealistic timelines for court proceedings which, if not met, could result in the rescission of the agreement for sale, the collective sale committee and its advisors will have to bear the consequences of that agreement.<sup>100</sup>

**B. Improvements to unit which affect appearance of building**

20.65 The High Court decision in *Management Committee Strata Title Plan No 940 v Lim Florence Marjorie*<sup>101</sup> was reviewed last year.<sup>102</sup>

**VIII. Land acquisition**

20.66 In *Ahmad Kasim bin Adam v Moona Esmail Tamby Merican s/o Mohamed Ganse*,<sup>103</sup> the collector of land revenue (“the Collector”) had awarded a sum of \$18,800 (“the award”) as compensation for the acquisition to the first and second respondents (“the paper owners”) under s 10 of the Land Acquisition Act<sup>104</sup> (“the 1987 LAA”) which was in force at the time of the acquisition. As neither of them collected the award, the Collector paid the sum into court.

20.67 The appellant brought proceedings for, *inter alia*, declarations that the award made by the Collector in 1988 be set aside and a rehearing for the assessment of compensation be ordered because the award was made without notice to him or his father. The third and fourth respondents, who were the Singapore Land Authority and the Attorney-General respectively, objected to the appellant’s attempt to have the award set aside.

20.68 The High Court dismissed the appellant’s application.<sup>105</sup> The Court of Appeal agreed with the High Court that there was no legal basis for the court to make a fresh award of monetary compensation to the appellant’s father’s estate. Among others, the 1987 LAA did not give the court jurisdiction to issue a compensation award at first instance. It was the Collector who made an award after holding an inquiry and this award was then appealable to the Appeals Board and thereafter to the Court

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99 *Kok Yin Chong v Lim Hun Joo* [2019] 2 SLR 46 at [104].

100 *Kok Yin Chong v Lim Hun Joo* [2019] 2 SLR 46 at [105].

101 [2019] 4 SLR 773.

102 (2018) 19 SAL Ann Rev 645 at 662–664.

103 See para 20.55 above.

104 Cap 152, 1985 Rev Ed.

105 See para 20.55 above.

of Appeal on a question of law.<sup>106</sup> In addition, compensation was not a suitable form of relief for a lack of notice in the making of the award.

20.69 There was also no legal basis for the court to set aside the award by declaratory relief and to make an order for a fresh hearing by the Collector. Section 53 of the 1987 LAA imposed an absolute bar on the issue of any court order declaring that the award was invalid and should be set aside as null and void.<sup>107</sup> The appropriate procedure for challenging the exercise of such powers was by way of the process of judicial review, which was not prohibited by s 53 of the 1987 LAA.<sup>108</sup>

20.70 In the circumstances, given the bar in s 53 of the 1987 LAA, the court was unable to grant the appellant a declaration that the award was null and void and should be set aside or to order that the Collector carry out a fresh inquiry.

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106 *Ahmad Kasim bin Adam v Moona Esmail Tamby Merican s/o Mohamed Ganse* [2019] 1 SLR 1185 at [77].

107 *Ahmad Kasim bin Adam v Moona Esmail Tamby Merican s/o Mohamed Ganse* [2019] 1 SLR 1185 at [81].

108 *Ahmad Kasim bin Adam v Moona Esmail Tamby Merican s/o Mohamed Ganse* [2019] 1 SLR 1185 at [82], citing *Seah Hong Say v Housing and Development Board* [1992] 3 SLR(R) 497 at [6]–[7].